



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. 2 OF 2012

NEWTON WEKESA WANGUSI PLAINTIFF

VERSUS

LEONARD CHELOTI WALUKANA DEFENDANT

JUDGMENT

1. In this appeal, Mr. Newton Wekesa Wangusi is challenging the trial magistrate's decision that adopted the award of the Webuye Land Disputes Tribunal in land case no. 13 of 2011 vide Webuye principal magistrate's court land case no. 22 of 2012. He has listed 3 grounds in his memorandum of appeal filed in court on 3rd January 2012 as follows:

1. ***That the learned trial magistrate erred both in law and in fact by totally failing to appreciate the fact that the Tribunal lacked jurisdiction to deliberate on a matter or a land dispute involving land with title.***
2. ***That the learned trial magistrate's judgment was contrary to the provisions of the Land Disputes Tribunal Act no. 18 of 1990.***
3. ***That the judgment delivered has occasioned a miscarriage of justice.***

2. The parties were both represented and through their advocates filed written submissions to argue the appeal. The appellant through his counsel submits first that the tribunal acted ultra vires its jurisdiction. In the appellant's view ordering for resurvey will amount to the size of his land being altered from what is in the register. Further that the elders contravened the provisions of the Land Disputes Tribunal Act as no statement of claim was filed and served on the appellant as is required. He submits that the award was not dated which is fatal. Finally he submits the award is a miscarriage of justice as it will make the appellant to lose a portion of his land. He urged the court to allow the appeal with costs.

3. The respondent is opposing the appeal and submits the claim before the tribunal was a boundary dispute which claim the tribunal had jurisdiction to hear as stipulated under section 3 (1) of the Land Disputes Tribunal Act (repealed). The respondent submits further that the trial magistrate did not act contrary to the provisions of the Act. According to the respondent, the judgment has not occasioned any miscarriage of justice to the appellant. He urged the court to dismiss the appeal with costs and allow the judgment and decree in Webuye PMCC land case no. 22 of 2011 to be maintained.

4. In ground one (1) of the appeal, the appellant submitted the trial magistrate failed in law and fact to appreciate the tribunal lacked jurisdiction to deliberate on a matter involving land with title. The question then is what was the magistrate's role as provided in the law in regard to adoption of awards emanating from the Land Disputes Tribunals? Under section 7 (1) of the Act the chairman of the tribunal is required to cause the decisions of the tribunal to be filed in the magistrate's court together with any depositions or documents.

7 (2) the court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided in the Civil Procedure Act.

5. Section 8 of Land Disputes Tribunal Act gives room for any party to the dispute who is aggrieved to appeal to the Provincial Appeals Committee within the prescribed time. In reading section 7 of the Land Disputes Tribunal Act, it is obvious the magistrate duties is merely to adopt the award as presented and not get into the details or the merits of the award. In this instant, it was not within the mandate of the learned trial magistrate to question the jurisdiction of the tribunal as is being submitted by the appellant. In any event the proceedings before the learned trial magistrate while adopting the award, the appellant did not raise any issue as he did not attend court inspite of being served with the hearing notice. The trial magistrate could not therefore go out of its way and on its own motion raise and determine an issue that was not placed before him. G.B.M Kariuki J. in the case of **Jamin Ameyo vs. Harry Ombeva Agema [2005] e KLR at page 2** stated that,

“Where one fails to appeal to the appeals committee and the award is consequently adopted by the resident magistrate's court as a decision of the court, no appeal lies from the decision of the resident magistrate because the provisions of the Land Disputes Tribunal Act do not give any right of appeal to this court from such act.”

Although this decision is not binding on me, I entirely agree with this view as is anchored on the provisions of the law. Although the Act was already repealed the appellant had the option to appeal the entire award of the Tribunal to the high court not the act of adoption as in this case. Consequently I find this ground challenging the magistrate's role in adopting the award as misplaced and lacking in merit and must fail.

6. The appellant stated that the learned trial magistrate's judgment was contrary to the provisions of the Land Disputes Tribunal Act. I have read the appellant's submissions and did not find any reference to any section of the Land Disputes Tribunal Act that was contravened by the trial magistrate in adopting the award. As explained in the preceding paragraph, the action taken by the magistrate is anchored under section 7 of the Land Disputes Tribunal Act (*repealed*). I find this ground as clearly not proved and/or established and it is also dismissed.

7. The appellant stated in his last ground that the judgment delivered occasioned him a miscarriage of justice. He justifies this by saying the decree will make him lose a portion of his land. In paragraph 9 of the award, the elders stated thus;

“The Land Disputes Tribunal members recommended that the court to order the official government surveyor to resurvey this parcel no. Bokoli/Misikhu/1145 to rectify the boundaries and varied dimensions once and for all.”

The dispute as can be adduced from the proceedings was concerning a boundary claim between parcels L.R. no. Bokoli/Misikhu/1144 owned by the appellant and 1145 owned by the respondent. The appellant is the one who sold L.R. No. 1145 to the respondent and from the documents on record; he sold 3 acres of land. I do not see how re-surveying L.R. no. 1145 to establish its exact boundaries would amount to the appellant losing a portion of his land. In my opinion the re-survey would merely establish the extent and boundaries of the size comprised in three (3) acres he sold.

8. Lastly, the appellant raised issues that did not form part of the grounds of appeal in their submissions i.e that no statement of claim was filed or served on the appellant and that the award was not dated. Under section 3 (2) – (6) requires parties to file their claim and responses thereto before the tribunal. However no sanctions are provided in the Act for failure to comply with that proviso. Since the Act is silent on failure to comply, this court cannot declare such failure to be fatal to the proceedings as it will amount to a decision not backed by law. In any event during the hearing before the elders, the appellant heard the statement presented by the respondent. He was given an opportunity and he cross-examined the respondent on that evidence. The appellant had the opportunity to present his version of events which he fully did. He was thus made aware of the claim brought against him by the respondent. Similarly there is no penalty provided in the Act where a decision of the Tribunal is undated. This limb of submissions was not backed by any law and I find it no merit in them. A point to add is that parties are bound by their pleadings so this submission was made outside the pleadings.

9. The upshot of my analyses of the facts and law raised by the parties to this appeal is that I find all the grounds raised in the appeal have no merit. The result is this appeal fails and I dismiss it with costs to the respondent.

DATED and **DELIVERED** this 29th day of September 2014.

A. OMOLLO

JUDGE.