



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL APPEAL 14 OF 2002

LUCAS M MUNGA & ANOTHERAPPELLANT

-VRS-

MWAKUNI MWAKITI & 3 OTHERS.....RESPONDENTS

JUDGEMENT

1. This appeal challenges an order made on 26.06.02 (erroneously stated as 23.08.01 in the memorandum of appeal) by the Resident Magistrate, Kaloleni in Land Award (Case) No.14/1996.

2. The brief facts of the matter are that the appellants being the successful claimant in Land Case NO.LAND/KAL/14 of 1996 before the Land Disputes Tribunal, moved to obtain judgment against the RespondentS before the Kaloleni Resident Magistrate`s Court, as provided under section 7 of the Land Disputes Tribunal Act (now repealed). That was on 8.10.96. Judgement was entered on 8.10.96.

3. In November of the same year the Respondents filed an application expressed to be brought under section 3A of the Civil Procedure Act seeking that the Land Disputes Tribunal decision of 8.10.96 be declared null and void.

4. The main grounds contained in the supporting affidavit and were accepted by the court were that the Tribunals` decision was in contravention of a court finding in an earlier related award, namely, Land Award case No.32/1985 Mombasa that a panel of elders had no jurisdiction to entertain the dispute in question. Secondly, it was alleged that some parties to the dispute were dead as at 8.10.96 Counsel for the Respondents argued the application exparte on 7.6.02 as the appellants were absent. He orally applied to amend the application to include OXLIV r 1 Civil Procedure Act and new prayer that the judgement entered on 8.10.06 be reviewed.

5. In his ruling delivered on 26/6/02 the learned District Magistrate concluded;-

“From the proceedings therefore, I agree that the proceedings which were before the land dispute tribunal be rendered null and void and that this court exercising its powers under section 3A Civil Procedure Act and under OXLIV r 1(Civil Procedure Rule) that the judgement entered and all proceedings in this suit is hereby ordered set aside and costs be paid to the defendant counsel(sic)”.

6. The decision of the Lower court went beyond reviewing the judgement, it set it aside. The amendment inserted at the hearing of the application completely changed the tenor of the same and should have been

served on the adverse party. The appellants' chief complaint in this appeal is that they were denied a hearing. It is valid.

7. In addition to setting aside the judgement adopting the elders' decision, the court declared the said decision null and void. The Respondents' counsel has supported this view. He submitted that the lower court's decision was made to "correct an anomaly" and that the jurisdiction is drawn from the preamble of the Land Disputes Tribunal Act.

8. That argument is not tenable, with respect. The Land Disputes Tribunal Act provided in sections 8 and 9 a system of appeals from the elders' panel to the Appeals Committee and the High Court. Alternatively where the question of the jurisdiction of the elders' tribunal required to be determined, the proper procedure would be a challenge by way of judicial review.

9. In the circumstances of this case the learned District Magistrate was not empowered under section 3A of the Civil Procedure Act or OXLIV rule 1 Civil Procedure Rule on which he relied, or even under the Land Disputes Tribunal Act, to order as he did. This fact alone is sufficient to dispose of this appeal. The orders made on 26/6/02 cannot be allowed to stand. The same are hereby set aside, with costs to the appellants.

Delivered and signed at Malindi this **11th May, 2012** in the presence Mr Mr Mkan for the Respondent, Mr Kilonzo for the appellant.

C. W. MEOLI
JUDGE