



REPUBLIC OF KENYA



**Zinj Limited v Attorney General & 4 others (Environment & Land  
Petition 2 of 2010) [2023] KEELC 66 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 66 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 2 OF 2010  
EK MAKORI, J  
JANUARY 19, 2023**

**BETWEEN**

**ZINJ LIMITED ..... PETITIONER**

**AND**

**THE HONOURABLE ATTORNEY GENERAL & 4 OTHERS ..... RESPONDENT**

**RULING**

1. By an application dated 24<sup>th</sup> February 2022 the Petitioner herein moved this Court seeking orders: -
  - i. That the decree issued herein be rectified to conform to the Judgment of the Supreme Court made on 31<sup>st</sup> December 2021.
  - ii. That the cost of the application be provided for.
2. There is opposition to the application. The court directed the parties to file written submissions on the matter. They complied.
3. The background to the application is that the Petitioner herein moved this Court vide a Petition dated 13<sup>th</sup> September 2010 alleging among other violations and contravention of its fundamental rights and freedoms under *the Constitution* of Kenya 2010.
4. The dispute between the Petitioner herein and the Respondents concerning the parcel of land known as LR No. 25528 situate in Kilifi County - comprised of 425.7 hectares held by the Petitioner on a 99-year lease from the Government of Kenya with effect from 1<sup>st</sup> April 1977 under Grant No. CR 35029 issued under the Registration of Titles Act, Cap. 281 of the Laws of Kenya (now repealed).
5. By the Judgment dated 15<sup>th</sup> March 2018 this Court - Olola J. held that the issuance of duplicate titles over the Petitioner's land, amounted to unlawful compulsory acquisition, and a violation of its right to property under Article 40(3) of *the Constitution*. He determined that the acreage unlawfully acquired



was 51.129 hectares and awarded the Petitioner a total sum of Kshs. 413,844,248.70/- as compensation for the land encroached and Kshs. 51,129,000/- as General Damages for breach of the Petitioner's right to property under Article 40 of *the Constitution*. Giving a total award of Kshs. 464,973,248.70/-.

6. The 1st Respondent herein filed an Appeal against the whole Judgment. Respondents on the other hand also Cross-Appealed.
7. The Court of Appeal at Malindi in Civil Appeal No. 56 of 2018 upheld this Court's finding on violation of the Petitioner's Constitutional Rights to the property by the Respondents and further determined that the Petitioner herein was entitled to compensation for the entire suit property.
8. The Court of Appeal - Visram, Karanja & Musinga, JJ. A made the following determinations: -

“31. Last but not least, having expressed that the appellant was entitled to compensation for the entire suit property we find that upon payment of the said compensation, the appellant will be deemed to have relinquished Its title thereto.

32. The upshot of the foregoing is that the appeal herein succeeds in part for the reasons outlined herein above. For the avoidance of doubt, we set aside the trial court's judgment to the extent of computation of the compensation for compulsory acquisition and damages payable for violation of the appellant's right to property and substitute the same with the following orders:

- a. Compensation for compulsory acquisition of the property shall be as per the report prepared by Wesco Property Consultants which puts the Open Market Value of the property at Kshs. 2,996,232,000/= plus an additional 15% of that value as per the Regulations in the Schedule to the repealed Land Acquisition Act comes to Kshs 449,434,800.
- b. Damages for violation of the appellant's right to property shall be computed at the rate of Kshs.100, 000 per acre, which translates to Kshs. 42,570,000.

Due to the partial success of the appeal, the Respondents shall meet half of the costs of this appeal as well as the suit in the ELC.”

9. Aggrieved by the said decision, the 1<sup>st</sup> Respondent herein appealed to the Supreme Court – in the Supreme Court Petition No. 1 of 2020. The Supreme Court upheld the finding of this Court and in the Court of Appeal at Malindi that the Government's action of issuing titles over a portion of the Petitioner's land amounted to a violation of its Right to Property. The Judgment is reported as - Attorney General Vs Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment).

