



REPUBLIC OF KENYA

High Court at Bungoma

Civil Appeal 23 of 2011

F.B.J.O.....APPELLANT

VERSUS

A.N.O.....RESPONDENT

JUDGMENT

This is an appeal against the decision/award of the Western Provincial Appeals Committee and adopted by the court in Bungoma Chief Magistrate's court land case No. 48 of 2010 on 27th January 2011. The appellant listed 5 grounds of appeal to challenge that decision as follows:

- That the appeals committee erred in law by entertaining a claim which was outside the provisions of the Tribunal Act No. 10 of 1990.
- That the appeals committee erred in law in upholding the decision of Kanduyi Land Disputes Tribunal when the Tribunal had no jurisdiction to hear and determine the appeal.
- That the Appeals Committee was illegal as it comprised a number of members in excess of those permitted by law.
- That the entire proceedings at the Kanduyi Land Disputes Tribunal and the Appeals Committee was a nullity ab initio.
- That the tribunal erred in law in hearing the dispute exparte without notice to the appellant.

He prayed for;

- (a). An order declaring the proceedings before the Kanduyi Land Disputes Tribunal and Western Provincial Appeals Committee as a nullity ab initio.
- (b). An order setting aside the decision of the Land Disputes Tribunal as well as that of the Western Provincial Appeals Committee.
- (c). An order that the appeal be allowed with costs of proceedings in the Tribunal and the Appeals committee.

Both counsels for the parties chose to argue this appeal by filing written submissions. The appellant submitted that he is the registered owner of L.R. No. [particulars withheld] and has exclusive possession and utilization of the same. He submits that both Tribunals acted ultra vires its powers as donated

under the now repealed Land Disputes Tribunal Act section 3 (1). That the appeals committee was illegal as it comprised the number in excess of that permitted by law. Finally that the appellant was condemned unheard as he was not present during the proceedings at the District Tribunal. They supported their submission with case law in **R. Vs. Chairman Makueni LDT & 3 others [2008] e KLR.**

The respondent on her part submitted that she is legally married to the appellant and was blessed with 8 children. The respondent has been in occupation of the suit property since 1955 and that the appellant deserted her to establish another home in Kitale with his two wives.

The respondent submits that issues before Tribunal was not about **ownership and registration** of title but the division of the suit property alongside her right to occupy or work land. That the case law cited by the appellant is totally different from the case at hand. It is her case that both the Tribunals were properly composed as provided under Section 4 (2) of the ACT. The appellant chose not to appear before the Tribunal and therefore has no excuse complaining. She urged this court to uphold the decision reached by the Appeals Committee & Kanduyi Land Disputes Tribunals and prayed for an order dismissing this appeal with costs to her.

Composition of the Tribunal :

Under Sec. 4 (2), the elders to be appointed would comprise the chairman and in **4 (2) (b) two or four elders selected by the District Commissioner from panel of elders appointed under Section 5 of the Act.** This means the full Tribunal can have either 3 or 5 members at each sitting. The panel who heard the instant suit in each of the Tribunals were 5 members. This means they captured the number provided in law. The appellant did not elaborate what the illegality was in this composition both in his memorandum of appeal and/or his submission. His ground 3 of the appeal therefore fails as it lacks basis given the composition complied with both Sec. 4 (2) & 9(1) (b).

Tribunal acting ultra vires:

Jurisdiction is donated to both Tribunals under Sec. 3 (1) of the Act. The claimant in her testimony before the Kanduyi Land Disputes Tribunal stated that she married the appellant and they were blessed with 8 children, two of which passed on. That the appellant does not assist her in anyway having deserted her while she was living on the suit parcel. The appellant has sold part of this land and has marked it for subdivision as shown in the mutation produced as claimant exhibit 3 with intention to sell them as plots. She demanded a share of the land for herself and her children. The appellant is hostile and has refused even his children to build on this land. After listening to her evidence and site visit the Kanduyi Tribunal's award was as follows;

- The panel of elders has unanimously awarded the claimant ANO a right of her claim of 9 ½ acres of land excised from parcel NO. [particulars withheld] together with her children.
- Through sympathetic point of view, the award given above will enable the claimant build a house for herself and also her two sons to construct their houses and get married. The first born son is 50 years old while the 2nd son is 46 years old both not married.
- The claimant preferable should get her share in Northern side where she had one time put building material lengthwise, right from Mumias/Webuye/Chwele road down to Khalaba river while the objector remains in the southern side from where he sold some three plots and pathway to be constructed right away from the river to the road in between the two parcels.
- The forest of Eucalyptus trees that they planted together must be equally shared when it comes to usages, for this will enable both the claimant and her sons to cheaply build their houses in their portion awarded.
- The objector is ordered to process the title deed to the claimant with immediate effect.

