REPUBLIC OE KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 70 OF 2008

CLEMENT WEKESA MUUYI .... APPELLANT

VERSUS

OKUMU MASAI..1ST RESPONDENT

WILSON SIMIYU MASAI .... 2ND RESPONDENT

IDI WASIKE MASAI .... 3RD RESPONDENT

JUDGMENT

The appellant CLEMENT WEKESA MUUYI filed a memo of appeal and in it listed six grounds to contest the ruling of Senior Resident Magistrate in Bungoma CMCC land case No. 20 of 2005 delivered on 9th October 2008. Along with it, he filed a record of appeal which contained all proceedings of this case.

I have had an opportunity to read through the record and this is what I deduce as the background of this case. The first Respondent;

Okumu Masai had bought land from Wilson Simiyu Masai the 2nd Respondent. The 3rd Respondent was the administrator of the estate of Wakhungu – deceased, the 2nd Respondents father. The 1st Respondent did not get his title deed for the portion measuring 2.8 acres and he therefore sued the 2nd & 3rd Respondents in Bungoma Senior Resident Magistrate court civil case no. 517 of 1989. The learned trial magistrate delivered the judgment on 2nd August 1990 when she dismissed the case because the agreement entered into was null and void as the 1st defendant (now 2nd Respondent in this appeal) had no capacity to sell land owned by the 2nd

Respondent (now 3rd Respondent).

Not being happy with this finding, the 1st Respondent commenced proceedings at the Kanduyi Land Disputes Tribunal. The panel of elders heard his case and granted him the following orders in the award dated 30th December 2005;

1. The panel of elders unanimously order that the claimant has the right of ownership to the disputed land.

2. The panel of elders further orders that the administrator (Idi Wasike Masai) to surrender the parcel of land measuring 6.5 acres belonging to the objector (Wilson Simiyu Masai) as the rightful successor of his father's (Wakhungu) estate.

3. Thereafter the objector (Mr. Wilson Simiyu Masai) to process land ownership measuring 2.8 acres to the claimant Mr. Okumu Masai immediately.

4. Both the administrator Mr. Idi Wasike and the Objector Mr. Wilson Simiyu Wasike to share equally the costs of the dispute.

5. The court to send the non-biased land surveyors through the land Registrar to determine the measurements and the boundaries of the disputed land.

6. The documents attached herein by the objector and the claimant verify the above award.

7. Also attached find the sketch map.

8. The aggrieved party has thirty (30) days right of appeal.

It is important at this stage to point out that the decision of the panel of elders did not make any reference to any specific parcel of land. This decision was filed in court of 30th December 2005 and allocated No. LDT 20 of 2005. The award was subsequently adopted as an order of the court on 15th February 2006 (as per copy of order exhibited at page 84 of the

record). In the order at paragraph (A) reads;

"***the applicant herein be and is hereby entitled to ownership of L.R. No. E. Bukusu/W. Sang'alo/433".***

The question then arises, how does this number crop up during the reading of the award when it was not part of the decision contained in the award of the tribunal?. I will refer to it later in this judgment. All this while, the appellant is not party to the proceedings.

With the order in hand, the 1st Respondent sets on a route to get title to his land. He filed an application dated 21st March 2006 seeking authorization of the Executive Officer of the court to sign transfer forms for the 2.8 acres. He obtained "vesting order" on 27th July 2007 (page 76 of the record) which authorized the Executive Officer to sign relevant forms to effect transfer of 2.8 acres to him and 3.7 acres to Wilson Simiyu Masai out of L.R. No. E. Bukusu/W. Sang'alo/433.

There is another application dated 8th August 2005 which forms part of the basis of this appeal. In this application, brought by way of chamber summons and filed in the same file as the one which adopted the award(land case no. 20 of 2005). The 1st Respondent sought orders that

" ***Land parcel nos. E. Bukusu/W. Sangalo/1708, 1709 and 1710 be nullified and reverted to original parcel No. E. Bukusu/W. Sang'alo/433 to enable the applicant and 1st Respondent obtain their shares as per the tribunal award."***

This order was granted by the court on 7th September 2006, effectively canceling the three titles quoted in that prayer. There is nothing in the affidavit in support of the application which gives the position as to who were the owners of 1708, 1709 & 1710 at the time of ordering of their cancellation.

With this background, now I will analyze the issues raised in the appeal. The orders of 7th September 2006 triggered the appellant to participate in the proceedings of the lower court. He received a letter asking him to move

out of the land from Nanzushi & Co. advocates. He therefore filed an application through Annet Mumalasi & co. advocates on 20th May 2008 seeking;

(*a). To be enjoined to these proceedings suo motto.*

(b). Injunctive reliefs against the 1st Respondent.

(c). Injunctive reliefs against the 1st Respondent.

(d). Orders of 7.9.2006 be reviewed and or set aside.

