



Nduma (Suing as the Legal Representative/administrator of the Estate of the Late Nduma Maruti) v Thagari & another (Environment & Land Case 157 of 2017) [2024] KEELC 5958 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELC 5958 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 157 OF 2017
A KANIARU, J
SEPTEMBER 18, 2024**

BETWEEN

**ESTHER MUNYU NDUMA (SUING AS THE LEGAL REPRESENTATIVE/
ADMINISTRATOR OF THE ESTATE OF THE LATE NDUMA
MARUTI) PLAINTIFF**

AND

**MILIKA NDUMA THAGARI 1ST DEFENDANT
JOYCE NGUNGI NAMU 2ND DEFENDANT**

JUDGMENT

1. The plaintiff herein - Esther Munyu Nduma - (Suing as the legal representative of the estate of the late Nduma Maruti) – filed this case here against the defendants vide a plaint dated 09.10.2017. In the plaint, she claims that her husband - Nduma Maruti - was the registered owner of land parcel no. Nthawa/Kirie/784. That the 1st defendant in the year 2010 filed a case in the land disputes tribunal against her husband - NDUMA MARUTI - claiming that he had sold the suit land to the 1st defendant's husband who is also deceased. That the tribunal awarded the suit land to the 1st defendant and directed, in the alternative that the plaintiff's husband pay with interest what the 1st defendant's husband had paid for the purchase of land. That the 1st defendant caused the suit land to be subdivided into land parcels no. Nthawa/Kirie/1777-1780 and transferred land parcel 1778 to the 2nd defendant.
2. The plaintiff complains that the Tribunal did not have the jurisdiction to make that award and wishes that the award as well as the subsequent decree issued by the principal Magistrate enforcing that award in Siakago LDT case no. 26 of 2010 be declared unlawful, null and void. She also wishes that the court makes an order to the land registrar, Mbeere, for the cancellation of the resultant sub divisions of the suit land and revert the same to the initial land parcel No. Nthawa/Kirie/784 in the names of her



- deceased husband. She also further prays for a declaration that any action made by the Land Registrar, Mbeere, on the basis of that award and decree be deemed null and void.
3. The defendants in response filed a statement of defence dated 21.12.2017. They denied the plaintiff's allegations and contended that the suit land was transferred to the 1st defendant on 03.06.2011 for a consideration of Kshs. 500,000/=. That the transfer was as a result of the Tribunal's award which transfer was made during the lifetime of the plaintiff's late husband. They further contended that there had been a sale of the suit land by the plaintiff's husband to the 1st defendant's husband on 06.10.1983. They denied that the plaintiff and her children occupy original land parcel 784 and alleged that they only occupy land parcel 1781 which they claim they encroached in the year 2011. That was after the Tribunal awarded the suit land to the 1st defendant.
 4. The matter was set down for hearing on 26.04.2022 and only the plaintiff testified. She was PW1. She testified that she was the wife of the late Nduma Maruti and that she was a peasant. She adopted her written statement as evidence and produced a copy of the decree as MFI -1, a Green card MFI-2, a Limited grant ad litem PEXh 3, a death certificate MFI-4, Searches PEXh 5a,b,c,d &c. She testified that she had sued the defendants because they had 'stolen' her late husband's land where she lives with her children. She denied having any knowledge that her husband had sold land to the 1st defendant's late husband. She also denied that her late husband attended the land disputes tribunal or the magistrates court for adoption of the award of the tribunal. She also further denied having any knowledge that her husband was given the option of refunding money to the 1st defendant's husband and asked the court to order that she gets her land back.
 5. The record shows that the matter was set down for further hearing on 14.06.2022 but the same did not take place as parties were attempting mediation. Mediation having not borne any fruit, the matter was set down for hearing on 26.09.2023 and the plaintiff continued with her testimony. She produced a copy of the decree from Siakago Principal Magistrate Court, a Green Card for land parcel 784, death certificate for Nduma Maruti as PEXH 1 to 3. On cross examination by the 1st defendant she denied that her husband had sold the suit land to 1st defendant's husband or that some cows had been given to her husband as payment for purchase of the land.
 6. The 1st defendant - Milka Nduma Thagari - testified as DW1. She adopted her witness statement as evidence and asked the court to help her so that her land was not taken away. It was her testimony that the land was purchased using many cows and goats given to the plaintiff's late husband.
 7. The 2nd defendant testified as DW2. She equally adopted her written statement as evidence. She testified that she did not occupy land parcel no. 1778 and that it was her mother, the 1st defendant who transferred it to her.
 8. The defendants called one witness - Grace Nthambi Kiura - as DW3. She adopted her written statement as evidence. She testified that she was a neighbour to the defendants and that they were the respective registered owners of the resultant subdivisions of original land parcel 784.
 9. The parties filed written submissions, with the plaintiff's submissions being filed on 24.01.2014. It was submitted that under section 3(i) of the Land Disputes Tribunal Act, the Tribunal only had jurisdiction limited to: a) the subdivision of or determination of boundaries to land including land held in common; b) a claim to occupy or work land or; c) a trespass to land. That therefore the decision of the tribunal awarding the suit land to the 1st defendant's husband was null and void as the tribunal lacked the jurisdiction to entertain matters on registered land. That even though parties will pursue judicial review proceedings to quash the decisions of the land disputes tribunal, which is a quasi-judicial body, that does not bar this court from making declaration orders. The cases of Nicholas Njeru v



Attorney General & 8 others (2013) Eklr and Johana Nyukwoyo Buti v Walter Rasugu Omariba (Suing through his attorney Beutah Onsono Rasugu) & 2 others (2011) Eklr were proffered in support of this position.

