



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

E. & L. APPEAL NO. 15 OF 2014

*(An Appeal arising from Divisional Land Dispute Committee adopted by
the Hon. Court vide Kakamega Award No. 52 of 2007)*

BLASIO SHIKUNDI

RAPHAEL K. SHIKUNDI

SHIKAMI MUKOTO.....APPELLANTS

BENARD LIMITI

VERSUS

SIMON SHIKANGA

JOSEPHAT A. SHIKANDA.....RESPONDENTS

JUDGMENT

1. This appeal arises from the decision made on 27/2/2009 by P. O. Ooko, Resident Magistrate at Kakamega. By that order the learned magistrate allowed an application dated 13/2/2008 in Award No. 52 of 2007 and adopted the award by the Ikolomani Land Disputes Tribunal as a judgment of the court.
2. Blasio Shikundi, Raphael K. Shikundi, Shikami Mukoto and Benard Limiti (The Appellants) had been sued before the Tribunal for placing a restriction on title Number ISAKHO/SHISESO/1712, preventing Simon Shikanga and Josephat A. Shikanda from processing a Title Deed for a portion they had purchased on behalf of a school. There was also a dispute on an access road to the Appellant's homes which had been allegedly closed by the school.
3. After hearing the dispute, the Tribunal made the following orders on a date that is not clear from the record.

“The Land Disputes Tribunal having listened carefully to this case orders that;

1. ***The restriction put on the three new numbers be removed and the school to***

process them as follows–

1) Imonje - No. Idakho/Shiseso/1835

2) Shikami – No. Idakho/Shiseso/1836

3) School – No. Idakho/Shiseso/1837

Which were already in process but stopped in the middle by the objectors.”

4. The adoption of the above award as a judgment of the court provoked this appeal and the appellants have raised four (4) grounds of appeal as follows;
 1. ***“The L.D.T. Committee Ikolomani and the trial magistrate erred in law and fact by not considering the fact that the suit L/P. No. Idakho/Shiseso/1712 is deceased’s land.***
 2. ***The L.D.T. Committee has no jurisdiction to hear any matter concerning a deceased land.***
 3. ***The trial magistrate and L.T.D. Committee Ikolomani erred in law and fact that the land is still in the name of the deceased and the same has to be succeeded through letters of administration by the High Court.***
 4. ***The LTD Committee Ikolomani erred in law by not considering the fact that we were not the title holder of the said land which is still in the names of our late father.”***
5. While the Memorandum of appeal is not dated, it appears to have been received at the Registry of appeals on 21/3/2008 but was given Civil Appeal No. 47 of 2009. However, since the order appealed against was made on 27/2/2009, the Registry stamp may have been erroneous.
6. Parties agreed to put in written submissions on 10/11/2010 but only the appellant had done so by 15/12/2014. The Respondents appointed counsel who on 15/12/2014 was given 21 days to file his submissions but by 12/2/2015 he had not done so and the court reserved a date for judgment.
7. Although not very well formulated, the grounds of appeal appear to attack the decision of the Land Disputes Tribunal and that of the learned magistrate for adopting the award. The Land Disputes Tribunal and the learned magistrate are blamed for not considering that the land belonged to a deceased person, that the Committee could not hear the dispute regarding a deceased person’s land and that there was no administrator yet to the deceased estate.
8. Counsel for the appellant, in a one page written Submissions, has submitted in essence, that the jurisdiction of the Defunct Land Disputes Tribunal as donated by Section 3 (1) of the Land Dispute Tribunal Act (No.8 of 1990), (now repealed) did not extend to adjudicating on matters touching on deceased persons properties. Counsel further submitted that Section 2 of the Law of Succession Act (Cap. 160) Laws of Kenya is to the effect that all cases of intestate or testamentary Succession to the estate of deceased persons shall be dealt under that Act. Counsel submitted therefore, that for the tribunal to have purported to make a decision over parcel of land No. Idakho/Shiseso/1712 was without jurisdiction.
9. The issues raised in this appeal and submissions by learned counsel for the appellants, are serious legal challenges to the decisions appealed from. I agree with learned counsel that where the owner of a parcel of land is deceased, no legal action can be taken against his parcel of land unless there is a legal representative who has authority to act on behalf of the estate.
10. But what did the law say on appeals from decisions of the Tribunal? Section 8 (1) of the Land Disputes Tribunal Act (No. 18 f 1990 – now repealed) provided as follows;

Section 8 (1) – “Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.”

11. Subsection 8 of Section 8 was even more important. It provided;

S. 8 (8) “The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie there from to any court.”

12. It is clear from the above proviso that the right of appeal lies only to the Appeals Committee whose decision on matters of fact is final. Under Section 8 (9) an appeal can only lie from the Appeals Committee to the High Court on a point of law.
13. That being the law then in place, the appellant's appeal from the magistrate's court directly to this court was in violation of that law. The appellants had the opportunity to appeal to the Provincial Appeals Committee where they could have raised those issues and if they lost, they could then come to this court since their grievances were really on issues of law.
14. It was improper for the appellants to come to this court in violation of clear provisions of a statute that was then in existence. That was the law and it had to be followed. In the case of **Kogi Kamau –vs- Jane Nduta Gitutha [2014] eKLR**, in a matter similar to the one before this court, the Court of Appeal upheld the holding by **Makhandia, J.** (as he then was) where he had held as follows;

“This is a matter which ought to have been sifted through the appellate Provisions of the Land Disputes Tribunal Act.

The appellant, however, opted not to pursue the appeal as aforesaid. Instead he opted for a short cut, which in law is a dangerous undertaking. He opted to appeal directly to the High Court from the decision of the learned Magistrate adopting the award, as orders of the court. The Land Disputes Tribunal Act does not provide for such appellate mechanism. The only appellate process allowable under the said statute is to the Provincial Land Disputes Appeals Committee and thence to the High Court. The appellant did not pursue that channel.”

15. That is precisely what happened in this case when the appellant opted to overlook clear provisions of the law and came directly to this court. The appeal was filed when the law was in existence and whatever the grievances and however strong, this court cannot overlook a legislation that intended to guide litigation but which was ignored by the appellants.
16. In any event, the magistrate's court was only doing what it was obligated to do under that Act just to adopt the award from the Land Disputes Tribunal as a judgment of the court. The law did not give the magistrate's court an option.
17. In the circumstances, this appeal fails and it is dismissed with costs.

Dated and delivered at Kakamega this 24th day of March, 2015

E. C. MWITA

J U D G E