



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL APPEAL NO. 21 OF 2011.

(From Original Busia PMC Land Dispute No. 49 of 2010)

HILLARY MUTETE APPLICANT

VERSUS

GEORGE OMONDI ADETI RESPONDENT

J U D G M E N T.

HILLARY MUTETE, the appellant through M/S. Wanyama & company advocate, being aggrieved by the award of Kakamega Provincial Land Dispute Appeals Tribunal ruling of 30th March, 2011, filed this appeal praying for the said ruling and that of Funyula Land Dispute Tribunal, to be set aside. The appellant has set out two grounds in the memorandum of appeal which are summarized as below;

1. That the appeals tribunal erred in law by upholding the decision of the tribunal where Musa Mutete(deceased) had been sued jointly with the appellant without confirming whether the appellant had capacity to defend the suit.
2. That the appeals tribunal erred in law and in fact by deciding on a boundary between parcels Samia/Luchululo-Bukhulungu/754 and 756 whose physical boundaries had never been planted and their documents had been drawn to reflect a bigger size than what was on the ground.

The appeal was opposed by the respondent who appeared through Mukele advocate. During the hearing of the appeal both Mr. Wanyama and Mr. Mukele for the appellant and respondent respectively made their submissions.

I have carefully considered the submissions by both counsel, and record of appeal. Even though the appellant appear to hold that the tribunal did not have jurisdiction to deal with the issue of the boundary between land parcels Samia/Luchululo-Bukhulungu/754 and 756, the court is of the view that the tribunal, indeed had jurisdiction to deal with issues of boundary determinations as provided for under Section 3 (1) of Land Dispute Tribunal Act (now repealed) which states;

“3. (1)Subject to this Act, or cases of a civil nature involving a dispute as to –

- a. the division of, or the determination of boundaries to land, including land held in common ;**
- b. a claim to occupy or work land ; or**
- c. trespass to land, shall be heard and determined by a Tribunal established under section 4”**

The decision of the Funyula Land Disputes Tribunal, of 8th April, 2010 was to the effect that the

parties were to jointly meet the cost of bringing the District surveyor to show where the boundary between land parcels Samia/Luchululo-Bukhulungu/754 and 756 was. The appellant herein was not satisfied with that decision, and filed an appeal before the Appeals Committee. The committee did not find merit in the appeal, and dismissed the same, thereby confirming the Funyula Land Disputes Tribunal ruling. The appellant thereafter, came before this court in this appeal.

During the submissions by counsel, the appellant took issue with the size of the respondent's land. He seems to say that, due to the influence the Respondent's relative, who was working with the land office, the respondent land was indicated to be bigger on the document than it was on the ground. This would mean that the appellant is taking issue with the result of the adjudication process that preceded the registration of the land and issuance of the title document. The Land Adjudication Act, Chapter 284 of the Laws of Kenya, has clear provisions on the procedure to be followed by persons who are not satisfied with the adjudication process of a specific section. Such a party is required to raise an objection with the adjudication officer concerned, and where not satisfied with the decision thereof, to file an appeal with the Minister concerned. (Sections 26 – 30 of the said Act are relevant). As this issue was not conversed before the tribunal, and the Tribunal did not rule on it cannot be an issue to be determined by this court. This court is only dealing with issues of the law as provided for under section 8 (9) of the Land Disputes Tribunal Act which states ;

“ 8 (9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High court on a point of law within sixty days from the date of the decision complained of .”

For the reason given above, the appellant has failed to prove the second ground. Going back to ground number 1, it is quite clear that the respondent, while filing his claim before Funyula Land Disputes Tribunal, included the names of Musa Mutete, who was already deceased, as a party in that case. This is in contravention of the law, as a deceased person cannot be served with court processes so as to defend the suit. A claim over land owned by a deceased person, can only be perused through the legal representative of the estate of such a deceased person appointed in accordance with the provisions of the Law of Succession Act, Cap 160 of the Laws of Kenya.

I have perused the proceedings before the Funyula Lands Disputes Tribunal and the Kakamega Provincial Appeals Tribunal and there is nothing to show that the appellant in this case had been appointed the legal representative of the estate of his father, Musa Mutete. For this reason, the respondent had sued the appellant in relation to a parcel of land registered in the names of Musa Mutete while he did not have capacity to defend this suit as he was not a legal representative of the deceased estate. Even though the court would not have found fault with the decision of the tribunal for the surveyor to be involved in confirming the position of the boundary between the two parcels, the fact that the parties sued included a deceased person, and another not yet appointed as the legal representative of the estate, makes the proceedings before the tribunal and the decision thereof, to be a nullity and void ab initio.

The court therefore finds merit on the first ground of the appeal. The appeal is therefore granted on that ground and the award of both the Funyula Land Dispute Tribunal and Kakamega Provincial Appeals Tribunal, in relation to Land parcels Samia/Luchululo/Bukhulungu/754 and 756, is hereby set aside with costs.

S. M. KIBUNJA,

JUDGE.

Delivered on 22nd day of July, 2013