



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NUMBER 80 OF 2002

JONATHAN WAFULA MBINGA.....APPELLANT

VERSUS

KABAKA WABWILE WEKESA.....RESPONDENT

J U D G M E N T

The appellant, Jonathan Wafula Mbinga, is the son of to One Wafula Tandasi Mbinga who died on 19th September, 2002. At the date of the latter's death an Award had been made against him vide the Western Provincial Land Appeals Committee, in Appeal No. 101 of 1997. The said Appeal Award was adopted by Bungoma Chief Magistrate vide Bungoma LDT Case No. 32 of 2002. The award gave the parcel of land the subject of this appeal to the Respondent, Kabaka Wabwile Wekesa.

The appellant accordingly, had to obtain a Grant of Letters of Administration to enable him to file an appeal to this court in place of his father. He applied to court under Section 67(1) of the Law of Succession Act, Cap 160 and obtained a Limited ad Colligenda bona Grant of Letters of Administration limited only to purpose of filing an appeal against the findings of the Tribunal in respect of case No. Bungoma/CMCC. L.D.T. 32 of 2002. He thereafter, using the Grant, filed this appeal. The appeal raised the following grounds: -

- 1. That there was no valid hearing and rules of natural justice were breached (grounds 1 & 2).**
- 2. That suit was *res judicata* Bungoma SRMCC No. 84 of 1986.**
- 3. That there were no valid proceedings conducted by the Western Provincial Lands Committee.**

In response, the Respondent urged that: -

- a) The appeal is incompetent for not having been accompanied with a certification that it was on law or on law and fact only.**
- b) That limited Grant of Letters ad colligenda bona used by the Appellant to file this appeal was fatally incompetent which nullified the Appellants *locus standi*.**
- c) The appeal was fatally incompetent for being filed out of time without leave of court.**
- d) The appellant had no *locus standi* because his name never replaced the name of the deceased in the original file to enable him to appeal.**

e) The Bungoma SRMCC No 84 of 1986 was not part of the Land Disputes Tribunal and Provincial Land Appeals Committee proceedings and cannot be introduced at appeal stage.

I have carefully perused the appeal record inclusive of the Memorandum of appeal and the written submissions from both sides. I find it appropriate to deal with the procedural issues first, raised by either party.

The first issue is whether or not the limited grant ad colligenda bona issued to the appellant gave the appellant locus standi to file this appeal. I observe that the Respondent had raised the issue before and Serگون, J in his ruling dated 18th June 2004 dealt with the matter. He answered it by stating that although the appellant had applied for and obtained a limited ad colligenda bona grant under Section 67 of the Law of Succession Act, instead of one under Section 54 of the Act, nevertheless the Grant issued, specifically provided that its purpose or purpose of issuing it, was for being used by the appellant to file this appeal. I cannot, therefore, go back to make a fresh decision on it even if I would think that the decision would be wrong. This is because the decision was not appealed from and, therefore, stands. In any case my view, is that the grant was competent for the purpose it was issued. It, therefore, gave the appellant locus standi.

With the same breath, I would hold that the said Limited Grant specifically authorized the appellant to file an appeal against the findings of the Western Provincial Land Committee Award as adopted under Bungoma CMCC Land Disputes Tribunal Case No. 32 of 2002. It was accordingly not necessary to go back to the Land Committee to substitute the name of the deceased with that of the Respondent before filing this appeal.

As to the issue of certification of the appeal to be on points of law only, there is no doubt that there was no such certification. However, this matter would have been raised during directions or should have been preliminarily taken up. Furthermore when the appeal was being admitted the Judge must have examined the appeal and satisfied himself that it was on a point of law only. Otherwise, he would not have admitted the appeal to a hearing. And finally on the point, the appeal as a matter of fact is on a point of law and substantial justice would not be obtained generally if the appeal would be dismissed on this technical ground which did not result to any injustice to the applicant.

The issue of res judicata raised by the appellant is a substantive matter which should have been raised during the hearing before the Land Disputes Tribunal or the Provincial Land Appeals Committee. It was not to raised and this court refuses to entertain it at this stage. That ground of appeal is accordingly rejected.

