



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omambia v Moinde (Environment & Land Case 520 of 2016)  
[2023] KEELC 850 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 850 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 520 OF 2016  
JM ONYANGO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JUSTUS MOFFAT OMAMBIA ..... PLAINTIFF**

**AND**

**CASIANO RATEMO MOINDE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the defendant alleging that the defendant had forcefully and illegally detained his land parcel number Majoge/Bosoti/ 2380. He therefore sought an order of eviction against the defendant.
2. Upon being served with Summons to enter appearance, the Defendant filed a Defence and Counterclaim denying the Plaintiff's claim and stating that the Plaintiff had subjected him to two criminal cases namely Rongo PM Criminal Case No 1391 of 2004 and Ogembo SPM Criminal Case No 282 of 2008 over the suit property which had been determined in favour of the defendant.
3. In his Counterclaim, the Defendant alleged that in the year 2004, the plaintiff filed a case at Ogembo Land Disputes Tribunal alleging that he was entitled to a portion of the suit property and the Tribunal purported to deal with land parcel number Majoge/Bosoti/1673 by ordering that the same be sub-divided into two. It is the defendant's case that the decision of the said Tribunal was beyond the powers conferred to it by the Land Disputes Tribunal Act No 18 of 1990. He stated that he appealed against the said decision of the Tribunal to the Kisumu Provincial Appeals Committee vide Appeal No 191 of 2005. However, during the pendency of the appeal, the Plaintiff caused parcel No Majoge/Bosoti/1673 to be sub-divided into parcels No 2380 and 2381.
4. He thus prayed for a declaration that the award of the Ogembo Land Disputes Tribunal dated November 25, 2004 and its adoption vide Kisii CM Miscellaneous Application No 62 of 2004 and its



consequential orders are null and void ab initio. He further prayed that the title for land parcel number Majoge/Bosoti/ 2381 be nullified.

### **Plaintiff's Case**

5. The case proceeded for hearing between 17.11.2019 and 6.6.22. The plaintiff testified as the only witness for his case. He stated that the defendant was his brother and he had another brother called Juma Moinde who had sued the plaintiff in ELC Case No 522 of 2016 in respect of the original parcel number Majoge/Bosoti/1673. The court directed that since the two cases relate to brothers and touch on the same subject matter, the outcome of this case would apply to ELC Case No 522 of 2016.
6. It was the Plaintiff's case that his late father owned land parcel No Majoge/Bosoti/1673 which he subsequently sub-divided into three portions and gave a portion to each of his three sons. After the sub-division, the Defendant removed the beacons and took possession of the entire parcel. This prompted the plaintiff and his brother Juma to file a case against the Plaintiff at Gucha Land Disputes Tribunal. The Tribunal gave an award in favour of the Plaintiff and Juma. The said award was subsequently adopted as a judgment of the court vide Kisii CM Miscellaneous Application No 62 of 2004. Following the said judgment, the plaintiff had land parcel No 1673 sub-divided into land parcels No 2380 and 2381. However, the Defendant refused to move out of parcel 2381.
7. Upon cross-examination, he denied that his father had transferred parcel 1673 to the defendant. He also denied that he sub-divided parcel 1673 while he Defendant's appeal at the Provincial Appeal's Committee was pending. He admitted that he had preferred criminal charges against the Plaintiff in respect of the suit property in Rongo and Ogembo court. He stated that he was not aware that the Land Disputes Tribunal did not have jurisdiction to make decisions relating to ownership in respect of registered land.
8. In re-examination he maintained that he followed the legal process obtaining at the time to claim his land. He concluded by stating that there was no order restraining him from sub-dividing the land and processing his title before the appeal was heard.

### **Defendant's Case**

9. The Defendant testified as DW1 and called one witness. It was his evidence that he was the registered owner of land parcel number Majoge/Bosoti/1673 measuring 2.4 acres which he inherited from his late father Moinde Kubencha. His father bought the said parcel of land from one Mecho Mosingi. When he distributed his land among his sons, his father gave the plaintiff and the defendant's other brothers bigger portions of his ancestral land and the defendant was only given one acre. That is why his father gave him parcel 1673. He got the title for parcel 1673 in 1999, five years before his father died.
10. He further testified that the plaintiff filed a case against him at the Ogembo Land Disputes Tribunal vide Tribunal Case No 4 of 2004. The Tribunal held that the said parcel be sub-divided into 3 portions. He told the court that he filed an appeal against the decision at the Kisumu Provincial Appeals Committee vide Appeal No 5 of 2005 but the Tribunal was disbanded in 2010 before the appeal was heard. In the meantime, the plaintiff had parcel No 1673 sub-divided into three portions namely, Majoge/Bosoti/2380, 2381 and 2382. It was his prayer that the decision of the Land Disputes Tribunal be nullified as the said Tribunal had no jurisdiction to order the sub-division of his land.
11. He stated that apart from the Tribunal case, the plaintiff had instituted criminal charges against him vide Rongo SRM Criminal Case No 1391 of 2004 and Ogembo PM Criminal Case No 282 of 2008 for trespass/ forcible detainer and interfering with boundary features but he had been acquitted of all the charges.



12. Isaac Oroko Mecheo who testified as DW2 stated that the Defendant had been in possession of parcel No Majoge/Bosoti/1673 since 1978. He told the court that the Defendant's father bought the said parcel of land from his (DW1's) late father. He said that his late father had recorded a witness statement in this case but he died before he could testify.
13. Upon the conclusion of the Defendant's case, both parties filed their submissions which I have considered.

### **Issues For Determination**

14. Having considered the pleadings, evidence on record and the rival submissions, the issues for determination as framed by the parties are as follows:
  - i. Whether the Defendant/ Counter-claimant was the registered owner of land parcel number Majoge/Bosoti/1673.
  - ii. Whether land parcel number Majoge/Bosoti/2380 was a sub-division of land parcel number Majoge/Bosoti/1673.
  - iii. Whether Ogembo Land Disputes Tribunal acted ultra vires in ordering the sub-division of land parcel number Majoge/Bosoti/1673.
  - iv. Whether the decision of Ogembo Land Disputes Tribunal is null and void and whether the same should be nullified.
  - v. Whether the title deed for land parcel number Majoge/Bosoti/2380 which was illegally obtained confers any rights on the plaintiff herein.

### **Analysis And Determination**

15. It is not in dispute that the Defendant was the registered owner of land parcel number Majoge/Bosoti/1673. It is equally not in dispute that the said parcel was divided into three portions namely: land parcels number Majoge/Bosoti/2380, 2381 and 2382 registered in the names of the plaintiff, Juma Moinde and the defendant, respectively.
16. What is in dispute is whether the said sub-division which was done pursuant to the decision in Ogembo Land Dispute case No 4 of 2004 was lawful. Learned counsel for the plaintiff submitted that the said sub-division was lawful as the defendant did not take any steps to reverse what in his view was done legally.
17. On the other hand, learned counsel for the Defendant submitted that the said sub-division was unlawful as the Tribunal had no jurisdiction to order the sub-division of registered land and it therefore acted ultra vires. It was his further submission that both the decision of the Tribunal and the judgment of the court adopting the said decision were null and void. He cited the cases of *Republic v Kajiado Land Disputes Tribunal & others Ex- Parte Lilian Murunja* Nairobi HC Misc Civil Application No 689 of 2001 (Unreported) where the court held as follows:

“The incompetency of the application does place the court in an awkward dilemma firstly because if the contention on jurisdiction is correct as stated above, the award is nullity and anything out of a nullity is a nullity i.e the judgment, decree or order by the magistrate.



The irregularities mentioned above notwithstanding, this court cannot countenance nullities under any guise. This court would like to apply the principle in *Animistic v Foreign Compensation* 19692 AC147;

“If a Tribunal mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question i.e one which it was not empowered to inquire and so had no jurisdiction to determine, its purported determination not being a determination within the meaning of the empowering legislation was accordingly a nullity”

It follows that both the award and the purported entering of the judgment in terms of the award were nullities. This is so because the maxim *ex nihilo nihil fit* applies-out of nothing comes nothing” The High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role. In my view it has powers to strike out nullities as was held in *R v Attorney Goldenberg Commission Ex parte Hon. Mwalulu* at pages 26-33.”

18. Counsel also cited the case of *Republic v The Chairman, Mosocho Land Disputes Tribunal & others* ELC Case No 91 of 2011 where Justice Mutungi relying on the finding of Okongo J in the case of *Republic v Chairman Borabu Land Disputes Tribunal & 2 Others Ex-parte Florence Nyaboke Machani* (2014) eKLR held thus:

Now the decision of the 1<sup>st</sup> Respondent was null and void, was there anything that the 2<sup>nd</sup> Respondent could adopt as a judgment of the court? In the case of *Macfoy v United African Company Limited* (1961) ALL ER 1169 Lord Denning stated as follows concerning an act which is a nullity at 1172.

If an act is void, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

19. The decision of the Ogembo Land Disputes Tribunal ordering the sub-division of land parcel No Majoge/Bosoti/1673 was ultra vires and its adoption by the court could not sanitize the said decision as the same was null and void ab initio. It matters not that the defendant did not that the appeal at the Provincial Appeals Committee was never heard to its logical conclusion.
20. Having arrived at the conclusion that the decision of the Ogembo Land Disputes Tribunal was null and void it follows that the plaintiff's suit cannot succeed and the same is hereby dismissed.
21. Conversely, the defendant's Counterclaim has merit. I therefore enter judgment on the Counterclaim and make the following final orders:
- a. A declaration is hereby issued that the decision of the Ogembo Land Disputes Tribunal dated November 25, 2004 and its adoption vide Kisii CM Miscellaneous Application No 62 of 2004 as well as its consequential orders are null and *void ab initio*.
  - b. The title for land parcel number Majoge/Bosoti/ 2380 and all other sub-divisions of parcel number Majoge/Bosoti/ 1673, are hereby nullified and cancelled.
  - c. The suit property shall revert to the name of Casiano Ratemo Moinde.



- d. The judgment herein shall apply to ELC Case No 522 of 2016 Juma Moinde Casiano v Ratemo Moinde mutatis mutandis.
- e. As the defendants are brothers, each party shall bear his own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**J.M ONYANGO**

**JUDGE.**

**In the presence of;**

- 1. Mr. Masese for the Plaintiff**
- 2. No appearance for the Defendant**
- 3. Court Assistant: Mr. Oniala**

