Liyayi & 2 others v Musoga (Civil Appeal 50 of 2018)
[2022] KECA 1117 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1117 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 50 OF 2018

M NGUGI, K M'INOTI & PO KIAGE, JJA

OCTOBER 7, 2022

BETWEEN

JEROME LIYAYI ..... 1ST APPELLANT

ALPHONCE LUKONGO ..... 2ND APPELLANT

CLEMENT AKWEYU MBAKA ..... 3RD APPELLANT

AND

JOSINA MUSOGA ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (N. A. Matheka J.) dated 7th March, 2018 in Kakamega ELC Appeal No. 7 of 2017)

JUDGMENT

JUDGMENT OF MUMBI NGUGI JA

1. This appeal has its roots in a dispute presented by the respondent before the Shinyalu Land Disputes Tribunal in Claim No 18 of 2006. The respondent's case was that the 1st appellant had sold land parcel number Isukha/Shinyalu/930 to her husband, one Francis Musoga Maswayi (Deceased). The 1st appellant had, however, reneged on the sale and instead sold and transferred the land to the 3rd appellant, Clement Akweyu Mbaka, and the land had been transferred to the 3rd appellant. Upon hearing the parties, the Tribunal pronounced itself in favour of the respondent in its award dated August 15, 2007. It ordered, inter alia, the District Land Registrar to 'cause nullification of the registration' of the land parcel in the name of the 3rd appellant and revert it to the name of the 1st appellant; and that the 1st appellant transfers the land to the respondent in this matter, the widow of Francis Musoga.

2. Thereafter, the award was placed before the Chief Magistrate's Court in Kakamega in Civil Misc Application (Award) No 163 of 2007. The record indicates that on October 19, 2007, the award of

the 'Shinyalu Land Disputes Tribunal read and explained in open court' in the presence of the parties, and that the right of appeal was also explained. The appellants thereafter filed an application dated November 8, 2007 in which they sought orders of stay of execution pending hearing of their appeal to the Provincial Land Disputes Appeal Tribunal, which orders were granted on January 18, 2008.

3. It appears that there were no further developments on the matter until the respondent filed an application dated March 1, 2012 seeking adoption of the award of the Land Disputes Tribunal as an order of the court. In the ruling dated May 24, 2012, the Chief Magistrate's Court held that the applicant was seeking what had already been given; that the adoption of the award was taken care of when the award was read to the parties on October 19, 2007; and that the issues raised in the respondent's affidavit in support of the application were issues that would arise in an application for execution of the award.

4. The respondent then filed an application dated June 4, 2012 seeking execution of the award. By consent of the parties, an order of stay of execution of the award pending hearing of the appellants' appeal was made on July 17, 2012. It is not clear from the record whether the stay was issued pending appeal against the decision of the Land Disputes Tribunal to the Provincial Land Disputes Appeals Tribunal or against the decision of the Magistrate's Court in Kakamega Magistrate's Civil Misc Application (Award) No 163 of 2007. Perhaps because the Land Disputes Act and the attendant procedures had by then been repealed, the latter is the appeal that the appellants pursued before the Environment and Land Court (ELC), raising the following grounds against the said decision:

    i. That the trial learned magistrate erred in fact and law in failing to decide on the issues that were before the court.

    ii. That the learned trial magistrate erred in fact and law in failing to properly interpret the issues of law relating to the matter before deciding on the same.

    iii. That the learned trial magistrate erred in fact and law in making a finding that the reading of an award is/was the same thing as adopting the same award.

    iv. That the learned trial magistrate erred in fact and law in deciding on the issue before the court without considering that an appeal that had been lodged at the Western Province Appeals committee against the award of the Shinyalu Division Land Disputes Tribunal had not been determined.

5. In the judgment dated March 7, 2018, the first appellate court found that the Magistrate's Court decision on the said application was judiciously arrived at, and it dismissed the appeal with costs to the respondent.

6. The appellants then filed the present appeal against the decision of the ELC. In the Memorandum of Appeal dated May 9, 2018, they raise the following grounds of appeal:

    i. The learned trial judge erred in law and in fact in not appreciating the award as read and adopted was a nullity from the start as the Shinyalu Land Dispute Tribunal acted in excess of its jurisdiction in ordering cancellation of the 3rd Appellants title in LR Isukha/Shinyalu/930.

    ii. The learned trial judge erred in law and in fact and failed to appreciate that (the) trial magistrate in Kakamega CMCC Misc Award No 163 of 2007 had erred in making a finding that the reading of an award was the same as adopting the award.

iii. The learned trial judge erred in law and in fact and failed to appreciate that the appeal filed in the Western Provincial Appeals Committee had not been determined and that there was a stay of proceedings in place in Kakamega CMCC Misc Award No 163 of 2007.

