Simiyu v Simiyu (Environment and Land Appeal 41 of 2019)
[2022] KEELC 3845 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3845 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 41 OF 2019

BN OLAO, J

JULY 28, 2022

BETWEEN

JANET NAMWENYA SIMIYU ..... APPELLANT

AND

PETER NJILANIA SIMIYU ..... RESPONDENT

(Being an appeal arising from the decision of the KANDUYI LAND DISPUTES TRIBUNAL in Case No 19 of 2009)

JUDGMENT

1. The dispute relating to the ownership of the land parcel No East Bukusu/North Sang'alo/2919 (the suit land) between Janet Namwenya Simiyu (the appellant) and Peter Njilania Simiyu (the respondent) was heard by the Kanduyi Land Disputes Tribunal (the Tribunal) under the provisions of the now repealed *Land Disputes Tribunal Act*. In their award dated October 5, 2009, the Tribunal found in favour of the respondent and made the following award: -

"AWARD

1. From the witnesses and documentary evidences (sic), the Panel of Elders has found the claimant (peter Njilania Simiyu) a rightful owner of the disputed land hived from parcel No East Bukusu/North Sang'alo/2919.
2. The panel of elders unanimously orders the objector to vacate the disputed parcel of land with immediate effect to allow the claimant develop it more.
3. The Administrator to process a title deed for the claimant (Peter Njilania Simiyu).
4. Enclosures: Documents marked CL OR OB & E.K."

2. The award was signed by the panel members on October 5, 2009 and on November 11, 2009, it was adopted as a Judgment of the court in Bungoma Chief Magistate's Ldt Case No 46 of 2009. A decree followed.

3. The appellant, who was the objector in the Tribunal, was aggrieved by that award and subsequent Judgment and moved to the Kakamega Provincial Appeals Committee (the Committee) as was then the law under section 8 (1) of the now repealed *Land Disputes Tribunal Act*.

4. However, due to several lapses at the Kakamega Provincial Commissioner's Office where the Committee was domiciled including lack of funds to enable the committee carry out it's mandate and the fact that the parties continued to engage both the committee and the Magistrate's Court with several applications, the appeal remained un – determined. It was not until 2014 that the appeal was finally forwarded to this Court *vide* letter dated August 6, 2014.

5. The appeal was subsequently placed before this court on October 7, 2019 when both parties sought time to engage Counsel. Later on, by an application dated February 24, 2020, the appellant was granted leave to file an amended memorandum of appeal. Then it took a while before the record from the Magistrate's Court Bungoma was submitted. The appeal was admitted to hearing on June 24, 2021.

6. The following grounds of appeal were proffered by the appellant: -

    1. The Tribunal erred in law and fact in hearing the respondent's claim without serving and/or notifying the appellant.

    2. The Tribunal erred in law and fact in entertaining the respondent's claim when he did not have locus standi to lay a claim over land parcel No East Bukusu/North Sang'alo/2919.

    3. The Tribunal erred in law and fact to entertain a suit when they did not have jurisdiction.

    4. The Tribunal erred in law and fact in hearing and ruling against the appellant in violation of the rule of natural justice and/or fair hearing.

    5. The Tribunal erred in law and fact generally in acting against the law.

    The appellant sought the following orders: -

    1. The appeal be allowed.

    2. The Tribunal's award and which was read and adopted as an order of the court be reversed and/or be set aside.

    3. The respondent to meet costs of this appeal and costs in the Subordinate Court.

7. I directed that the appeal be canvassed by way of written submissions. These were filed both by R Wamalwa instructed by the firm of Emmanuel Wanyonyi & Company Advocates for the appellant and by Ms Ratemo instructed by the firm of K Ratemo & Associates Advocates for the respondent.

8. I have considered the record, the memorandum of appeal and the submissions by counsel.

9. From the record of proceedings before the Tribunal, the respondent's claim was that although he purchased a portion of land measuring 25 feet by 100 feet from one Damara Wamalwa out of the land parceL No East Bukusu/ North Sang'alo/2919 while living with the appellant as man and wife, their relationship came to an end when she accused him of being behind the death of her son from another relationship and who had died in a road accident. She then organized for a gang led by Timothy Simiyu And Chrisantus Wekesa to attack him on September 20, 2008. He reported the incident to the chief

and also to the village elder at Bukembe village since he had lost trust in her. And although the chief asked her to apologize, she refused. The two did not have any children although the appellant had three (3) children from another relationship when the respondent met her, started paying her rent and later took her in as a wife. But when he addressed the Tribunal during the hearing, his plea was: -

> "I claim Janet Namwenya to vacate my plot which I bought from Damara Wamalwa On November 18, 2003 because I was just keeping her as a friend and the friendship is now broken."

