



Okwiri ((Suing as the personal representative of the Estate of Nicholas Litswa Mbehelo - Deceased)) v Mbehelo (Environment and Land Appeal E004 of 2023) [2025] KEELC 2953 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2953 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E004 OF 2023
DO OHUNGO, J
MARCH 27, 2025

BETWEEN

ELIZABETH ATEMOKWIRI APPELLANT
(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
NICHOLAS LITSWA MBEHELO - DECEASED)

AND

ADRIANO OKANGA MBEHELO RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kakamega (Hon. B. Ochieng, Chief Magistrate) delivered on 22nd June 2023 in Kakamega CM Misc. Award No. 199 of 1998)

JUDGMENT

1. The background of this appeal is that Nicholas Litswa Mbehelo (Nicholas) filed Notice of Motion dated 10th March 2021 through which he sought from the Subordinate Court the following orders against the Respondent herein:
 - a. [Spent]
 - b. [Spent]
 - c. [Spent]
 - d. That the transfer of land title No. Kakamega/Idakho/Shivakala/1154 from the applicant Nicholas Litswa Mbehelo to the respondent Adriano Okanga Mbehelo on 6-10-2020 on the basis of the court order herein dated 9-8-2012 in this matter, Kakamega CM Misc. Award No. 199 of 1998, be cancelled and or revoked and the said title do revert to the name of the applicant Nicholas Litswa Mbehelo as the legitimate and absolute owner as the said order dated 9-8-2012



had been set aside on 5-12-2012 by consent of the respondent and it was no longer in effect or existence.

- e. The respondent to bear the costs of this application.
2. The Respondent reacted to the application by filing Notice of Preliminary Objection dated 26th April 2021 in which he contended that the Subordinate Court lacked jurisdiction to review or set aside a decision made by the High Court and that the application was res judicata.
3. Upon hearing the application and the preliminary objection, the Subordinate Court (Hon. B. Ochieng, Chief Magistrate) wrote a ruling which was delivered on his behalf on 22nd June 2023 by Hon. Ndururi, Senior Principal Magistrate. The learned Magistrate held that res judicata had been established and that the application lacked merit. He dismissed the application with costs.
4. While the application was pending, Nicholas passed away on 22nd January 2022. Elizabeth Atemo Okwiri, the Appellant herein, obtained Limited grant of Letters of Administration Ad Litem in respect of his estate on 4th August 2022.
5. Dissatisfied with the outcome, the Appellant filed this appeal on 13th July 2023, through Memorandum of Appeal dated 12th July 2023. She prayed that the appeal be allowed with costs, the ruling of the Subordinate Court be set aside and be replaced with an order allowing Notice of Motion dated 10th March 2021 with costs.
6. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
 1. The Learned trial magistrate erred in law and or fact in dismissing the appellant's application dated 10th March, 2021 when the same was merited and against the facts on record and the law.
 2. The Learned trial magistrate erred in law and fact in failing to make a finding on the principal prayer being prayer (d) in the appellant's application dated 10th March, 2021 and he erred by ruling on only the interim reliefs.
 3. That the trial magistrate Misapprehended the facts and or issues in the matter and he erred in law and fact by failing to identify and make a finding on the correct issues and or prayers sought and he erred by making findings on extraneous issues.
 4. The Learned trial magistrate erred by shifting the burden of proof and or by applying wrong principles in determining the appellant's application.
 5. The learned trial magistrate erred by holding or insinuating that the appellant sought to be awarded land vide his application dated 10th March, 2021 when that was not the case and when the appellant merely sought the correction or reversal of the respondent's irregular and unlawful execution of an order which had been set aside by consent of the parties.
 6. The learned trial magistrate's ruling was arrived at in a cursory and perfunctory manner and the same is flawed, biased, indefensible, irrelevant and biased and has occasioned a serious miscarriage of justice.
7. The Appeal was canvassed through written submissions. The Appellant filed submissions dated 15th January 2024 wherein she argued that Nicholas neither sought to be awarded the suit property nor review of the issues determined by the High Court. That all that Nicholas was saying in the application was that the dispute between the parties had been determined by the High Court and the Subordinate Court and that parties ought to abide by the decisions of the said courts. She further argued that in a bid to defeat the said decisions, the Respondent registered and effected the order dated 9th August



