



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC APPEAL NO. 3 OF 2013

ISAAC KAARA NGUMBA & SUSAN NJERI MARARO

(Suing As Legal Representatives of The Estate of Jonathan Karanja Mararo, Deceased).....APPELLANT

VERSUS

JOSEPH NJUGUNA.....RESPONDENT

JUDGMENT

1. Introduction:

At all material times, all that parcel of land known as LARI/KIAMBAA/266 (hereinafter referred to as “the mother title”) was registered in the name of one, Jonathan Mararo (hereinafter referred to only as “the deceased”). The deceased had three sons, Joram Gatibaru Mararo, Benjamin Ngumba Mararo and Kenneth Mbogo Mararo. On 14th August 1986, the deceased subdivided the mother title into three portions namely, LARI/KIAMBAA/505, 506 and 507(hereinafter referred to as Plot No. 505, Plot No. 506 and Plot No. 507). Following the subdivision of the mother title, the deceased transferred Plot No. 506 (hereinafter referred to as “the suit property”) to one, David Kuria Kamau (hereinafter referred to as “the original transferee of the suit property”). On or about 14th August 1989, the original transferee of the suit property sold and transferred the same to the respondent herein, Joseph Njuguna Charles (hereinafter referred to only as “the respondent”). Jonathan Karanja Mararo, deceased (hereinafter referred to only as “the appellant”) is one of the sons of Benjamin Ngumba Mararo (also deceased). As stated earlier, Benjamin Ngumba Mararo was one of the sons of the deceased.

Sometimes in 2011, the respondent lodged a claim against the appellant and three others namely, David Wagichiengo Ngumba, Isaac Kaara Ngumba and Robert Ngumba Mute (hereinafter referred to as “others”) before, Lari District Land Disputes Tribunal (hereinafter referred to as “the tribunal”) under the provisions of the Land Disputes Tribunal Act, 1990(now repealed) with respect to the suit property. The respondent’s claim against the appellant and others before the tribunal related to the appellant and others alleged; refusal to vacate the suit property, destruction of the boundaries of the suit property, interference with the respondent’s use of the property by carrying out destruction of his crops and defamation. The respondent’s claim was opposed by the appellant and others. The tribunal heard the respondent’s claim and made a determination on 11th July 2011. The tribunal made a finding that the respondent had established his title to the suit property and ordered the District Surveyor to visit the property and put beacons thereon to enable the respondent to use the same. The tribunal also awarded the respondent the costs of the tribunal’s suit and the loses that he had incurred as a result of having not used the suit property for several years. The appellant did not appeal the decision of the tribunal to the Provincial Land Disputes Appeals Committee within 30 days of the decision as provided for under section 8 of the Land Disputes Tribunal Act, 1990 (now repealed). The tribunal’s decision was filed at the Senior Resident Magistrate’s Court at Limuru on 27th September 2011 for adoption as a judgment of that court pursuant to section 7 of the said Act. The tribunal’s decision was adopted as an order of the court by the Senior Resident Magistrate’s Court at Limuru (hereinafter referred to as “the Magistrate’s Court”) on 27th August 2013 and a decree was issued in accordance with the terms thereof.

2. Appeal against the decision of the tribunal:

The appellant lodged the present appeal on 6th September 2013. The appellant’s appeal was against the decision of the tribunal that was made on 11th July 2011 and adopted by the Magistrate’s Court on 27th August 2013. The appellant challenged the decision of the tribunal on the following main grounds;

- i. The tribunal erred in subdividing the deceased’s land while it was aware that the deceased was dead.
- ii. The tribunal erred by not taking into account the evidence that was adduced by the appellant.

- iii. The tribunal erred in accepting the evidence that was tendered by the respondent to the effect that the mother title had been subdivided.
- iv. The tribunal erred in not taking into account the fact that there were other descendants of the deceased who were not made parties to the claim before it.
- v. The tribunal erred in its finding that the deceased sold the suit property to the original transferee while he was alive.
- vi. The tribunal erred in not taking into account that the mother title was the subject of succession proceedings in the High Court which were pending.
- vii. The tribunal erred in not taking into account the fact that the mother title could not be subdivided while there was a caution registered against the title.
- viii. The tribunal erred in holding that the transaction through which the respondent acquired the suit property was legal.
- ix. The tribunal erred in law in holding that Plot No. 505 belonged to Kenneth Mbogo Mararo.