10. The defendants' submissions on the other hand were filed on 12.02.2024. It was submitted that Section 107 and 109 of the *Evidence Act* provides that he who alleges must prove; that the plaintiff alleged that the Tribunal lacked jurisdiction but did not present any proof of such allegations. The case of Justus Mathumbi & 9 others v Cabinet Secretary, Ministry of Lands, Housing and Urban Development & 4 others (2018) Eklr was proffered to drive the point home. It was submitted further that the plaintiff ought to have brought this suit not by way of plaint but by way of a judicial review application to accord the court the opportunity to determine the extent of exercise of the tribunal's power. The plaintiff was equally accused of delay and the court urged to dismiss the same with costs to the respondents.
11. I have considered the pleadings as filed, the evidence tendered during hearing, and the written rival submissions. The plaintiff herein complains that the Land Disputes Tribunal in LDT case no. 26 of 2010 awarded land parcel 784 to the 1st defendant's husband whereas it lacked the jurisdiction to do so. She complains that the Tribunal did not have the jurisdiction to determine the issue on ownership of registered land. The defendants in the suit on the other hand are challenging the manner in which this suit was filed, as according to them, the plaintiff ought to have approached the court by way of judicial review and not by way of plaint seeking declaratory orders.
12. The jurisdiction of the Land Disputes Tribunal is provided for under section 3(1) of the Land Disputes Tribunal Act which provides as follows:
 3.
 - (1) Subject to this Act, all cases of a civil nature involving a dispute as to—
 - (a) the division of, or the determination of boundaries to land, including land held in common;
 - (b) a claim to occupy or work land; or
 - (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.
13. The same Act also provides for mechanisms for dealing with the decisions of the Land Dispute's Tribunal's when a party feels aggrieved. Under section 8 & 9 of the Act, it provides as follows;
 - “8
 - (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.
 - 9 -Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved”.
14. It follows therefore that the available remedy for the plaintiff was to appeal to the Appeals Committee challenging the jurisdiction of the Tribunal to make the award complained of within thirty days of the decision. The plaintiff could also have filed judicial review proceedings to quash the said award. There



is no evidence that was done. Instead, the matter was placed before the Magistrates' court as provided for under Section 7 of the Act, and the award was adopted as the judgment of the court. The plaintiff still did not appeal against the judgment. In the case of *Catherine C Kittony v Jonathan Muindi Dome & 2 others* [2019] eKLR the court held thus:

“The Land Dispute Tribunal had mechanisms to deal with outcomes such as the one rendered by the 2nd respondent. The award by the 2nd respondent ceased to exist upon adoption by the court as its judgment and a decree. The award cannot be challenged by filing a fresh suit as it is trite law that where a statute establishes a dispute resolution mechanism that mechanism must be followed and exhausted, where a party fails to do so he cannot be heard to say that his rights were denied.”

The court further observed:

“In the instant appeal, it is not in dispute that the appellant was aggrieved by the decision of the 2nd respondent. However, instead of lodging an appeal before the Provincial Appeals Committee constituted for the province in which the land which was the subject matter of the dispute was situated and if still dissatisfied to appeal to the High Court on a point of law (see: Section 8(1) and (9) of the Land disputes Tribunal Act) or institute judicial review proceedings to quash the decision by the 2nd respondent as it was alleged that it acted in excess of its jurisdiction in making the award, the appellant opted to file a fresh suit before the ELC which was not in order.

Similarly in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others* (2014) Eklr the court stated as follows:

“It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

15. See also *Mathenge v Gatua & another (Civil Appeal 94 of 2018)* [2024] KECA 341 (KLR) (22 March 2024) (Judgment) where the court observed:

“When the respondents did not follow due process, and the decision of the Tribunal was adopted by the Magistrates' court, it became a legally binding judgment. Later, when the respondents moved the trial court with a case that challenged the legitimacy of the tribunal's decision, they were utilizing a process that was not provided for by law to try and circumvent the judgment of the magistrates' court. As the learned Judge was persuaded that the tribunal lacked jurisdiction, and she so declared, the result was akin to pulling the rug from underneath the feet of the tribunal, whereas the tribunal had long before that ceased to have anything to do with the matter. The tribunal's decision had already metamorphosed into a judgment of the court, following its adoption. In the circumstances, there remains a judgment that is valid and unchallenged by an appeal, whereas the foundation upon which the said judgment was based was being voided by a parallel legal process. In our considered



view, the courts are duty-bound to take heed to deliver substantive justice. We must not be enslaved to procedures and technicalities. Nonetheless, the court cannot be expected to harp on the need to guard against enslavement to technicalities and in the process ignore the real confusion that could arise when we endorse the failure to comply with the written law.”

16. It follows therefore that after the adoption of the award by the tribunal in the Magistrate’s court at Siakago, the award of the tribunal became a legally binding judgement of the court. Therefore, a valid judgment of the court exists vide Siakago PMC No. 26 of 2010 and there is a valid decree issued in terms of the said judgment. As the said judgment has not been overturned through the legal process of appeal, then the same still stands to date. I am therefore not persuaded that the plaintiff is entitled to the orders sought in the plaint.
17. Consequently, the suit is dismissed entirely with costs to the defendants.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.

In the presence of defendants. Leadys – Court Assistant.

A. KANIARU

JUDGE – ELC, EMBU