- 2012 whose effect was to cancel Nicholas' name from the register of the suit property and to have the suit property registered in his (the Respondent's) name.
8. The Appellant went on to argue that the Respondent's action was unlawful and mischievous since he was aware that the order which he was implementing was no longer in force since it had been set aside by consent on 5th December 2012. That the application was aimed at rectifying the mischief so that the registration of the Respondent as proprietor of the suit property on the basis of a non-existent order be set aside. The Appellant also argued that the Learned Magistrate veered off and made findings on irrelevant issues, yet the application was not opposed. She therefore urged the court allow both the appeal and Notice of Motion dated 10th March 2021 with costs.
 9. In response, the Respondent filed submissions dated 14th February 2024. He argued that the dispute between the parties had been substantially litigated, and that the principle of finality required litigation to come to an end. He relied on the cases of Patrick Gathenya v Esther Njoki Rurigi and another [2008] eKLR and Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & another [2019] eKLR in support of that contention.
 10. The Respondent further relied on Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR and Daniel Lago Okomo v Safari Park Hotel Ltd & another [2018] eKLR and argued that the matter was res judicata and that the court was precluded from awarding ownership to land based on a null and void decision. The Respondent therefore urged the court to dismiss the appeal with costs.
 11. This being a first appeal, the mandate of this court is to re-consider and re-evaluate the record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR. I further bear in mind that an appellate court should not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. See *Mombasa Cement Limited v Kitsao & 34 others (Civil Appeal E016 of 2020)* [2022] KECA 562 (KLR) (24 June 2022) (Judgment).
 12. I have carefully considered the entire record, the grounds of the appeal and the parties' submissions. The issues that arise for determination are whether the Subordinate Court had jurisdiction and whether the reliefs sought in the application ought to have issued.
 13. In his Notice of Preliminary Objection, the Respondent contended that the Subordinate Court lacked jurisdiction, and that the application was res judicata. Additionally, the Respondent has argued that the Subordinate Court was precluded from awarding ownership to land based on a null and void decision. Since res judicata is also an issue of jurisdiction, I will deal with the issue of jurisdiction under one heading.
 14. Jurisdiction, as the courts have severally stated, is everything in litigation. Without it, the proceedings come to a certain end and the court cannot take any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. Any action or step taken by a court in the absence of jurisdiction is a nullity. See *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR.



15. The Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

A Court's jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

16. A perusal of prayer d of the Notice of Motion reveals that Nicholas sought cancellation of the Respondent's title to the suit property. Even though Nicholas did not annex any certified copy of the register in respect of the suit property or a certificate of official search, the assumption, based on his case, is that the Respondent was the registered proprietor. The reasons that Nicholas advanced in support of the application notwithstanding, he sought cancellation of title to registered land and conferment upon him of the said title.
17. The rights conferred due to registered proprietorship of land and the circumstances in which registered title to land can be impeached are all matters clearly provided for in law, particularly at Sections 24 and 26 of the Land Registration Act. Cancellation and conferment of registered title to land are substantive reliefs which cannot casually be sought through an application in a miscellaneous cause.
18. According to the Appellant, the order that gave the Respondent title was made on 9th August 2012. That is some 9 years before Notice of Motion dated 10th March 2021 was filed. Even though the application was only opposed through a preliminary objection, title to registered land is a matter of record and changes do occur in such record. New entries such as transfers and even subdivision may have been made in the register during the 9 years interval with the potential that the Subordinate Court could have made orders affecting other persons who were not parties before the court. That is yet another reason cancellation of title cannot simply be sought through an application. The Court must be given all the necessary information, though an oral hearing backed with cogent evidence.
19. The proceedings in Kakamega CM Misc. Award No. 199 of 1998 which were before the Subordinate Court were commenced for purposes of adopting and enforcing the decision of the Ikolomani Land Disputes Tribunal which had awarded the suit property, which is registered land, to the Respondent. Subsequent tribunal decisions aside, the genesis of Kakamega CM Misc. Award No. 199 of 1998 was the said award.
20. It will be recalled that the Respondent has argued that the Subordinate Court was precluded from awarding ownership to land based on a null and void decision. There are many decisions emphatically stating that the tribunal which was established pursuant to Section 4 of the Land Disputes Tribunals Act, 1990 (repealed) did not have jurisdiction to determine title to or ownership of registered land. Suffice it to mention the case of *Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others* [2014] eKLR where the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal when it comes to ownership of registered land as follows:

On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

- 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 on in common,



- (b) A claim to occupy, or work land or
- (c) Trespass to land.”

Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity....

- 21. Thus, the decision of the Ikolomani Land Disputes Tribunal and the ensuing tribunal appeals must inevitably be seen against that background of the law. I agree with the Respondent that the entire process, including the proceedings in Kakamega CM Misc. Award No. 199 of 1998, was a nullity and could not be the basis of awarding ownership to land. As Lord Denning stated in *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, a every proceeding which is founded on a nullity is void. I find that the Subordinate Court did not have jurisdiction to determine Notice of Motion dated 10th March 2021 and indeed in the whole of Kakamega CM Misc. Award No. 199 of 1998.
- 22. If the parties have any substantive issues to litigate concerning title to the suit property, they may find it more constructive to file substantive suits instead of perpetually being deadlocked in Kakamega CM Misc. Award No. 199 of 1998. The parties are ably represented by counsel and are well aware of the law.
- 23. In view of the foregoing discourse, I find no merit in this appeal. I dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 27TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Akwala for the Appellant

Ms Chesire for the Respondent

Court Assistant: B Kerubo

