



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 81 OF 2011

JOSEPH OLIEKO ONDIEK APPELLANT

VERSUS

WILLIAM ONDIEK OJWANG RESPONDENT

JUDGMENT

(Being an appeal from the Decision of the Nyanza Province Appeals Committee dated 17th February, 2009 in Appeal No. 22 of 2009)

1. At all material times, the appellant was the registered proprietor of all that parcel of land known as LR No. Kanyamwa/K/Kadwet/772 (hereinafter referred to as “the suit property”) which measures 0.67 hectares. The suit property was registered in the name of the appellant on first registration on 8th July, 2003. On or about 27th June 2008, the respondent lodged a claim against the appellant before Homa Bay District Land Disputes Tribunal (hereinafter referred to as “the Tribunal”) in Tribunal Case No. 147 of 2008. In his claim, the respondent contended that the appellant is his uncle and that he had settled in Tanzania. The respondent contended that during the land adjudication at Kanyamwa Kadwet in 1975, his mother caused a portion of her land to be registered in the name of the appellant. That portion of land was registered in the name of the appellant as LR No. Kanyamwa/ K/Kadwet/772 (the suit property). The respondent contended that since the appellant was residing in Tanzania, the suit property was placed in his custody to hold on his behalf.
2. The respondent’s complaint was that the appellant was in the process of selling the suit property to third parties without involving him. The respondent contended that the appellant had no right to sell the suit property. He contended that since the suit property was given to the appellant by his (the respondent) mother on humanitarian grounds, the appellant who had decided to settle in Tanzania permanently had an obligation to relinquish his right over the suit property unconditionally to the respondent rather than selling it to third parties.
3. In his response to the claim, the appellant admitted that he was away in Tanzania during the land adjudication. He denied however that the suit property was given to him by the respondent’s mother. He contended that the property was given to him by his children. He told the tribunal that when he came back to Kenya, he asked the respondent to assist him with some money to pay school fees for his children. When the respondent failed to come forth with the assistance, he decided to lease the suit property to his nephews to plant sugarcane. They gave him Ksh. 60,000.00 as consideration for the lease. He contended that the claimant decided to lodge the claim before the tribunal when he learnt that he (the appellant) had leased the suit property indefinitely to his nephews aforesaid.
4. After hearing the respondent and the appellant, the tribunal made its decision on the claim on 18th September, 2008. The tribunal held that:-

- a. **Since the appellant had settled in Tanzania, the suit property should be transferred to the respondent whose mother had given the same to the appellant.**
- b. **The respondent should undertake that in the event that the appellant is repatriated from Tanzania, he would have a right to settle on the suit property.**

The tribunal's decision was filed at the Resident Magistrate's Court at Homa Bay for adoption as a judgment of the court in Homa Bay SRMC Misc. Civil Application No. 12 of 2009. The same was adopted as such on 12th March, 2009 and a decree issued accordingly on the same date. The appellant was aggrieved by the decision of the tribunal and preferred an appeal against the same to the Nyanza Provincial Appeals committee (hereinafter referred to as "the appeals committee") on or about 28th March, 2009.

5. The appellant appealed against the decision of the tribunal on among other grounds; that the tribunal had no jurisdiction to determine the respondent's claim as it concerned partly, ownership of land registered on first registration and partly, sale of land and that, the tribunal erred in filing its decision at the Resident Magistrate's court for adoption as a judgment of the court before the same was read to the parties.
6. The appellant's appeal came up for hearing before the appeals committee on 17th February, 2011 when only the respondent appeared. The appeals committee dismissed the appeal for non-attendance and proceeded to uphold the decision of the tribunal. Following the decision of the appeals committee aforesaid, the tribunal made a further order on 18th March, 2011 that the executive officer of the court should execute all documents and forms that may be necessary to facilitate the transfer of the suit property to the respondent. This further order was once again filed at the Resident Magistrate's Court at Homa Bay for adoption as a judgment of the court and the same was duly adopted as such on 31st April 2011 and an amended decree issued on the same date.
7. The appellant was aggrieved with the decision of the appeals committee and lodged a second appeal to this court on 3rd May, 2011 against the same. The appellant has challenged the decision of the appeals committee on the following four (4) grounds:
 - a. **The appeals committee erred on several matters of law relating to land registered under the Registered Land Act (Cap 300) Laws of Kenya (now repealed).**
 - b. **The appeals committee erred in law in failing to note that land parcel No. Kanyamwa/K. K. Kadwet/772 (the suit property) was registered in the name of the appellant on first registration and as such its title was indefeasible pursuant to section 143 (1) of the Registered Lands Act.**
 - c. **The appeals committee erred in law in failing to note that the tribunal acted *ultra vires* in entertaining and determining the dispute.**
 - d. **The appeals committee erred in law of procedure, practice and evidence in hearing the appeal ex parte without first ascertaining that the appellant was properly served with a hearing notice and in deciding the case against the weight of evidence in that:-**
 - i. **The appellant to the appeal before the appeals committee was not in attendance and no reason is shown in the record as to whether the appellant was served.**
 - ii. **No reason was shown for dismissing the appeal save that the appellant resides in Tanzania which is not a customary law issue and which issue would be outside the jurisdiction of the tribunal.**
8. The respondent on his part filed grounds of opposition dated 20th May 2011 in opposition to the appeal although the same is not provided for in the rules. In the said grounds of opposition, the respondent who is acting in person contented as follows:-
 - i. **That the appeal is brought in bad faith is vexatious and is an abuse of the court process.**
 - ii. **That ground two of appeal has no basis because the appellant has never obtained a title deed in respect of suit property.**

