REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 46 OF 2013

(*From Original Busia CM Land Dispute No. 80 of 2007*)

BONFACE OJUMA ODWALI.....APPELLANT

VERSUS

BONFACE WAFULA OWIRE.....RESPONDENT

JUDGEMENT

INTROUDCTION

1. The appellant in this matter- **BONFACE OJUMA ODWALI** – was selling some land to the respondent – **BONFACE WAFULA OWIRE**- sometime in the year 2005. He was paid the full purchase price but he seems to have changed his mind mid-way and baulked at the idea of putting the respondent into possession and/or ownership. The turn of events led the respondent to file a claim against the appellant before the then operational Land Disputes Tribunal of the area. The tribunal found for the respondent. The appellant was dissatisfied. He appealed before the now defunct Provincial Land Disputes Appeals Committee. He lost the appeal. There was then a prolonged hiatus and the appellant then filed this appeal.

2. The grounds of appeal are two and are spelt out as follows:

> ***1. The panel of elders in the appeals committee erred in law by ordering specific performance of a sale of land agreement in excess of jurisdiction and contrary to the provisions of Land Control Act.***
>
> ***2. The panel of elders in the appeals committee erred in law by ordering for specific performance of an agreement that was rendered incapable of enforcement due to mistake in location of the subject portion sold and duplication of registration numbers.***

BACKGROUND

3. The appellant and the respondent entered into a land sale transaction, with the appellant being the seller and the respondent the purchaser. The appellant however opted out of the sale allegedly due to challenges caused by duplication of registration numbers regarding and surrounding his parcels of land, including the parcel he wanted to sell. The appellant also alleged that the respondent had delayed in payment of the full purchase price.

4. The respondent however was determined to go on with the purchase and when the appellant started showing dilatory behavior, he sued him before the then existing Land Disputes Tribunal. The tribunal handled the matter and found for the respondent, in the result ordering the appellant to transfer four (4) acres to the respondent. The appellant felt aggrieved and appealed before the then operational Kakamega Provincial Land Disputes Appeals Committee. The appeals committee again found for the respondent. Feeling aggrieved yet again, the appellant filed the appeal now under consideration.

5. It is clear that the two different fora that handled the matter ordered specific performance on the part of the appellant. And specific performance meant that the appellant was duty bound to transfer four (4) acres of land to the respondent. The respondent disputes that order firstly because the fora had no jurisdiction to make the order and secondly due to uncertainty surrounding the registration number of the land being sold.

THE LAW

6. The operations of the Land Disputes Tribunal and the Land Disputes Appeals Committee were governed by the now repealed Land Disputes Tribunal Act, 1990 and the jurisdiction was stated at Section 3(1) of the Act as follows:

3(1) Subject to the 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.

The Section 4 mentioned in Section 3 established the Land Disputes Tribunal. The appeals committee was established by Section 9 and it existed primarily to handle appeals arising from the decisions of the Land Disputes Tribunal. It follows therefore that its mandate had to be within the scope of Section 3(1) (supra). These two fora could arrogate themselves presumptuous jurisdiction.

SUBMISSIONS

7. The appeal now at hand was canvassed by way of written submissions. The appellant filed two sets of submissions: one on 10th October, 2017 and another on 19th September, 2018. The respondent's submissions were filed on 25th June, 2018. The appellant emphasized the issue of lack of jurisdiction and pointed out that specific performance could not be ordered in respect of a Land Sale agreement that had been rendered null and void by Section 6 of the Land Control Act. In other words, the sale transaction had become void for want of the requisite consent from Land Control Board.

8. The other aspect of the appellants submissions is that both fora lacked jurisdiction to order specific performance as that was not within the mandate conferred by Section 3 of the Land Disputes Tribunals Act, 1990. Simply put, the whole thing was a nullity for want of the requisite jurisdiction.

9. The respondent's submissions were filed on 25th June, 2018. The approach taken by the respondent was decidedly technical and consisted largely of finding fault with the appeal because of non-compliance with procedural law. According to the respondent, the appellant's first appeal to the Provincial Appeals Committee was made outside the 30 – day period afforded by Section 8(1) of the Land Disputes Tribunal Act, 1990. The decision of the tribunal was said to have been given on 13th November, 2007. The appeal to Kakamega Provincial Appeals Committee was said to have been filed on 10th July, 2008, some eight (8) months later. The respondent's argument then is that what was preferred before the Provincial Appeals Committee cannot be called an appeal. It was something else.

10. The argument went further. As there was no appeal before the Kakamega Provincial Appeals Committee, what this court is considering now cannot also qualify to be an appeal, the same being a purported appeal from what was legally not an appeal. This appeal therefore is also something else.