The record shows that the respondent called five (5) witnesses during the hearing who testified in support of his claim. These were Patrick Misiko Wamalwa, Susan Amis Misiko, Francis Makokha Kalamu. Henry Barasa Okumu And Peter Wekesa Mulundu. The Tribunal members also visited the plot which they found had just recently been purchased.

10. The record shows further that although the appellant was served twice with summons, she did not attend the hearing but only came to the site during the visit and became violent.

11. The Tribunal having considered the evidence before it arrived at the award which I have reproduced above and which was subsequently adopted as a Judgment of the subordinate court and a decree followed.

12. In ground 1 of the appeal, the appellant faults the Tribunal for hearing the respondent's claim without serving her. However, the record shows that she was served twice but refused to attend the hearing. Before arriving at the award which it did, the Tribunal made several findings two of which are relevant for purposes of this ground of appeal. These are: -

> 11: "Though the objector was seen at her home, she stubbornly refused to attend the hearing despite the fact that she was twice served with summons."
>
> 12: "During the second hearing on the site, the objector appeared at the meeting apparently to disturb, scold and curse the panel and the crowd and was indeed violent."

There is nothing to suggest that the above record is not a true reflection of what transpired during the Tribunal proceedings or that the record is concocted. In his submissions, counsel for the appellant has stated thus: -

> "In this appeal, we are submitting that the panel of elders proceeded with the case in the absence of the appellant. At page 10 of the record of appeal, the panel of elders simply stated that the appellant was served to attend the Tribunal two times. There is no documentary evidence to show that the appellant was ever served. Neither did the panel stated (sic) how the appellant was served. The panel does not stated (sic) who serve (sic) the appellant and when.
>
> Your Lordship, it is trite law that however bogus one's defence may be, he has to be given a chance to be heard."

It is true that the record of the Tribunal does not have copies of any summons served to the appellant. Indeed, there is no record of any summons having been served upon the respondent as well or even to the five (5) witnesses who attended and testified before the Tribunal during the two days i.e. July 24, 2009 and August 7, 2009. However, I am not in the least persuaded that the appellant had no notice of the Tribunal hearings. Firstly, there is nothing to suggest that the Chairman of the Tribunal and it's members had any reason to decide to hear the matter without notifying the appellant. The appellant has not mentioned that the Tribunal members harboured any ill will against her which would

have motivated them to keep her away from the proceedings. Whereas this Court notes that under the schedule to the repealed *Land Disputes Tribunals Act* Form B issued under rule 3(2) of the Rules provides for a notice of the hearing of the complaint which is to be served as provided under the *Civil Procedure Rules*, it must be remembered that such proceedings are not, stricto sensu civil proceedings as known in law. Indeed, the fact that the Tribunal was composed of either two or four elders (as provided under section 5 of the Act) is proof of that. I take the view that so long as the Tribunal notified a party in any manner, about the date and place of the hearing, that would suffice. I am not persuaded that the Tribunal could have recorded that the appellant "stubbornly refused to attend the hearing despite the fact that she was twice served with summons," or that the appellant "appeared at the meeting apparently to disturb, scold and curse the panel," unless that infact happened. The Tribunal as I have already stated, had no motive to place that on record unless it actually happened and the fact that no copies of summons were filed does not derogate from the fact that the appellant was served to attend the hearing but refused to attend.

13. It is also instructive to note that when the appellant first filed her appeal in person at the Committee, she did not raise as a ground of appeal that she was not served. Yet that is now a key plank of her appeal. In her un – dated Application File Appeal Against The Decision Of The District Land Disputes Tribunal (Form R5) the appellant wrote the following in paragraph 4(c) on particulars of appeal: -

> 4(c) "Specific grounds of appeal:
>
> > I bought the land from Mr Patrick Misiko Wamalwa and mr peter njilania was a witness to the sale agreement."

If she had not been served to attend the hearing, that ought to have been a ground of appeal. The irresistible conclusion is that the ground alleging failure to serve or notify her is a mere afterthought. It is for dismissal.

14. In ground 2, the Tribunal is faulted for entertaining the respondent's claim when he "did not have locus standi to lay claim thereto over Lr No East Bukusu/North Sang'alo/2919." Nothing can be further from the truth. The term "*locus standi*" has been defined in *Black's Law Dictionary* 9th edition as: -

> " The right to bring an action or to be heard in a given forum."

The Court of Appeal in *Alfred Njau & Others v City Council Of Nairobi* 1983 eKLR put it in the following terms: -

> " The term *locus standi* means a right to appear in court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding."

hat he had taken care of the respondent and her children, he personally raised the funds to purchase a plot measuring 25 feet by 100 feet from Damara Wamalwa to be curved out of the land parcel No East Bukusu/North Sangalo/2919. The consideration was Kshs 40,000/= part of which he raised by selling land at his home. But when their relationship hit the rocks, he decided to withdraw his good will and wanted her to vacate the plot. His testimony was corroborated by that of his witnesses. Clearly, nobody else had a greater claim to the plot than the respondent. It is therefore preposterous for the appellant to allege that the respondent had no locus standi to approach the Tribunal seeking orders that the appellant vacates the plot. That ground is devoid of merit and must also be dismissed.