10. The final orders of the Supreme Court were as follows: -

Consequent, upon the forgoing analysis, we make the following Orders:

F. Orders

- i. The Appeal dated 21st January 2020 partially succeeds.
- ii. We set aside the award of special and general damages in the sum of Kshs 492,004,800.00 by the Court of Appeal.



- iii. 464,973,248.70 is hereby affirmed.
- iv. The Award of Compensation relating to the “un-acquired” portion of the suit property by the Court of Appeal, is hereby set aside.
- v. That portion of the suit property, over which no titles were issued by the Government, in favour of third parties, shall remain vested in the respondent, in accordance with the Grant it holds in its favour.

G. Costs

Each Party shall bear its own Costs.

It is so Ordered.”

11. The application beforehand seeks the replacement of the initial orders of this Court with the Orders as issued by the Supreme Court. The applicant seeks that this court recalls the Decree and have it amended in terms of the Supreme Court’s decision.
12. The only single issue here then is whether this court can recall its Decree, and amend it to conform to the pronouncement of the Supreme Court. The applicant submits that this court has such inherent powers to do so. The Applicant’s submission on this proposed issue for determination is that its purpose is not to re-open any matters that were in dispute for further litigation between the parties but to reckon the Decree and Orders that are alive for obeisance and implementation by the parties in terms of the findings of the Supreme Court. This is borne of the fact that the Appeals preferred at the Court of Appeal, the Supreme Court, and the determinations therefrom only partially disturbed the determination of Olola J. delivered herein.
13. The Applicant contends that res judicata does not prevent a Court of law from dealing with all and every other consequent, complementary, supplementary, and necessary facilitative process to the effective redress of the cause(s) of action preferred and determined. The Petitioner herein is not introducing new facts or facts already adjudicated. It is simply seeking the extraction of the necessary Orders for implementation and redress.
14. The same was discussed in the case of Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018]-eKLR, the Court said of the doctrine of functus officio: -
 

“I understand the doctrine, like its sister, the res- judicata rule to seek to achieve finality in litigation. It is a way of a court saying, ‘I have done my part as far as the determination of the merits is concerned hence let some other court deal with it at a different level’. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

It however does not command that the moment the court delivers its Judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary, and necessary facilitative processes... Put in the context of the application before me, I do not consider the Decree/holder to ask the court to rehear and make a decision about the disputes in the file on the merits.”
15. The 1<sup>st</sup> to the 5<sup>th</sup> Respondents through their Litigation Counsel think otherwise and submit that the issue before the court is on the extraction of the Decree and not rectification as per the prayers sought by the Applicant. Order 21, rule 8 of the Civil Procedure Rules provides for the preparation and dating



of Decrees and Orders. Rectification is governed under Section 99 of the [Civil Procedure Act](#) which provides: -

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

Section 100 [Civil Procedure Act](#) provides –

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

16. The Respondents further submitted that in the Court of Appeal in the case of National Bank of Kenya Ltd. -vs Ndungu Njau [1997] eKLR the Court held that: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”

17. The Respondents submit that at this stage, the court cannot rectify any Decree, as the court is now functus officio the matter has proceeded to appeal and there is a final judgment issued by the Supreme Court. The Applicant ought to follow the procedure in obtaining a decree from the Supreme Court Judgment in accordance with the Civil Procedure Rules.

18. I have considered the application and the submissions by both sides on the one issue as to whether to recall the decree emanating from the Judgment of this court - Olola J. and have it varied, rectified, replaced, or revised to accord with the final Decree on appeal as rendered by the Supreme Court.

19. It is not in dispute that the matter beforehand was determined by this court. An appeal was preferred to the Court of Appeal and finally to the Supreme Court and the Supreme Court gave final Orders on the matter. What remains is how to extract and execute those Orders.

20. Section 100 of the [Civil Procedure Act](#), which is relied on by the Applicant deals with amendment of errors apparent on the face of the proceedings such errors do not exist, and neither is there anything to rectify as envisaged under Sections 99 of the Act.