- iii. **That the appellant was summoned several times by the tribunal but he neglected and /or refused to attend the tribunal.**
- iv. **The appellant has not given any reasonable ground as to why he failed to attend the hearing of the appeal which he filed personally.**
- v. **There were reasonable grounds for dismissing the appellant's appeal.**

9. When the appeal came up for hearing before me on 21st April 2015, the parties who at that time were all acting in person made oral submissions. The appellant submitted that his appeal was dismissed by the appeals committee without a hearing as a result of no fault of his own since he did not receive summons from the said committee to appear for the hearing. He informed the court that he wished to rely entirely on his grounds of appeal and the material on record. He urged the court to allow the appeal.
10. In reply, the respondent reiterated the testimony that he gave before the tribunal. He submitted that the suit property was registered in the name of the appellant in 1975 when the appellant was away in Tanzania. He submitted that he has all along been taking care of the suit property on behalf of the appellant. He contended that the suit property was given to the appellant by his (respondent) mother and that he got surprised when the appellant came from Tanzania and wanted to sell the property to third parties. He submitted that he was aggrieved by this move by the appellant. He felt that the appellant was thankless in that he failed to appreciate that the suit property was given to him by his (the respondent) mother and that it is him (the respondent) who had taken care of the property while the appellant was away. This is the reason why he decided to lodge a claim against the appellant before the tribunal so that the appellant may be stopped from selling the suit property.
11. He submitted that the appellant had no right to sell the suit property that was given to the appellant by his (respondent's) mother and contended that if appellant was comfortable with his stay in Tanzania, he should surrender the suit property to him. The respondent submitted that he was not aware that the tribunal had no jurisdiction to entertain his claim. He urged the court to dismiss the appeal because the suit property has been registered in his name.
12. This being a second appeal, the court is only concerned with issues of law as stipulated in section 8(9) of the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) which states that:

“8 (9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on point of law within sixty days from the date of the decision complained of.

Provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law (other than customary law) is involved.”

13. The only issue that arises for determination by this court is whether the appeals committee erred in dismissing the appellants appeal for non-attendance. The appeals committee did not consider the appellant's appeal on merit. The grounds of appeal that have been put forward by the appellant relating to the merit of the appeal are misplaced in the circumstances. Section 8 of the Land Disputes Tribunals Act, 1990 (“the Act”) (now repealed) provides that an appeal to the appeals committee shall be registered in the register of appeals in the same manner as the register of claims and a notice thereof shall be served on the other party to the dispute in the same manner as provided in sub-section (4) of section 3 of the Act. Section 3(4) of the Act provides that, every claim shall be served on the other party to the dispute in accordance with the rules of Civil Procedure regarding service of summons. Section 8(4) of the Act provides that the appeal shall be set down for hearing by the appeals committee at a date, time and place to be notified to the parties. Rule 5 (1) and (2) of the Land Disputes Tribunals (Forms and Procedure) Rules, 1993 (“the rules”) provides that an application for an appeal to the appeals committee shall be in Form 1 set out in the Third Schedule and the hearing notice and the notice of attendance to the respondent shall be in forms 2 and 3 respectively in the Third Schedule. Rule 10 of the said rules provides that the clerk shall prepare a hearing notice and a notice of attendance and shall effect service in the manner provided for by the rules made under the Civil Procedure Act.