The appellant urged the court to set aside the decision of the tribunal and the adoption thereof by the Magistrate's Court. The appellant also prayed for an order that the subdivision of the mother title that gave rise to Plot No. 505, Plot No. 506 and Plot No. 507 including the mutation dated 5th October 1981 be canceled.

3. The submissions by the parties;

The appeal was heard by way of written submissions. The appellant filed submissions dated 9th February 2021 in which he framed two issues for determination by the court namely;

- i. Whether the Magistrate's Court "erred in law by confirming land whose subdivision were effected after the registered owner had died."
- ii. Whether the appeal should be allowed by; "Quashing and or setting aside the read at the Senior Resident Magistrates Court on 28th August 2013."

On the first issue, the appellant submitted that the Magistrate's Court erred by failing to take into account the fact that the mother title that gave rise to the suit property was subdivided after the death of the deceased and before a grant in respect of his estate was issued. The appellant submitted further that the Magistrate's Court also erred in failing to consider the fact that the purported subdivision was carried out when there was a caution registered against the mother title. The appellant submitted further that since the mother title was subdivided irregularly, all resultant titles including the title that the respondent held in respect of the suit property were unlawful and should be cancelled.

On the second issue, the appellant submitted that the decision of the tribunal should be set aside for the reasons that I have highlighted above. The appellant submitted further that the tribunal had no jurisdiction to determine the claim that was brought before it by the respondent. I must say that I strained to follow the appellant's argument on this point. What I could pick out on this issue was that the tribunal was not properly constituted as it neither had three nor five elders as set out in section 4 of the Act. The appellant urged the court to find that since the tribunal was not properly constituted, it had no jurisdiction to determine the respondent's claim.

The respondent filed his submissions on 18th May 2021. The respondent gave a brief history of the dispute between the parties and thereafter made submission on each ground of appeal. On the first ground of appeal, the respondent submitted that the claim before the tribunal was not over the subdivision of the mother title. The respondent submitted that his claim was over the boundary and trespass on the suit property. The respondent submitted that the evidence that was tendered by the respondent was very clear that the respondent wanted the boundary of the suit property aligned and trespassers on the property removed. The respondent submitted that this ground of appeal was misplaced since the tribunal did not render any award regarding the subdivision of the mother title.

On grounds two and three of appeal, the respondent reiterated that the tribunal was not dealing with the deceased's family dispute over the subdivision of the mother title and ownership of the property. The respondent submitted that on these grounds of appeal, the appellant confused the first complaint that was lodged with the tribunal in 1999 which involved the family of the deceased in respect of which a separate award was made and the respondent's complaint that was lodged in 2011. On grounds 4 and 5 of appeal, the respondent submitted that the sketch map discredited by the appellant as fake was drawn by the tribunal while on a site visit to confirm the evidence that had been adduced by the parties. The respondent submitted that no evidence was tendered by the appellant to prove that the said sketch map was fake. On the appellant's contention that the respondent did not join some necessary parties to his claim before the tribunal, the respondent submitted that the claim was lodged against only those who had interfered with the boundaries of the suit property. The respondent submitted that it was not necessary to bring a suit against all the members of the deceased's family.

On grounds 6, 7 and 8 of appeal, the respondent submitted that evidence was led before the tribunal that the suit property was sold to the original transferee in 1984 during the lifetime of the deceased who was the original owner thereof and that the original transferee transferred the property to the respondent in 1989. The respondent submitted that as at the time he lodged a complaint at the tribunal, he was the registered owner of the suit property. The respondent submitted further that no mutation could have been drawn without ascertaining the physical boundaries of the land that was being subdivided. The respondent submitted further that the issue of the caution was not before the tribunal. The respondent submitted that the subdivision of the mother title was carried out in 1981 during the lifetime of the deceased. The

respondent submitted that the person who was supposed to complain about the subdivision was the deceased. The respondent submitted further that the suit property did not form part of the estate of the deceased and as such could not be the subject of the succession proceedings relating to the estate of the deceased.

On ground 9 of appeal, the respondent submitted that the respondent tendered evidence before the tribunal that he took possession of the suit property and that the appellant and others kept interfering with his use of the property which interference he reported to the Police who took no action leaving him with no alternative but to file a claim before the tribunal. The respondent submitted further that the tribunal during its site visit established the acts of trespass he was complaining about.

