



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC APPEAL NO. 45 OF 2011**

**(Being an Appeal from the Judgment of the Honourable Senior Resident Magistrate G. Sagero delivered on 21st June 2011 in Malindi CMCC NO. of 2011, Kahedza Ponda -vs- Katana Karisa Kenga)**

**KATANA KARISA KENGA .....APPELLANT**

**=VERSUS=**

**KADZEHA PONDA.....RESPONDENT**

**J U D G M E N T**

**Introduction:**

1. This matter commenced in the Land Disputes Tribunal, Magarini division pursuant to the provisions of the Land Disputes Tribunal Act, 1990, as Land Dispute Number 27/8 of 2010.
2. In the Tribunal, the Appellant herein was the Respondent while the Respondent herein was the claimant. The Tribunal decided the dispute in the favour of the claimant (the Respondent herein) in the following terms:
  - (a) That the claimant (the Respondent herein) has proved his case and that he is the rightful and customarily lawful inheritor of his ancestral land.
  - (b) That the objector (The Appellant herein) alongside the two (2) interested persons in the disputed portion of land being parcel number 4, Garashi Shopping Center are evicted forthwith to allow vacant possession by the claimant.
  - (c) That the disputed portion of the parcel of land number 54, Garashi shopping center be registered under the claimant (the Respondent herein).
3. The award by the Tribunal was adopted by the Senior Resident Magistrate Malindi in Land Case Number 17 of 2011 on 21<sup>st</sup> June 2011.
4. The Appellant has now filed an appeal against the judgment of the Senior Resident Magistrate adopting the Tribunal's award on the following grounds:
  - (a) That the Honourable Chief Magistrate erred in law in failing to find that the Tribunal had no jurisdiction to hear and determine the matter.

**(b) That the Honourable Chief Magistrate erred in law in failing to find that the Appellant was not duly served.**

**(c) That the Honourable Chief Magistrate Court failed to make a finding that there were virtually no proceedings at the Tribunal stage.**

**(d) That the Honourable Tribunal erred in law in failing to find that the Respondent had not proved his case against the Appellant**

**(e) That the plot in question was sub-divided into many plots the appellant's being plot no. 54.**

**(f) That the Honourable Tribunal erred in law in failing to follow the rule of natural justice.**

5. The Appellant is seeking for the nullification of the judgment of the Senior Resident Magistrate and the award of the Tribunal.
6. The Appellant was allowed by this court in Misc. Civil Application Number 47 of 2011 to file this appeal out of time. The parties agreed to dispose of the appeal by way of written submissions.

#### **Submissions:**

7. The Appellant's advocate submitted that the Appellant was not served with the award of the Tribunal; that the Appellant was not aware of the existence of the dispute before the Tribunal and that the Appellant only came to learn of the existence of the decree on 18<sup>th</sup> October 2011.
8. Counsel submitted that there is no evidence to show that either form A or a document referred to as "land visitation" notice was ever served upon anybody and what subsequently followed was the award.
9. According to counsel, there was in existence a letter dated 3<sup>rd</sup> September 2009 indicating that the area in question had been declared to be an adjudication section under the Land Adjudication Act and consequently the Tribunal did not have jurisdiction to deal with the dispute.
10. The Respondent's counsel submitted that under Section 7 (2) of the Land Disputes Tribunal Act, the role of the magistrate is limited to entering judgment in accordance with the decision of the Tribunal.
11. The Respondent's counsel further submitted that the Tribunal had jurisdiction to entertain the claim because the dispute revolved around occupation of the land and that there is no evidence that the land fell in an adjudication section.
12. Counsel submitted that the Appellant was aware of the dispute before the Tribunal; that the matter proceeded ex parte and that the only evidence adduced was that of the Respondent.

