

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 137 of 2007

SAMUEL KAYI APPELLANT

V E R S U S

DOREEN MUTENDE 1ST RESPONDENT

JOSEPH OCHIENG 2ND RESPONDENT

JUDGMENT

This is an appeal from the decision of the Chief Magistrate's Court in Misc. Civil Award no. 163 of 2005 at Kakamega. The appellant's grounds of appeal are that the magistrate erred in law in not considering that the original parcel no. **BUTSOTSO/INDANGALASIA/367** had been subdivided into two plots namely 4095 and 4096, that the magistrate erred in law in not finding that he had no jurisdiction to cause cancellation or transfer of the suit land, that there was a total miscarriage of justice and the process was an abuse of justice and that the trial court was biased against the appellant.

Parties agreed to file written submissions but only the appellant managed to do so. The appellant contends that the trial court made an order on the 3rd of August 2007 empowering the Executive Officer of the court to execute transfer documents in favour of the respondents and that order was unlawful. Further the suit land was sub-divided into two and the respondents were to reside on plot number **BUTSOTSO/INDANGALASIA/4096** but failed to do so. Parties had consented to the subdivision of the land and the only issue remaining was a boundary dispute between the two parcels. The trial court lacked jurisdiction to cause cancellation or transfer of the suit parcel of land as those orders could only be granted by the High Court as per the provisions of **Section 159** of the **Registered Land Act**. The appellant further contends that the trial court did not give reasons for its decision.

The history of this matter can be traced from proceeding before the Lurambi Land Disputes Tribunal between the two parties herein. The respondents were the claimants before the tribunal claiming to have bought 2 acres of land from the appellant for a sum of KShs.170,000/=. The original plot number was **BUTSOTSO/INDANGALASIA/367** and it was divided into two plots **BUTSOTSO/INDANGALASIA/4095** and 4096. Parties went before the Lurambi Land Control Board and a consent to subdivide was granted. The appellant later refused to go to the Land Control Board and obtain a consent to transfer the portion bought by the respondents. In his evidence before the tribunal the appellant conceded that indeed on the 24th of May 2003 he sold two acres of land to the two respondents for KShs.170,000/=. The land was to be subdivided and they obtained the consent from the board but when they went to the Land Control Board the second time they did not carry the survey forms and that is why he could not sign the transfer forms. After sometime he went to the land office at Kakamega and found new title deeds and he took his leaving the one for the two respondents. The appellant's main dispute was that four different surveyors were used to subdivide the land and wanted the tribunal to settle the boundary dispute.

The tribunal heard the dispute and visited the suit property and directed that the district land surveyor effect the division of the land into two as the total acreage was four acres and the appellant had sold two acres. The award was filed before the Chief Magistrate and read on the 13th of January 2006. The respondents later filed an application dated 9th May 2006 seeking an order that the award that had been read on 13th January 2006 be adopted as an order of the court. The application was listed for hearing on

the 16th of June 2006 and the appellant was in court. In response to that application the appellant informed the court as follows:-

“I have not appealed, I agree that I had sold land to the complainants.”

The court went ahead and granted that application. Thereafter the respondents filed another application dated 6th September 2006 seeking an order that the district land surveyor visit the two plot numbers **BUTSOTSO/INDANGALASIA/4095** and **4096** with a view of confirming the boundary and acreage. On 13th of November 2006 the trial court granted that application and directed the surveyor to visit the two plots and demarcate the boundary. The respondents were not yet done and filed an application dated 3rd August 2007 seeking an order that the Executive Officer of the court to sign all the transfer documents on behalf of the appellant so that the respondents could get their title deeds. The trial court granted that application on the 26th November 2007 and by then the report by the district surveyor had been filed.

The appellant's contention is that the trial court lacked jurisdiction to entertain the matter. It is clear from the history of the dispute that the appellant sold two acres of land to the respondents. It was his evidence before the tribunal that he collected his title deed from the Kakamega Lands office and left the one for the respondents at the registry. When he appeared before the subordinate court he confirmed that he had indeed sold two acres to the respondents. It is further established by the record that the two respondents were pursuing the matter so that they could get their title. In his replying affidavit sworn on the 14th September 2007 in reply to the application dated 3rd August 2007 the appellant contended that the respondents had already obtained their share of the land and were now asking for more land. Further that the title deeds for plot number 4095 and 4096 were in his name and therefore the panel of elders and the magistrate's court had no jurisdiction to deal with the subject matter.

The report of the District Land Surveyor dated 25th June 2007 does indicate that the two plot numbers **BUTSOTSO/INDANGALASIA/4095** and **4096** are equal each measuring 0.801 Ha. The surveyor noted that the appellant kept on altering the boundary on the ground. From that report it is established that the original plot number **BUTSOTSO/INDANGALASIA/367** was four acres and it was subdivided into two. The appellant's contention that the respondents are seeking more land is misplaced and contrary to his evidence before the tribunal that he collected his title deed for plot number **BUTSOTSO/INDANGALSIA/4096**. It is therefore meant that plot number **4095** was to be transferred to the respondents.

Section 159 of the **Registered Land Act** as cited by the appellant empowers the subordinate court to handle civil suits where the value of the subject matter in dispute does not exceed 25,000 pounds. That amount multiplied by KShs.20 translates to KShs.500,000/=. The land was bought for KShs.170,000/=. I therefore find that the subordinate court had the jurisdiction to entertain the dispute. The appellant is simply trying to be difficult as it is clear that he had refused to transfer plot number 4095 to the respondents. There is no evidence that the respondents had already been given the land they had purchased from the appellant. There is no evidence that plot number 367 was more than four acres. It was the appellant's evidence before the tribunal that he had sold two acres to the respondents out of plot number 367. That being the case and the plot having been subdivided into two, I do find that this appeal is simply intended to take the respondents round in circles and does not serve any purpose. The appellant does not tell the court which plot he transferred to the respondents in satisfaction of the consideration of KShs.170,000/=. By the time the matter was filed before the tribunal the subdivision had already been done and it was not the tribunal that ordered the land to be subdivided.

In the end I do find that the appeal lacks merit and the same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 30th day of July 2012

SAID J. CHITEMBWE

JUDGE