On issues of law, the respondent submitted that the appeal was time barred. The respondent submitted that the appellant should have filed the appeal within 30 days from 11th July 2011 when the tribunal made its decision. The appellant submitted that the appeal that was filed on 6th September 2013 without leave of the court was time barred and should be struck out. On the issue of the jurisdiction of the tribunal, the respondent submitted that the tribunal was at all material times quorate and that the issues dealt with by the tribunal were within its jurisdiction.

The respondent urged the court to dismiss the appellant's appeal with costs.

4. Determination;

I have considered the proceedings of the tribunal and the Magistrate's Court. I have also considered the grounds of appeal and the submissions by the advocates for the parties. For reasons which are not clear, the appellant's submissions were not aligned to his grounds of appeal. Most of the issues that the appellant raised in his submissions were not part of his grounds of appeal. The parties raised some preliminary issues that I wish to dispose of before I consider the merit of the appeal should it become necessary. The first issue touches on the competency of the appeal before the court. Under section 8 of the Land Disputes Tribunal Act, 1990 (now repealed), the appellant had a right to appeal against the decision of the tribunal to the Provincial Land Disputes Appeal Committee within 30 days from the date of the decision. It is not disputed that the decision of the tribunal was made on 11th July 2011. As rightly submitted by the respondent, as at that date, there was still in existence the Provincial Land Disputes Appeals Committee to which the appellant should have lodged his appeal if he wished to appeal against the decision of 11th July 2011. It is not disputed that no appeal was lodged with the Provincial Land Disputes Appeals Committee within the prescribed period. It follows therefore that the appellant lost his right to appeal against the decision of the tribunal.

The present appeal was filed on 6th September 2013 following the adoption of the decision of the tribunal by the Magistrate's Court on 28th August 2013. By the time the said decision of the tribunal was being adopted, the appellant had already lost his right of appeal against the same. When the appellant lodged his appeal to this court, he could only appeal against the decision of the Magistrate's Court and not against that of the tribunal. All the grounds of appeal in the appellant's Memorandum of Appeal dated 5th September 2013 are against the decision of the tribunal. I am in agreement with the respondent that to the extent that the appellant purported to appeal on 6th September 2013 against the decision of the tribunal that was made on 11th July 2011 without leave of the court, the appeal is time barred and as such incompetent.

In view of that finding, it is not necessary for me to consider the other preliminary issues raised in the appeal. For completeness of the record however, I will consider the issue of the jurisdiction of the tribunal that was raised by the appellant. The tribunal was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) ("the Act"). The powers of the tribunal were spelt out in the said Act. The tribunal could not therefore exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the tribunal had jurisdiction as follows:

“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 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.”**

From the proceedings of the tribunal, the respondent sought the determination of the boundaries of its land (the suit property) and the removal of trespassers from the property so that he could put the land into use. The claim therefore fell within section 3(1) (a), (b) and (c) of the Act. In its award, the tribunal ordered that a survey be carried out to determine the boundaries of the suit property and for the boundary beacons to be put in place. I am in agreement with the respondent that the tribunal had jurisdiction to determine the respondent's claim and to make the award that it made.

The appellant had also claimed that the tribunal was not quorate when it made the impugned decision. It is clear from the decision of the tribunal that the same was signed by the Chairman and two elders. That met the quorum requirement set out in section 4 of the Act. The appellant's claim that the tribunal lacked jurisdiction for lack of quorum has no basis in the circumstances.

Due to the foregoing, the issue of the competency of the appeal and jurisdiction of the tribunal are determined in favour of the respondent and that determination is sufficient to dispose of the appeal. Since the court has made a determination that the appeal is time barred, it is not necessary to consider the merit of the appeal. In this case even if the appeal was considered on merit, it would still fail. As I have stated earlier, the appellant did not make any submission on his grounds of appeal. The appellant framed completely new issues which he submitted on. The appellant did not therefore persuade the court as to the merits of his grounds of appeal. The court cannot determine the appeal outside the grounds of appeal that were framed by the appellant. In my view, the respondent answered satisfactorily each ground of appeal that was put forward by the appellant. From the proceedings of the tribunal and the impugned decision, I find no merit in all the grounds of appeal put

forward by the appellant. It follows therefore that the appellant's appeal fails both on the preliminary issue regarding its competency and on merit.

5. Conclusion:

In the final analysis and for the foregoing reasons, I find no merit in the appeal before the court. The appeal is dismissed with costs to the RESPONDENT.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Wanjiru h/b for Mr. Kimani for the Appellant

Ms. Muhoho for the Respondent

Ms. C.Nyokabi-Court Assistant