#### **Analysis and findings:**

13. The grounds of appeal are in relation to the decision of the Magistrate dated 21<sup>st</sup> June 2011 and the award by the Tribunal dated 20<sup>th</sup> May 2011.
14. On the issue as to whether the Magistrate erred in adopting the Tribunal's decision on the ground that the Tribunal had no jurisdiction and the rules of natural justice were not complied with, I find and hold that the Magistrate had no powers to make such a finding.
15. I say so because pursuant to the provisions of section 7(2) of the Land Disputes Tribunal Act (repealed), the Magistrate's role was limited to adopting the award of the Tribunal without questioning the legality or otherwise of the said award.
16. The adoption of the award by the Magistrate was only meant to facilitate the enforcement of the award as an order of the court and nothing more.
17. If a party is aggrieved by the award of the Tribunal then the Act allowed such a party to file an appeal with the Provincial Appeals Committee or this Court.
18. The Appellant herein has challenged the decision of the Tribunal, in his grounds.
19. According to the Appellant, the Tribunal did not have jurisdiction to deal with the dispute and did

- not follow the rules of natural justice thus acting ultra vires the Constitution.
20. I will deal with the question of whether the Tribunal accorded the Appellant a fair hearing first.
21. If indeed the Appellant was not notified of the proceedings before the Tribunal, then the decision of the lower court should be set aside *ex debito justitiae*.
22. I say so, because the Constitution and the provisions of the Civil Procedure Rules provides that every party to a dispute must be accorded a fair hearing. Where a party is not accorded a fair hearing by being notified of the dispute, then the proceedings and the subsequent award is a nullity ab initio.
23. I have perused the Record of Appeal and the file in the Chief Magistrate's court number 17 of 2011 which adopted the award of the Tribunal. That file should contain the entire proceedings of the Tribunal and the award that was adopted.
24. The file has a Form A which was a complaint filed by the Respondent in the Tribunal. In the "form", the Respondent alleged that him together with his family members are the absolute owners of portion of land number 4 curved out of parcel of land number 130, Garashi village, Garashi location.
25. In the decision/Judgment of the Tribunal dated 20<sup>th</sup> May, 2011, the chairman noted as follows:

**"The Chairman Mr. Joshua Charo Kazungu, started the sitting by introducing both parties in dispute to the panel of elders but is worthy mentioning here that the objector hereinabove DID NOT MAKE GOOD by appearing before the LAND DISPUTES TRIBUNAL COURT NEITHER DID HE SEND A REPRESENTATIVE."**

26. The record in the lower court shows that the Tribunal received the claimant's/Respondents statement dated 23<sup>rd</sup> September 2010 and went ahead to make its findings on 20<sup>th</sup> May 2011 in favour of the Claimant/Respondent.
27. Attached on the award of the Tribunal is a "short summary" which states as follows:

**"During the visitation day, on 20th day of April 2011, the aforesaid objector at a sitting in the chief's office, Garashi Location, revealed that he had no any summons (sic) earlier on to appear before the Land Disputes Tribunal Court.... At that juncture the (local administration) Chief's Office admitted that the summons was received and forwarded to a LAND OFFICIAL. The Tribunal Court noted with a lot of concern the action by the Administration Office of the DIVERTING THE SUMMONS to a person NOT concerned".**

28. The Tribunal therefore acknowledged that the Appellant was never served with the summons when it visited the site on 20<sup>th</sup> April 2011 but went ahead to deliver its findings.
29. It was not enough for the Tribunal to have noted with "a lot of concern" the want of service of summons on the Appellant. The Tribunal should have commenced the case de novo by hearing the claimant and the objector before making its findings. The Tribunal could not have arrived at a fair decision before hearing both parties.
30. Service of summons on the Appellant pursuant to the provisions of Section 3(4) of the repealed Act and order V of the Civil Procedure Rules is mandatory.
31. In view of the fact that the Tribunal itself acknowledged the fact that the Appellant was not served with the summons and considering that the Tribunal arrived at its findings without hearing the Appellant, I find and hold that the Appellant's Appeal should be allowed.
32. For the reasons I have given above, I allow the Appellant's Appeal dated 24<sup>th</sup> November 2011 in the following terms

**(a) The judgment of the Honourable Senior Resident Magistrate in the Chief Magistrate's Court at Malindi in Land Case NO. 17 of 2011 and the Tribunal's award in Land Dispute No. 27/8 of 2010 be and is hereby set aside.**

**(b) The Respondents to pay the costs, both for this Appeal and in Land Dispute No. 27/8 of 2010**

Dated and delivered in Malindi this **6<sup>th</sup>** day of **January**, 2015.

**O. A. Angote**

**Judge**