This application was opposed by the 1st Respondent. The orders of being enjoined and stay of Execution was granted exparte on 26th May 2008. This application was subsequently withdrawn on 30th June 2008 and another one filed on the same date. Again interim orders are obtained on 30th June 2008 although the introductory part of the order refers to application dated 20th May 2008 which had been withdrawn. The application was heard interpates on 31.7.2008 and the same was dismissed on 9th October 2008 by the ruling of the learned Magistrate delivered. The appellant was unhappy with this ruling hence he appealed. Both counsels have filed written submissions which they highlighted before me on 21st May 2013. I have perused the submissions.

The appellant argued that he was condemned unheard when the orders of 7th September 2006 were issued. From the documents annexed to the supporting affidavit in the application of 30.6.2008, the appellant was registered owner of L.R. No. E. Bukusu/W. Sangalo/1710 from 1990 to the time of its cancellation. The trial magistrate found that the appellant was not a party in the proceedings which gave rise to the orders he is seeking to review therefore he lacked locus to bring the application. He said the applicant ought to have approached the court in a different way.

This was in my view a misdirection on the part of the learned magistrate. Although the appellant sought to be joined after the proceedings had taken place, this was not a bar for him not participate however late it was as the order affected his title to land. In any event at paragraph 7 of the

application, the appellant asked for the orders to be reviewed **and or set aside**. The learned magistrate ought to have analyzed the proceedings before him both for review or setting aside. He only made a decision on one thus closing out the applicant.

In ground 3 of the appeal, I believe the appellant did not understand the reasoning of the learned magistrate as regards locus. The trial court felt the applicant lacked locus because at the time the order who was made, the appellant was not a party to the proceedings. I have answered this further in the preceding paragraph.

In ground 4 of the appeal, the appellant faulted the trial magistrate for not setting aside the orders of 7th September 2006 as the granting of the same was a nullity since the court lacked jurisdiction to grant it. In his submissions filed in court, the appellant through his counsel did not address this important fact raised by themselves. The 1st respondent submitted that the orders sought which is made up in the order of 7.9.06, "***were specifically in furtherance on the execution of the decree which arose from the land disputes tribunal and the court was justified in granting the said orders."***

This ground is core because it then puts the question did the court have powers to entertain the application dated 8.8.06 granting the orders of 7th September 2006? It is now settled principle of law that once a magistrate's court has adopted the order of a tribunal, it is functus officio. It lacks jurisdiction to entertain any further proceedings in matter. The orders of 7th September 2006 were in my view totally independent of the award of the tribunal. The award did not mention any parcel no. The parcel no L.R. NO. E. Bukusu/W. Sangalo/433 is only mentioned during cross examination of the 1st Respondent by the panel of elders. There was no order of cancellation of any title contained in the award. These are weighty issues that ought to have been determined by a fresh suit and not by way of application. The court thus entertained fresh issues when it did not have such powers. On powers of court after adoption of an award, I refer to the case of ***Mutemi Muasya vs. Mutua Kasuva, Machakos HCCA No. 140 of 2001*** where Justice Nambuye while quoting Sec. 7 of land Disputes Tribunal

Act held that the lower court is limited to; *(a) receive the award from from chairman (b). enter judgment in accordance thereto (c). cause decree to be drawn.* In view of the issues raised by the appellant in his application of 30.6.2008, the learned trial magistrate ought to have on its own motion set aside the orders of 7th September 2006.

The last aspect I would like to consider is whether the application for review was proper having been brought by an interested party. Mrs. Mumalasi has submitted that her client met the conditions for review.

She submitted the trial court misdirected itself when it dismissed the application. That the wording of order 44 (1) referred to "***any person"*** considering himself aggrieved. Her client was such 'any person'. She also submitted that the court did not consider whether there was any other sufficient reason or mistake or error apparent on the face of the record to warrant the review.

Under the heading sufficient reason, the court has a wide discretion not limited to the two headings. Justice Hayanga (as he then was) in ***Nbi Civ. Case no. 250 of 1993 – Standard chartered Bank (K) Ltd. vs. Taif Holdings, e KLR*** quoted Mulla in his Code of Civil procedure 14the edition vol. III on "***any sufficient reason"*** as follows;

"***These words must mean that the reason must be one sufficient to the court to which the application for review is made and they cannot be held to be limited to the discovery of mistake or error apparent on the record."***

And Mulla quoting an Indian case of NARAIN DAS CHIRANJI LAC [1925] 47 A 11 said;

"***For any other sufficient reason are not only very wide in their solus, but were intentionally so made by the legislature because of the possibility of exceptional cases arising in which obvious injustices would be worked by strict adherence to the terms of the decree as originally passed ……. and should be construed liberally."***

In this instance, although the appellant was not a party to the proceedings when the decree was passed, having approached the court by way of review and explained the obvious injustice occasioned to him, his application ought to have been granted. The court had powers to exercise its discretion based on the facts presented before it.

For the reasons explained above, I find this appeal has merit. I therefore substitute the order of the lower court dismissing the application dated 30.6.2008 with an order that the said application be allowed in part in terms of prayer 6,7, & 9. The appellant to commence fresh suit for prayer no. 8 on cancellation of tittles. The appellant is also awarded costs of the appeal.

JUDGMENT DATED, SIGNED, READ and **DELIVERED** in open court this 25th day of JUNE 2013.

A. OMOLLO

JUDGE