REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 118 of 2009

(An appeal arising from the decision of Kakamega Land Disputes Appeals Committee Case No.13 of 2008 delivered on 12th November 2009 also arising from an Award in Matungu Land Disputes Tribunal case No. 26 of 2007)

FREDRICK MUKA MALALA …….. 1ST APPELLANT

LAWRENCE MUSALA SHIKUNYI ……..…….. 2ND APPELLANT

DOMINIC MWITAKHO SHIKUNYI …….....….. 3RD APPELLANT

V E R S U S

PHANISE NYAMANGA MUSOTSI ……..…….……. 1ST RESPONDENT

RECHO MUSOTSI …….....…….. 2ND RESPONDENT

LILIAN MUSOTSI …….....….. 3RD RESPONDENT

TABITSA MUSOTSI ……..…….....……. 4TH RESPONDENT

CECILIA MUSOTSI ……...…….....…….. 5TH RESPONDENT

J U D G M E N T

This is an appeal from the Western Province Land Disputes Appeals Committee in case number 13 of 2008. The appellant's grounds of appeal are that the Appeals Committee deliberated upon land parcel number **N.WANGA/MAYONI/1730** yet the parcel of land was non-existent, the Committee lacked powers to entertain succession proceedings, the Committee lacked jurisdiction and its decision is null and void as it infringes on the provisions of the Registered Land Act and that the Committee erred in law by ordering cancellation of titles for land parcel numbers **N.WANGA/MAYONI/1764, 1765** and **1766**.

Parties agreed to proceed by way of written submissions. Counsel for the appellant mainly expounded on the above grounds. It is submitted that the suit property that was the subject of the case was no-existent, that the parties who litigated did not have letters of administration and that the Appeals Committee lacked jurisdiction to entertain the dispute. On his part counsel for the respondents submitted that the appellants fraudulently did succession and excluded the respondents. The appellants then proceeded to subdivide the original plot number **N.WANGA/MAYONI/1730** and excluded the respondents. Counsel further submits that the appeal was not filed within the prescribed time and that the

appellants purported to disinherit the widow and her daughter on the sole basis of gender. Counsel contends that the issues being raised by the appellants are based on technicalities and falls within the provisions of **Article 159(2)** of the Constitution.

I have gone through the record of appeal. The record shows that the dispute was initially heard before the Matungu Land disputes Tribunal as case number 26 of 2007 and the respondents were the claimants. The 1st respondent testified that she was the widow of the late **PROTUS MUSOTSI** who was the owner of the suit land. Her husband died in 1980 and the appellants who are related to her husband took the land. It was her evidence and that of her witnesses that the suit land was meant to be inherited by her husband. The land was registered in the names of **JOSEPHINE NAMBIRO** who seemed to have been the mother of the 1st respondent's husband. On their part the appellants testified that they did a succession cause and inherited the suit land. The succession cause was advertised in the Kenya Gazette vide Notice number 2166 of 30.3.2001. Thereafter the land was subdivided into other plots.

The Matungu Land Disputes Tribunal found that the respondents herein were entitled to inherit the suit land. The Tribunal ordered the cancellation of the subdivisions that were created out of plot number **N.WANGA/MAYONI/1730**. The tribunal also ordered that the respondents be given 10.63 acres out of the suit land. The appellants herein appealed to the Provincial Land Dispute Appeals Committee vide case number 13 of 2008. On the 12.11.2009 the Appeals Committee dismissed their appeal due lack of new evidence.

As to whether the appeal was filed out of time, I note that the memorandum of appeal was filed on the 30.11.2009 and that was within the sixty (60) days period provided for by **Section 8(9)** of the now repealed Land Disputes Tribunals Act No. 18 of 1990. I therefore find that the appeal was filed within time. This being a second appeal it is provided under the now repealed Land Disputes Act that only matters of law should be entertained. From the record of appeal it is clear that the appellant obtained their title deed through a succession cause whose number is not given in the proceedings. However, I am satisfied that there was a succession cause that was advertised in the Kenya Gazette as indicated herein above. The decision of the Matungu Land disputes Tribunal as well as the Appeals Committee meant that the appellants' title deeds were to be cancelled and the respondent be given 10.63 acres of the suit land. Although counsel for the respondents indicates that the issues raised by the appellants are purely technical, I am satisfied that the two tribunals lacked jurisdiction to entertain claims that were arising from land that had undergone through a succession cause. The respondents ought to have pursued their claim through the succession cause. Although I am convinced that the respondents indeed have an arguable claim over the suit land the procedure they used was not proper. Further I do find that the two tribunals lacked jurisdiction to cancel land titles that were registered under the Registered Land Act. The tribunals had no powers to order cancellation of the title deed even if the same had been obtained through fraudulent means.

In the end, I do find that the appeal is merited and the same is allowed. The respondents are at liberty to pursue their claim through the proper channels which I belief is the succession cause. I do order that each party shall meet his/her own costs for the proceedings before the two tribunals as well as this appeal.

Delivered, dated and signed at Kakamega this 29th day of May of 2013

SAID J. CHITEMBWE

J U D G E