14. It is clear from the foregoing that the tribunal had a duty to set down the appeal for hearing and to notify the parties to the appeal accordingly of the hearing date. The appellant has contended that he was not notified of the hearing date of his appeal and as such his appeal was dismissed for non-attendance irregularly. Although the respondent has contended that the appellant was duly served with a hearing notice, there is nothing on record in proof of such service. It appears from the record that the tribunal was informed and was aware that the appellant was residing in Tanzania. There is no evidence that an attempt was made to serve him with a hearing notice. The record shows that when the appeal came up for hearing before the appeals committee, the members of the committee asked the respondent of the whereabouts of the appellant and his response was that the appellant was residing in Tanzania with his family. There is nothing on record to show that the appeals committee inquired whether the appellant who was said to be staying in Tanzania was served with a hearing notice and if at all he was, how such service effected upon him. If at all service of a hearing notice was effected upon the appellant and there was evidence to that effect, it would not have been difficult for the respondent to place such evidence before this court through a supplementary record of appeal. As things stand at the moment, I am persuaded by the appellant's argument that he was not notified of the date for the hearing of his appeal before the appeals committee.
15. In the absence of service, it was wrong for the appeals committee to dismiss the appellant's appeal for non-attendance. It is therefore my finding that the appeals committee erred in dismissing the appellants appeal. I would set aside the tribunal's order of dismissal and reinstate the appeal for hearing on merit. With this finding, it is now open to this court pursuant to the provisions of section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya to either, send the appeal back to the appeals committee for hearing on merit or to proceed to determine it conclusively. The first option is not open to the court. The appeals committee was disbanded with the repeal of the Land Disputes Tribunals Act, 1990 by the Environment and Land Court Act, 2011. The only option that is open to this court is to determine the appeal. The material before me in my view is sufficient for that purpose.
16. As I have stated earlier in this judgment, the appellant had raised several grounds of appeal against the decision of the tribunal. One of the grounds concerned the jurisdiction of the tribunal to determine the respondent's claim. I am of the view that that ground of appeal should be determined first because if the court finds that the tribunal had no jurisdiction to determine the dispute that was taken before it by the respondent, then its decision was a nullity and as such it may not be necessary to consider the other grounds of appeal. In the case of **The MV SS Lillian S [1989]KLR 1** Nyarangi JA. stated as follows at page 14:

“Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

In the case of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank and 2 others [2012] eKLR**, the Supreme Court held that:

“A court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

17. Jurisdiction of the Land Disputes Tribunal (“the tribunal”) was set out in section 3 (1) of the Land Disputes Tribunals Act, 1990 (now repealed) which provided that the tribunal had power to determine:

“...all cases of 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.**

It is clear from the foregoing that the tribunal did not have jurisdiction to determine disputes over ownership of or title to land. It is not in dispute that, at all material times the suit property was registered in the name of the appellant as the registered owner thereof. It is also not in dispute that what the respondent sought from the tribunal was an order cancelling the appellant's title and transferring the suit property to him on the ground that the appellant had settled in Tanzania and as such was obliged to surrender the suit property to him. The appellant denied the respondent's claim over the suit property and asserted that he was the lawful owner of the suit property which he had just leased out to his nephews. What the tribunal was called upon to determine was ownership of the suit property. From what I have set out above, the tribunal had no jurisdiction to determine such issue. The tribunal did not also have jurisdiction to order the cancellation of the appellant's title and the transfer of the suit property to the respondent as it purported to do.

18. Due to the foregoing, I am in agreement with the submission by the appellant that the tribunal had no jurisdiction to determine the claim that the respondent had against the appellant. The tribunal's award or decision dated 18th September, 2008 was therefore null and void having been arrived at without jurisdiction. The same applies to its adoption as a judgment of the court on 12th March, 2009. In view of these findings, it is not necessary for me to consider the other grounds of appeal that were set out in the appellant's application to file an appeal dated 28th March, 2009.

19. In conclusion, the appellant's appeal succeeds and I hereby proceed to make the following orders;

- a. The appellant's appeal is allowed.
- b. The decision of the Nyanza Land Disputes Appeals Committee dated 17th February, 2011 is set aside.
- c. The decision of Homa Bay District Land Disputes Tribunal dated 18th September, 2008 is set aside and in place thereof, an order is made dismissing the respondent's (claimant's) claim against the appellant (objector).
- d. The decree issued on 12th March, 2009 by the Senior Resident Magistrate's Court at Homa Bay in Misc. Civil Application No.12 of 2009 is set aside.
- e. The decision of Homa Bay District Land Disputes Tribunal dated 18th March, 2011 is set aside.
- f. The amended decree issued on 31st April, 2011 by the Senior Resident Magistrate's Court at Homa Bay in Misc. Civil Application No.12 of 2009 is set aside.
- g. Each party shall bear its own costs of the tribunal's case, the appeal to Nyanza Provincial Land Appeals Committee and the appeal to this court.

Delivered, Dated and Signed at Kisii this 26th June, 2015.

S. OKONG'O

JUDGE

In the presence of:

Appellant present in person

N/A for the respondent

Caroline Obura Court Assistant

S. OKONG'O

JUDGE