21. I also do not see anything apparent on the face of the record - error, defect, or omission worth reviewing as enunciated in the quoted case of National Bank of Kenya Ltd. -vs Ndungu Njau [1997] eKLR (supra).

22. The procedure of extraction of the Supreme Court’s Decree and Orders for execution after exhaustion of appeals is an administrative matter between the Registrar of the Supreme Court and the Registrar of this Court. It cannot be a judicial function of this Court to vary, amend, alter, review or replace its earlier Orders. The doctrines of res judicata and functus officio will not apply here. This Court having rendered itself on the matter did its part. The other Superior Courts also rendered their part under the hierarchical ranking of Courts. The Supreme Court finally settled the matter as hereinabove



stated. What remains is to have the final Orders extracted by the Registrar of the Supreme Court or Registrar of this Court and commence the execution and implementation of the Judgment of the Supreme Court. That is not the work of a Judge of this Court. The procedure to follow is provided in our *Civil Procedure Act* part 111 - and that laid in Order 21, rule 8 of the Civil Procedure Rules significantly sections 30 and 31 of the Act provides as follows: -

“Courts by which Decrees may be Executed

30. Court by which decree may be executed

A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

31. Transfer of decree

(1) The court which passed a decree may, on the application of the decree-holder, send it for execution to another court—

- a. if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of that other court; or
- b. if such person has no property within the local limits of the jurisdiction of the court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other court; or
- c. if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the court which has passed it; or
- d. if the court which has passed the decree considers for any other reason, which it has recorded in writing, that the decree should be executed by such other court.

(2) The court which passed a decree may of its own motion send it for execution to any court of inferior but competent jurisdiction.”

23. The Supreme Court Rules LN No 101 of 4<sup>th</sup> June 2020 further buttresses the *Civil Procedure Act* on the manner the Supreme Court Decrees and Orders can be extracted and enforced see Rules 29 and 30 here below: -

“29.

- (1) Except for an Advisory Opinion, a decision of the Court on any proceedings shall be in form of a decree or an order, as may be appropriate.
- (2) A decree of the Court shall be as set out in Form C of the First Schedule.
- (3) An Order of the Court shall be as set out in Form D of the First Schedule.



- (4) Any party may, within fourteen days from the date of judgment or ruling, prepare a draft order and submit it for the approval of the other party and who shall, within seven days of receiving the draft order—
  - (a) approve it, with or without any changes; or
  - (b) reject it.
- (5) Where the parties approve the draft, it shall be submitted to the Registrar who shall, if satisfied that it is properly drawn, certify the Order accordingly.
- (6) Where parties do not agree on the content of the Order, any judge who sat at the hearing shall settle the terms of the Order.

30.

- (1) The Registrar shall certify every decision of the Court for transmission to the High Court for execution.
- (2) An order or a decree of the Court may be enforced as if it were an order of the High Court.”

24. From the foregoing, I humbly conclude that the law and procedure provide an elaborate route for the extraction of Decrees and Orders of the Supreme Court for enforcement. The roadmap envisaged by the Applicant is not one of them. Going that route will be opening new frontiers in litigation. The applicant has moved the court under erroneous provisions and misinterpretation of the law. The issue at hand is a simple administrative exercise – even via correspondence addressed to the Registrar of the Supreme Court to extract a Decree and have it remitted to the Registrar of this Court for enforcement.

25. Therefore, the application dated 24<sup>th</sup> February 2022 is hereby dismissed with costs to the Respondents.

**Dated, signed, and delivered at Malindi virtually in open court on this 19<sup>th</sup> day of January 2023.**

**E. K. MAKORI**

**Judge**

**In the Presence of: -**

**Mr. Ojwang for the Respondents**

**In the Absence of: -**

**Mr. Muturi Mwangi for the Applicant**

*MALINDI PETITION NO. 2 OF 2010 RULING Page 6*