- Through the honorable court, the panel of elders requests the Land Registrar to send District Surveyor, Provincial Administration and Security personnel to the dispute site to oversee the determination of the boundary and establishment of the pathway.
- Enclosed are CL's or OB's exhibits.

The appellant has not denied the marriage between the respondent and himself. This relationship creates a different shift in my view as regards the fact that the Tribunal was arbitrating the issue of ownership and registration. The parties is a couple and therefore the tribunal under section 3(7) of the Act had capacity given issue of customary laws then applied to the matters in question. In any event the Tribunal in their findings above did not question the ownership and/or registration of the suit property. Instead they dealt with the issue of “division of the property and “the right to occupy or work “land. In its award no. 2 above, they hoped the award will enable the claimant build a house for herself and her two sons.

In the appellants submissions they stated that “The Land Disputes Tribunal exceeded their mandate by entertaining issues which they did not have jurisdiction to determine especially issues touching on ownership and registration of LR No. [particulars withheld]”. There is no further explanation preferred by the appellant in exactly what the Land Disputes Tribunal did that was excess of jurisdiction in the proceedings before it. From the proceedings they did not deny the land belonged to the appellant. The appellant when he appeared before the Appeals Committee did not deny that he is married to the respondent. At paragraph 2 in the proceedings he states “*My wife objector Anna and her son took our dispute to the chief, District Officer & to the Kanduyi Tribunal Court*”. Paragraph 4 – *my wife's demand for half share. I can offer her land at the reserve but not plot no. 328*. This to me is a clear issue of division of land and therefore fell squarely within the jurisdiction of the Tribunal. Secondly the respondent stated at the Tribunal that the appellant demolished a structure she had put up to use for selling items for her upkeep. Her house also collapsed and she wishes to build as well as her children to also build so they can marry. Again I hold this is petitioning for a right to occupy and work land within the mandate of the Tribunal.

The appellant lives in Kitale and it is the respondent who is in occupation of the suit property. This means ground 1, & 4 of the appeal is not proved. However a reading of the award of the Kanduyi Land Disputes Tribunal was partly in excess of jurisdiction particularly award no 1 which gave the respondent 91/2 acres of land and no 5 which ordered the objector/Appellant to process title for the same. I therefore set aside the two awards and leave it to the Respondent to take appropriate steps under the new Land Registration Act to get the physical sharing of the suitland if at all. Ground 2 of the appeal thus succeeds in part to the extent of the limb no 1 and no 5 of the award set aside.

Ground 5 – not affording appellant a Hearing:

The appellant was heard before the Appeals Committee. He was absent during the proceedings before the District Tribunal. At page 6 of the Kanduyi Land Disputes Tribunal proceedings paragraph 32 and 33, the elders recorded thus

“Despite the fact that the objector was sent several summons to attend the dispute, he stubbornly refused to turn up. He made comments in one of them ex 10. on 15.8.2010, the objector wrote to the chairman of the Land Disputes Tribunal for apology promising to attend next time to which he never showed up – Ex. 11”.

A look at EX. 10 the comments on the summons were “*this matter has been settled by both my family and chief's town court. Please refer to him*”. He never denied the signature on this comment as not being his. In exhibit 11, his handwritten letter he acknowledges receipt of the summons but apologizes for not being able to come and sought more time.

During his appeal before the Western Appeals Committee, he stated that his wife and son had referred this matter to the chief, District officer, Land officer and Kanduyi Land Disputes Tribunal.

All these shows that he was fully aware of his wife's claim before the Tribunal. He does not indicate why he did not attend the proceedings of 2nd December 2010. This court can only conclude that he decided to ignore the proceedings before the Tribunal. He cannot therefore blame them for condemning him unheard. The rules of natural justice cannot be abused by parties who disregard summonses sent to them. I therefore find this also lacking in merit. In any event he had got a chance to ventilate his claim before the Committee and his appeal was dismissed for lacking in merit as such his claim for being condemned unheard does not bear much in this appeal.

In light of the foregoing, all the grounds of appeal fail for the reasons given. The appeal therefore succeeds in part on the two limbs of the award set aside and the rest of the decision is upheld. Each party shall bear their costs of the appeal.

JUDGMENT DATED, SIGNED, READ AND DELIVERED in open court this 23rd day of May 2013.

A. OMOLLO

JUDGE.