The main substantive ground of appeal is that the Western Provincial Land Appeals Committee did not conduct a competent hearing of the appeal No. 101 of 1997 as a result of which it failed to come out with a reasoned-out judgment. I have carefully examined the Committee's record of proceedings dated 18th July, 2002. Its findings state that the Respondent who herein is the Appellant's deceased father, Tandasi Mbinga Mukumama, had not attended the Tribunal for the appeal on several occasions which were tabulated thereon. What would have been a proper procedure, would have been to satisfy itself on the record that the Respondent had been always served with summons to attend the Tribunal Proceedings, but had deliberately ignored to do so. That should have been put on the record. The Committee would have then on record allowed the appellant who was present to argue his appeal, notwithstanding the absence of the Respondent. Thereafter, the committee would based on merit have written its Award in which it would state the grounds leading to the Award.

However, the committee after commenting that the Respondent therein had failed to attend the hearing on those dates stated: -

“The Respondent having been absent on the above quoted dates, the Penal decided that the land in question is hereby awarded to the appellant, Kabaka Wabwile Wekesa”.

Clearly, the appeal was not decided on any meritorious grounds. The land was awarded to the Respondent herein because the Appellant's father, now deceased did not attend before the Appeals Committee. There

is no indication that the Panel looked at the lower Tribunal's proceedings and/or judgment or that it found it faulty or unmeritorious in any manner, which would then entitle the Appeals Committee to interfere with it. The Appeals Committee, therefore, reversed the Award of the Kanduyi Land Disputes Tribunal dated 2nd November, 1987 purely and on the mere reason that the Respondent therein, had not attended court.

In the opinion of this court, therefore, the provincial Land Appeals Committee clearly erred in awarding the Respondent the land and thus reversing the lower Land Disputes Tribunal on an incompetent reason. Its award is unmeritorious and the award cannot be left to stand. It is hereby set aside as this appeal is declared allowed.

I have carefully considered what would be the best and just course hereafter. I have perused the full record of this appeal. I notice that the Kanduyi Land Disputes Tribunal made its decision in November, 1987, most probably before the parcel of land in dispute was registered in the name of the Respondent herein. Entries in the title show that he was so registered on 2nd April, 1993 and his title issued to him on the same date. There is credible evidence on the record from both parties that the land was sold to the appellant's father Wafula Mbinga Mukumeme in 1968 but acreage increased from 7 ½ to 10 acres in 1970 and to 15 acres in 1971, at a final total price of Kshs.3,750/-. There is evidence on record also that when the dispute went to the Kanduyi Land Dispute Tribunal, it was the wife of the respondent herein who filed and presented evidence despite the fact that her husband, the Respondent herein, was alive and present. He did not even attend the Tribunal to support the wife's claim. As a result, the Kanduyi Land Disputes Tribunal awarded the land to the Appellant's father.

Unfortunately, the Kanduyi Land Disputes Tribunal handled the dispute when the land had clearly been registered probably in the name of the Respondent's father or close relative who on 2nd March 1993 had to transfer it to him. Indeed even when the Respondent sold the 15 acres to the Appellant's father Wafula Mbinga Mukumeme, the land was already registered in his name. The record shows also that the reason he failed to transfer the parcel to the appellant's father who had taken possession and developed the land, was because the Respondent had no national identity card which he was told by the Land Registry to obtain before a transfer would be effected. Thereafter and before the respondent could transfer the land, he sold the land he had acquired at a place called Kimanga and went to reside in Uganda for many years, thus avoiding transferring the subject land to the respondent.

It is clear from the record accordingly that the Kanduyi Land Disputes Tribunal, in awarding a registered land to the Appellant's father, despite the latter's occupation and possession thereof, had no jurisdiction to do so. The Tribunal was dealing with and transferring the substantive beneficial interest in registered land contrary to the provisions of Section 3(1) of the Land Disputes Tribunal Act. Kanduyi Land Dispute Tribunals Award of the land to Appellant's father was, therefore, definitely null and void. The award which was later to be dealt with by the Western Provincial Land Appeal Committee nothing more than a nullity. This means and I so find that both Awards of the Tribunal and of Provincial Land Appeals were a nullity.

If this court, therefore, sends this matter down to the Tribunal's for retrial, it would be doing no worthwhile useful legal process. The best this court can do at this stage, is to declare the proceedings and processes before both Tribunals, a nullity, which I hereby do. This in no way interferes with the rights, if any, that the Appellant may have acquired over the land through adverse possession, if any. He is accordingly, given the liberty and leave to file, if he so wishes, a suit in this court to seek reliefs. The same should be done within 30 days of the delivery of this judgment. I make no order as to costs in this appeal. Orders accordingly.

Dated and delivered at Bungoma this 6th day of March, 2012.

D A ONYANCHA

JUDGE