11. The non-compliance was said to be serious; so serious infact, that the provisions of law, notably Article 159 (d) of the Constitution, Section 19 (1) of the Environment and Land Court Act, and Sections 1A, 1B and 3A of the Civil Procedure Act, cannot be invoked to mitigate the consequences. The respondent submitted that these provisions of law do not *"**give parties leeway to flout clear provisions of law in pursuing their claims. Failure to follow the well laid conditions as mandated by legislated provisions of law is not a technicality but a breach of the law from which a party in breach should not benefit."***

12. The appellant filed the second set of submissions, styled as appellant's supplimentary written submissions, possibly on realizing that the respondent was not responding to his first set of submissions but had instead choosen to proceed on a different trajectory that placed procedural shortcomings at the centre of his focus. It is also clear that the appellant felt that the respondent had mis-represented some facts. The second set of submissions sought to clear the air concerning the mis-representations.

ANALYSIS

13. I have considered the appeal as filed, the proceedings that gave rise to it, and rival submissions of both learned counsel. In very simple terms, the two sides to the dispute have predicted the outcome of this appeal on application of law at the two levels: one, at the level of procedural law and, two, at the level of substantive law. The respondent focused on the first level; the appellant on the second. The appellant's main argument is that both the first and second fora that handled the matter acted without or in excess of jurisdiction, the applicable law – Land Disputes Tribunals Act, 1990 – having not mandated them to make orders for specific performance, which would ultimately result in change of ownership of land.

14. The respondent however did not specifically respond to the argument by the appellant but chose to find fault with procedural lapses that saw the appellant file his appeals out of time. The respondent's argument is that such lapses were serious and negated the validity of the appeals.

15. The court is faced with two stark choices: base its decision on consideration of procedural law or go by the dictates of substantive law. Here is how I see it: The respondent started the dispute. He felt aggrieved when the appellant showed signs of reneging on the land sale agreement that had already been entered into. He wanted to get the land and for that reason went to a forum which he thought was well placed to ensure that he got it. That forum was the Land Dispute Tribunal. Unfortunately for the respondent, that forum was not mandated by law to give land to anybody. Unfortunately too, that forum thought that it could give the land. As I have pointed out earlier in this ruling, the law only mandated that forum to handle issues related to subdivision, boundary, occupation, work on land, or trespass. It could not order specific performance of a contract or decree that somebody was the deserving owner of some land, particularly registered or titled land.

16. But that is what the forum precisely did. It ordered the appellant to transfer four (4) acres of land to the respondent. That is why the appellant is saying that the forum had no jurisdiction to do that. And the appellant is right. His position is informed by substantive law, not

procedural law. The respondent has not challenged this position. And I think the reason for this is that the position is incontestable.

17. But to say that the respondent did not respond to an issue is not to say that he didn't respond at all. There was a response by the respondent but the focus as I said earlier was on shortcomings related to compliance with procedure. The response seems to me to have a good legal and factual foundation. It is reasonably clear that the appellant was not serious about complying with the timelines given by law for filing appeal. But such timelines are a matter of procedural requirements and the law- see for instance Article 159 (d) of the Constitution and Section 19 of Environment and Land Court Act – allows for relaxation of the application of procedure to meet the ends of justice.

18. In my view, non-compliance with substantive law by the respondent is of more serious nature than non-compliance with procedure by the appellant. The respondent is labouring under the false belief that there are legal merits in the award of the land to him by the tribunal. The truth of the matter is that the tribunal could not award what the law did not allow it to award. It was itself a creature of the law and it could not circumvent the law and assume powers it did not have. Its act was therefore void and amounted to nothing. Let the respondent not delude himself. The award made was of no legal consequence.

19. It may be useful to remember the words of the late Lording Denning in the case of **MACFOY VS UNITED AFRICA CO. LTD (1961) 3 ALL ER 1169 at page 1172 (1)**, which were 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 the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is formed on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

20. In this matter, the "nothing" that the tribunal awarded will become "something" if the court agrees with the respondent. The respondent will just choose to pursue the transfer of four (4) acres to himself as ordered by the tribunal. That should not be allowed to happen. The tribunal had no power to make such order. This court will not be serving the interests of justice by endorsing the process that resulted in the order.

DECISION

21. When all is said and done, justice has to be done. Justice is a matter of good conscience, nay, conscience of the whole humanity. And justice results from fair interpretation and application by the law. And it is not fair interpretation of the law when a patently illegal process is left standing or clothed with legality because of procedural shortcomings. To me, it is clear that the proceedings of the Land Disputes Tribunal and the Appeals Committee that handled the matter were unlawful right from the beginning. The respondent can always start the process at the right forum. I therefore allow the appeal herein but make no order as to costs.

Dated and signed at Kericho this 10th day of March, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 10th day of March, 2020.

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A. OMOLLO

JUDGE