



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 83 of 2007

JOSEPH WEKESA WATULO APPELLANT

VERSUS

CHARLES BARASA MAKHANU 1ST RESPONDENT

ROSE NANJEKHO 2ND RESPONDENT

JUDGMENT

The appellant filed his appeal against the ruling of the trial magistrate in Bungoma LDT No. 53 of 2007 which rejected the award of the Kanduyi Land Disputes Tribunal in land case No. 2 of 2007 in respect of land Parcel **East Bukusu/North Sangalo/2016**.

The decree appealed against is dated 15th November 2010 which read;

“that the tribunal award is rejected with costs” .

The appellant filed five grounds of appeal as set out here below.

1. THAT the learned magistrate erred in law and in fact by arrogating to himself the powers of the High court and setting aside the Tribunals award when his only duty was to read the award and give the parties statutory period to appeal to the Provincial land Disputes Appeals Committee.
2. THAT the learned magistrate erred in law and in fact in failing to appreciate the legal position that the parties had not yet exhausted the machinery established under the Land Disputes Tribunals Act (No. 18 of 2001).
3. THAT the learned magistrate erred in law and in fact in failing to find that this court had no jurisdiction to dismiss the award of the Tribunal before the machinery established under the Act had been exhausted.
4. THAT the learned magistrate erred in law and in fact by narrowly interpreting one provision of the Act and failing to appreciate the legal position that since the land involved is registered under the registered Land Act (cap. 300) customary law is not an overriding interest as recognized under Section 30 of the said Act.
5. THAT the learned magistrate erred in law and in fact in failing to appreciate the legal position that by having the land registered under the registered Land Act, the title was taken out of the purview of customary law by the provisions of the registered land Act which extinguished such customary rights.

The appellant through his advocate Mr. Ateya filed their written submissions as a way of urging the appeal.

The respondent did not file any document neither did he appear in court both on the 15th January and 23rd January 2013 when the matter was listed for mention. The appellant filed an affidavit of service in respect of the mention on 23rd January 2013 which affidavit indicated that the 2nd respondent is deceased.

The appellant has submitted that the magistrate erred in law and fact by rejecting the tribunal's award as it contravened the provisions of Section 7 (1) & (2) of the Land Disputes Act NO. 18 of 1990.

Section 7 (2) provides thus;

“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 for under the Civil procedure Act.”

This court seeks to determine the question if the magistrates court has power to reject an award/decision of the tribunal once the same is forwarded to it in compliance with section 7 (i) of the land Disputes Tribunal Act (now repealed).

When the application came up for hearing of the adoption of award, trial magistrate stated thus

“ I have looked at the proceedings of the Land Disputes Tribunal from the reading of Section 3 (1) of the Land Disputes Tribunal Act, it is clear the jurisdiction of the Land Disputes Tribunal is limited to adjudication of cases in line with recognized customary law. In granting the award over East Bukusu/North Sangalo/2016 which the claimant allegedly purchased from Shem Makhanu Lusaka – deceased, the tribunal has over reached its statutory competence.....”

For these reasons I find the tribunal award unsound in law and the result, I reject it with costs.”

From the wordings of the Act, it is couched in mandatory terms so that the magistrate's court is allowed to adopt the award of the tribunal as is and not to determine its merits or otherwise. To this extent, I am in agreement with the appellant that the trial magistrate had no jurisdiction to dismiss the award of the tribunal in ground 1 & 3 of the appeal.

In a similar case High Court in Kakamega, Civil Appeal No. 77 of 2008 regarding Paulo Ndalusia Sasala vs. Jacob Nyikuli Mukaramoja e KLR, Justice Kimaru held that ***“The role of the magistrate's court when a party seeks to have an award of the LDT adopted can be said to be administrative duty. It does not require the magistrate to examine or analyze the award with a view to determining whether or not it fulfills certain legal criteria for the same to be adopted as the judgment of the court.”***

I do therefore allow the appeal. The decision of the resident magistrate made on 29th October 2007 rejecting the application seeking to adopt the award of the tribunal is hereby set aside. The appellant is at liberty to appear before the Bungoma chief Magistrate's court so that the award may be read and adopted as a judgment of the court as provided under Section 7 (2) of the land Disputes tribunal Act. I make no order as to costs.

JUDGMENT read and delivered in open court this 30th day of January 2013.

A. OMOLLO

JUDGE.