15. Ground 3 assails the Tribunal for entertaining a suit in which it had no jurisdiction. The jurisdiction of the Tribunal was circumscribed under section 3(1) of the repealed law as follows: -

> " Subject to this act, all 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."

It is the submission of Counsel for the appellant that since the suit land was not in the name of the respondent at the time of the trial, then the Tribunal had no jurisdiction to hear and determine the dispute. Counsel for the respondent has however submitted that this was a claim to occupy land and so the Tribunal had jurisdiction.

16. Earlier in this Judgment, I captured what the respondent sought from the Tribunal. It is worth repeating because that was the gravamen of his claim. His closing remarks when he testified were: -

> " I claim Janet Namwenya to vacate my plot which I bought from Damara Wamalwa on November 11, 2003 because I was just keeping her as a friend and the friendship is now broken."

It is not therefore clear on what basis the appellant is questioning the Tribunal's jurisdiction. The respondent's complaint hinged on trespass and a claim to occupy land. Those are remedies that the Tribunal could grant as provided in section 3(1) of the repealed law. And by the time that the Tribunal was making it's award which I have captured elsewhere in this Judgment, the plot measuring 25 feet by 100 feet had already been hived from the suit land although no title had been issued. That is why the Tribunal ordered the appellant to vacate the plot and allowed the respondent to obtain his title. The respondent had no dispute with the registered proprietor of the suit land. His dispute was with the appellant who was essentially a trespasser on the plot measuring 25 feet by 100 feet. Where the dispute fell within the parameters of section 3 (1) of the repealed law, it did not matter whether or not the land was registered. The caveat discussed in cases such as *Jotham Amunavi v Chairman Sabatia Division Land Disputes Tribunal & Another* CA Civil Appeal No 256 of 2002 only apply where the dispute relates to title to registered land. However, as was held in *R v Chairman Land Disputes Tribunal Kirinyaga District & Another Ex – Parte Kariuki* 2005 2 KLR 10, where the dispute, like in this case, fell within section 3(1) of the repealed law, it did not matter whether or not the land in question was registered under the Registered Land Act.

17. Ground 3 of the memorandum of fail is therefore dismissed.

18. By the same token, ground 4 of the appeal in which the Tribunal is faulted for acting against the law must also be dismissed. As I have already stated above, the Tribunal properly exercised the powers bestowed upon it under section 3(1) of the repealed law. There is no merit in that ground.

19. Finally, the Tribunal has been faulted for hearing the claim against the appellant in violation of the rules of Natural Justice and Fair hearing. Of course article 50(1) of the *Constitution* is coached in very clear terms. It says: -

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and important tribunal or body."

20. Article 47(1) of the *Constitution* also provides that: -

> " Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

And in the landmark case of *Ridge v Baldwin* 1964 A.C 40, the rules of Natural Justice and in particular the right to a fair hearing (*audi alteram partem* rule) were clarified. These are: -

1. The right to be heard by an unbiased tribunal.
2. The right to have notice of the charges.
3. The right to be heard in answer to those charges.

There is no doubt that the right to be heard in inalienable. However, as I have already stated elsewhere in this Judgment, the appellant's allegation that she was not notified about the hearing is not true. This court accepts the record of the Tribunal that she was served but "stubbornly refused to attend the hearing" and during the visit to the site, she went there only "to disturb, scold and curse the panel and the crowd and was indeed violent." A real drama queen, it would appear. The bottom line, however, is that she was given an opportunity to be heard but squandered it. She cannot now turn around and complain that the dispute was heard in her absence. In *Union Insurance Company Of Kenya Ltd v Ramazan Abdul Dhanji* CA Civil Appeal No 179 of 1998, the Court of Appeal stated thus: -

> The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it." Emphasis mine.

Therefore, while the right to be heard is a basic natural justice concept, it is also not infinite or a bottomless pit. The appellant should have expended her energy by attending the hearing at the Tribunal where she had the opportunity to demonstrate why she should not have been ejected from the suit land rather than scolding, cursing and disturbing the members. And as is now clear from the record, the respondent has since obtained a title deed for his portion of the suit land being East Bukusu/ North Sang'alo/4842 dated March 26, 2010. This appeal was really an academic exercise.

21. Ground 4 is also for dismissal.

22. Ultimately therefore, this appeal is devoid of any merit. It is accordingly dismissed with costs to the respondent.

Boaz N. Olao.

J U D G E

28th July 2022.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 28TH DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 18TH MAY 2022.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

28th July 2022.