7. The appellants were represented at the hearing of the appeal by learned Counsel, Mr Okali, holding brief for Mr Getanda, Counsel on record for the appellants. There was no appearance for the respondent at the hearing, nor were submissions filed on her behalf, though the record indicates that service was effected on her Counsel on record, the firm of Elung'ata & Co Advocates.

8. While the appellants have set out three grounds of appeal in their memorandum of appeal before this Court, in their written submissions dated February 25, 2022 and in the oral highlights by Mr Okali, they focused on a single ground: the issue of jurisdiction of the Land Disputes Tribunal. They term the award of the Shinyalu Land Disputes Tribunal a nullity, their submission being that in light of the provisions of section 3 of the repealed Land Dispute Tribunals Act, the Tribunal acted in excess of its jurisdiction in directing, in its decision dated August 15, 2007, that the title to land reference number Isukha/Shinyalu/930 registered in the name of the 3rd appellant should be cancelled.

9. The appellants cite the case of the Supreme Court in *S K Macharia, & another v Kenya Commercial Bank limited & 2 others [2012] eKLR* and sections 3 and 4 of the repealed *Land Disputes Tribunal Act* with respect to the jurisdiction of the Tribunal. They further rely on the case of *Lucy Bosire v Nyankoni Manga Robi (2014) eKLR* in support of their contention that the Tribunal acted in excess of its jurisdiction. They submit that the Tribunal had no jurisdiction to adjudicate over matters touching on the proprietary rights over disputed property, or to cancel titles. The decision of the Tribunal was a nullity, and to allow it to stand and disallow their appeal would amount to an injustice on the appellants.

10. They further rely in support of their submissions on the case of *Macfoy v United African Co Ltd [1961] 3 ALL ER 1169* in which Lord Denning stated as follows:

> "... If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of 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 bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

11. In response to the question whether the issue of jurisdiction had been raised before the ELC, Counsel for the appellants submitted that though it was not raised, this Court has the discretion to entertain the issue as it is purely a matter of law.

12. I have considered the appellants' appeal, their written submissions and the oral highlights at the hearing of the matter. I have also read and considered the record of the first appellate court.

13. While the appellants had lodged an appeal before the ELC from the decision of the Magistrate's Court, it is noteworthy that the decision appealed from arose pursuant to an application by the respondent seeking adoption of the award of the Tribunal. The decision of the Magistrate's Court on that application to the effect that the respondent was seeking orders that she had already been given was upheld by the ELC, leading to the present appeal in which the appellants, in their submissions, confined themselves to the question of the jurisdiction of the Tribunal. Section 3(1) of the *Land Disputes Tribunals Act 1990* (repealed) which conferred such jurisdiction provided as follows:

(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.

14. In the claim before the Shinyalu Land Disputes Tribunal, the respondent sought and was granted orders relating to the title to Isukha/Shinyalu/930. The Tribunal purported to issue an order directing the Land Registrar to cancel the registration of the suit land in the name of the 3rd appellant, revert it to the 1st appellant; and then directed that the 1st appellant, upon reversion of the title to him, transfers the land to the respondent.

15. In upholding a decision in which the High Court had issued orders quashing the decision of a Land Disputes Tribunal, this Court in *M'Marete v Republic & 3 others [2004] eKLR* held as follows:

> " In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under *Registered Land Act* to the appellant. In our view, the Tribunal acted in excess of its jurisdiction."

16. The Tribunal in this matter, evidently, had no jurisdiction to issue the orders that it did.

17. As conceded by the appellants, the issue of the Tribunal's jurisdiction had not been raised before the ELC. However, it is now settled law that the issue of jurisdiction is so important that it can be raised at any point, even by the court suo motu. In its decision in *Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR*, this Court stated as follows:

> " This Court in *Adero & Another v Ulinzi Sacco Society Limited [2002] 1 KLR 577*, quite sufficiently summarised the law on jurisdiction as follows;
>
> "...2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.
>
> 3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
>
> 4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal....
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> We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:
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> > "....at any time, in any manner, even for the first time on appeal, or even *viva voce* and indeed, even by the Court itself- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."
> >
> > (See *All Progressive Grand Alliance (APGA) v Senator Christiana ND Anyanwu & 2 others, LER [2014] SC 20/2013 Supreme Court of Nigeria*). We agree with

these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, ex nihilo nihil fit (out of nothing comes nothing)." (Emphasis added).

18. The appellants in this matter participated in the proceedings before the Shinyalu Land Disputes Tribunal. They participated in the proceedings before the Magistrate's Court in Kakamega. They filed an appeal before the ELC in Kakamega. They did not raise the question of the Tribunal's jurisdiction until the appeal before us. In all these proceedings, the appellants were represented by Counsel, but at no time did the appellant's Counsel raise the issue of the Tribunal's jurisdiction. The law, however, is that the question of jurisdiction can be properly raised at any point, though it would be best raised at the earliest opportunity.

19. The decision of the Tribunal directing the transfer of the subject land was a nullity ab initio, as the Tribunal lacked the jurisdiction to adjudicate on the matter of ownership, or to issue the orders that it did. Indeed, the Magistrate's Court and the ELC could, quite properly, have raised and considered the issue on their own motion, so that the resolution of the matter need not have taken a further fifteen years from the decision of the Tribunal in 2007.

20. In the result, I would allow the appellant's appeal and set aside the decision of the ELC.

21. That, however, does not put an end to the matter, for the issues considered and determined by the ELC did not touch on the question of the Tribunal's decision. I would therefore go a step further and direct that the decision of the Tribunal having been arrived at without jurisdiction and therefore being a nullity, the adoption of the order by the Magistrate's Court was also a nullity, and the said orders could not be executed by the respondent to compel the Land Registrar to effect a transfer to herself. In the words of Denning LJ in the Mcfoy case, where the original act is a nullity:

> " Every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there."

22. Given the circumstances and history of this matter, I would direct that the parties bear their respective costs of the appeal.

JUDGMENT OF K M'INOTI

1. I have had the advantage of reading the Judgment of Mumbi Ngugi, JA in draft, with which I concur. I would only like to emphasise that from their history and antecedents, the Land Disputes Tribunals were never intended to adjudicate disputes involving title to land.

2. Before 1981, the Magistrates' Courts Act, cap 10 vested jurisdiction in Magistrates Courts to hear and determine land disputes, subject to specified monetary value, which was adjusted from time to time. In 1981, the Magistrates' Jurisdiction (Amendment) Act (Act No 14 of 1981) amended the Magistrates' Courts Act by removing from magistrates and vesting in a panel of elders the jurisdiction to hear and determine some disputes touching on land. The panel of elders was chaired by the District Officer for the area in which the land in dispute was situated.

3. The changes were justified on the assertion that the elders had a better sense of justice in the concerned land matters and that the transfer of jurisdiction would expedite resolution of such disputes. Section 9A of the 1981 Act provided as follows:

(1) Notwithstanding the provisions of sections 5 and 9 or any other written law conferring jurisdiction but subject to the provisions of this part, no Magistrate's Court shall have or exercise jurisdiction and powers in cases of a civil nature involving:

a. the beneficial ownership of land;

b. The division of, the determination of boundaries to, land including land held in common;

c. A claim to occupy or work land; and

d. Trespass to land.

(2) An issue relating to any matter set out in paragraph (a) to (d) of subsection 1 shall be referred to. Panel of elders to be resolved."

4. Arising from the obvious lack of clarity in the above provision, the panels of elders soon started delving into issues of validity of title to land, cancelling titles of registered owners, and awarding parcels of lands to other parties. The ensuing confusion, hue and cry led to the enactment of the Statute Law, (Miscellaneous Amendment) (No 2) Act, 1984, which effected further amendments to the Magistrates' Court Act and provided thus:

5. An issue relating to any matter set out in paragraphs (a) to (d) of subsection (1) shall be referred to a panel of elders to be resolved; but nothing in that subsection shall be construes as conferring jurisdiction or powers on a panel of elders to determine title to land."

6. In 1990 the above provisions in the *Magistrates' Courts Act* were repealed by the Land Disputes Tribunals Act, which re-established the panels of elders as Land Disputes Tribunals under the chairmanship of the District Commissioner for the area under which the land in dispute was situated. By dint of section 3(1) of the 1990 Act, the jurisdiction of the Land Tribunals was limited to "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."

7. Until the Land Disputes Tribunals were abolished, following the repeal of the Land Disputes Tribunals Act by the Environment and Land Court Act, 2011, it was always understood that the Tribunals had no jurisdiction to determine title to land. In addition to the decisions cited by Mumbi Ngugi, JA, I would add the following decisions of this Court that reiterated that the Land Disputes Tribunal could not determine title to land: *Asman Maloba Wepukhulu & Another v Francis Wakwabubi Biketi*, CA No 157 of 2001, *Kakamega County Council v Chairman Tiriki East Disputes Tribunal & 3 Others [2011] eKLR*, and *Wachira Wambugu & 2 Others v District Land Disputes Tribunal, Othaya & 3 Others [2013] eKLR*.

8. Having purported to determine a matter over which it had no jurisdiction, the question whether the Tribunal had jurisdiction to entertain the dispute could be raised at any stage and even suo moto by the Court itself. As was stated way back in 1938 in Sir *Ali Bin Salim v Shariff Mohamed Shatry [1938] KLR 9*:

9. If a court has no jurisdiction over the subject matter of the litigation its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable: they are void and

have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction."

10. I would accordingly allow the appeal with no orders on costs.

JUDGMENT OF KIAGE, JA

1. I have had the benefit of reading in draft the judgment of Mumbi Ngugi, JA. I entirely agree with it and have nothing useful to add.

2. As M'Inoti, JA is in agreement, the appeal shall be allowed along the lines proposed by Mumbi Ngugi, JA.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

K M'INOTI

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JUDGE OF APPEAL

P O KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR