



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL APPEAL NO. 181 OF 2009**

**JUDITH AKINYI OBIERO .....APPELLANT**

**VERSUS**

**DORINA NDEGE ONYURO .....1<sup>ST</sup> RESPONDENT**  
**GILBERT NDEDE OKELLO .....2<sup>ND</sup> RESPONDENT**  
**CLARICE AKINYI .....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The appellant herein moved to the seat of justice and filed Nyando SRMCC No. 303 of 2009, and filed a plaint dated 20<sup>th</sup> day of July 2009, and filed on the 27<sup>th</sup> day of October 2010. In a summary form the salient feature of the same are as follows;-

- That she is a daughter in law to the first defendant.
- The first defendant was the registered owner of land parcel number KISUMU / SONGHOR / 220.
- Out of the total acreage comprised in the said title the appellant / plaintiff was entitled to 8 (ha).
- The appellant was to get the said acreage upon subdivision but instead of giving her, her share, the first respondent transferred the land to the 2<sup>nd</sup> and 3<sup>rd</sup> respondent.
- The appellant became aggrieved and took the dispute to the land disputes tribunal which awarded her the land.
- The 1<sup>st</sup> respondent became aggrieved and then moved to the provincial appeals, board which allegedly up set the decision of the first tribunal and ruled in favour of the first Respondent.
- That decision prompted the appellant to move to the lower court seeking among others an order that the resultant subdivisions of parcel number, KISUMU .SONGHOR/220 namely KISUMU / SONGHOR /927 and 928 and transferred the same to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent / defendants should be faulted.
- The appellant / plaintiff therefore sought orders from the lower court to have the resultant subdivisions cancelled and the original title number restored after which the court issue an order for the appellant to be given her share of the original title number.

The defendant had filed a defence dated 5<sup>th</sup> day of August 2009 and filed the same date and the salient features for purposes of the record are as follows:-

- Concedes existences of land dispute tribunal case no 10 of 2008, which ruled in favour of the appellant which decision was appealed against by the first Respondent vide appeals case No. 25 of 2009, which was decided in favour of the 1<sup>st</sup> Respondent.
- Vide paragraph 5, that the transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was procedurally done and it is proper and should not be upset.
- That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are purchasers for value without notice and their purchase should not be upset as the 1<sup>st</sup> defendant as the owner of the suit land was entitled to deal with the said land as he wished anchored on the said plaint was a Chamber summons application dated 20<sup>th</sup> day of July 2009, and filed on the 27<sup>th</sup> October 2010, seeking among others an order of a mandatory injunction against the defendants / respondents compelling and or restraining them from interfering with and or alienating plot no title No. KISUMU / SONGHOR / 220, title number KISUMU / SONGHOR / 928 and title No. KISUMU / SONGHOR / 927 measuring (12.80), HA (8.0) (4.80) HA pending hearing and the determination of the application, an order that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants be compelled to restore and / or restitute plot of land No. KISUMU / SONGHOR / 220, title No. KISUMU/SONGHOR / 928, KISUMU / SONGHOR / 927 measuring (12.80) HA (8.0) HA respectively to original plot No. KISUMU / SONGHOR / 220, an order that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> defendants be compelled to transfer (10.0)HA from the original title land No. KISUMU / SONGHOR / 220, KISUMU / SONGHOR / 927 and KISUMU / SONGHOR / 1928 respectively to the plaintiff / applicant. An order that the land Registrar Kisumu to be ordered to facilitate the transfer of original title No. KISUMU / SONGHOR / 220, title NO. KISUMU/SONGHOR/ 928, KISUMU / SONGHOR / 927 after total approximate area of (10.0) HA to the plaintiff as was ordered by the Honourable Court in favour of the plaintiff / applicant.

The interim application was opposed by a means of a replying affidavit whose contented reiterated the content of the defence afore set out herein. Parties were heard on their merit and the said arguments gave rise to the ruling delivered by the lower court on 26<sup>th</sup> November 2009. The salient feature of the said ruling are as follows:-

- The courts' assessment of the facts as deponed to by the plaintiff and the defendant tend to suggest that the subject property KISUMU/SONGHOR / 220 belonged to the 1<sup>st</sup> defendant who was the registered owner.
- That the plaintiff is a daughter – in law to the first defendant .
- That the first defendant preferred an appeal to the Provincial Land Appeal Committee Nyanza being appeal No. 25 of 2009 and which was heard on 16<sup>th</sup> June 2009.
- That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are purchasers for value without notice.
- The plaintiff being a daughter – in law to the first defendant and being aggrieved by the 1<sup>st</sup> defendants action not to give her 8 HA of parcel No. KISUMU / SONGHOR / 220, referred this matter to the land disputes tribunal which gave her 16 acres.
- That the 1<sup>st</sup> defendant was however not satisfied with that decision and she referred the matter to the Provincial land Disputes Appeals Committee.
- That the Provincial Appeals Committee decided that since title deed had been issued for the land, it had no jurisdiction over the matter.
- The plaintiff never challenged that decision but decided to file the present suit and application.

- The plaintiff / Respondent ought to have moved the high court and not this court.
- The plaintiff was seeking relief inter alia a mandatory injunction and cancellation of title deeds and as such it cannot grant the prayer sought.
- An order for cancellation can only be granted by the high court.
- As for mandatory injunction, courts are reluctant to grant the said orders unless if it can be shown that there are special circumstance and the case is a clear once which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied
- With respect to the counsel for the applicant no exception as circumstances in this case and more over the first respondent was the original owner of the subject land in dispute and therefore had an indefeasible title to the same and the applicant cannot say she had a right over it.
- In any case the applicant admits in her pleadings that the 1<sup>st</sup> applicant was the owner.

In the circumstances, stated that there was nothing to justify a mandatory injunction on the interlocutory application and for the reasons given dismissed the application.

The appellant became aggrieved and moved to this court by way of an appeal dated 8<sup>th</sup> day of December 2009, citing 12 grounds of Appeal namely, that the learned trial magistrate erred both in law and in fact in:-

- (i) Failing to appreciate the law on an interlocutory injunction by failing to appreciate that a claim seeking an injunction based on equity cannot be dismissed summarily without going into the merits of the case.**
- (ii) By failing to appreciate the Honourable court's own ruling and orders dated 16<sup>th</sup> October 2009, that there was no Bonafide Provincial Land Disputes Tribunal award for adoption as required by law.**
- (iii) Failed to appreciate that the application or suit was not only between the appellant and the 1<sup>st</sup> Respondent but between the appellant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are not parties to the said adopted Land Dispute Tribunal Award dated 23<sup>rd</sup> October 2008**
- (iv) To rule against an adoption orders of the same court when there is no order reviewing an earlier court order of land dispute tribunal award.**
- (v) To find / rule that all the defendants including 3<sup>rd</sup> defendants/respondents filed replying affidavits to the application and a further affidavit as required by law.**
- (vi) By failing to appreciate that the respondent conspired to defeat the adopted judgment of the Honourable Court dated 23<sup>rd</sup> October 2008 which was a subject matter adopted from a Land Disputes Tribunal on beneficiary interest.**
- (vii) By failing to appreciate that the 1<sup>st</sup> respondent could not sell or transfer a title already subject of a court judgment as adopted on 23<sup>rd</sup> October 2008, before the same is revoked or quashed by a court of law.**
- (viii) By finding out that the first defendant referred the matter for appeal which appeal was allowed and subsequently adopted in Kisumu case No. 37 of 2009 when the plaintiff was not a party to the said adoption.**

**(ix) By failing to appreciate that the appellant was awarded 16 acres by the Land Disputes Tribunal as was adapted by the Honourable Court as a result of beneficiary interest and adverse possession after staying on the parcel of land No. KISUMU /SONGHOR /220 for over 20 years, and they extracted order does not show the subject matter or show 2<sup>nd</sup> and 3<sup>rd</sup> respondents as parties to the same.**

**(x) By failing to appreciate that it had jurisdiction or power to trace and/or provide relief and cancel a title deed under equity.**

**(xi) By failing to appreciate that there existed exceptional circumstances in this case to justify the grant of a mandatory injunction on the interlocutory application.**

**(xii) Did not conform to the provisions of Order XX Rule 4 and 5 (A) of the Civil Procedure Act, and / or failing to appreciate that the said purported 2<sup>nd</sup> adoption was done to an already alienated or subdivided and transferred Land in disregard to the Court adopted judgment / Tribunal proceedings.**

Further from the record it is evident that a preliminary objection had been filed on two front.

**(i) That the application is fatally defective for failing to comply with the mandatory provisions of Order L 15 (2) of the Civil Procedure Rules.**

**(ii) That this honourable court lacks jurisdiction to entertain the present suit regard being no jurisdiction of courts under the Registered Lands Acts Chapter 300 law of Kenya.**

The lower court proceedings reveal that the preliminary objection was argued between pages 39 – 43 and Ruling given at pages 43 – 45. **At page 45 line 11 from the bottom the learned trial magistrate appreciated the fact that the issue before court was a land matter which had been deliberated before a land disputes tribunal, judgment given in favour of the appellant where upon the first respondent appended to the provincial appeals board which declined jurisdiction because the land was registered and referred parties to seek help in the high court but neither party did so and instead of resorting to the high court the appellant moved to the lower court to seek reliefs that the issue of peculiarly jurisdiction could not arise because the court, had not been told what the value of the land was in order to make an informed decision. Further that no prejudice was suffered by the defendant for failure to comply with the provisions of Order L Rule 15 (2) of the Civil Procedure Rules and that the same was an error that could be corrected on that note the preliminary objection was rejected and the interim application argued on merits**

Only counsel for the appellant filed written submissions and made oral representations, the Respondents counsel having failed to attend court despite notice. A perusal of both the written skeleton arguments and the oral representations are simply a reiteration of the content of the grounds of appeal already set out herein.

The grieving findings of the learned trial magistrate have already been set out herein but in a summary form these are

(i) That the original land bore the registration number KSM/SONGHOR / 220.

(ii) That the land dispute tribunal gave the appellant 16 acres out of this land.

(iii) The said decision of the land dispute tribunal was forwarded to the magistrate's court and adopted as a judgment of the lower court.

(iv) That the 1<sup>st</sup> Respondent moved to the Provincial Land Disputes Tribunal purporting to appeal against that decision but the Provincial Appeals Tribunal declined jurisdiction since the land had title and referred parties to the high court.

- (v) That neither party moved to the high court and instead the appellant moved to invoke the lower courts' jurisdiction.
- (vi) That at the interim stage, the appellant was seeking a mandatory injunction and cancellation of titles numbers KSM / SONGHOR / 220, 928 and 927 and an order compelling the 1<sup>st</sup> Respondent to transfer 8 hectares to the appellant
- (vii) The lower court has no jurisdiction to cancel a title deed.
- (viii) That a mandatory injunction can only be issued in clear cases whose facts are clear and simple and could be dealt with in a summary manner but on the facts before the magistrate there were no special circumstances.
- (ix) That the first defendant as an owner had an indefeasible title to the same and since this was admitted by the appellant in her pleadings, she cannot say she had a right over it.

As an appellate court its mandate is to reevaluate the facts before the lower court, and then determine whether the conclusions reached by the lower court are to hold or not with power

**(a) To determine the issues finally**

**(b) Frame issues and refer them to the lower court for trial and or require additional evidence to be taken either for purposes of disposing off the matter at the lower court level or for purposes of finally determining the suit in the lower court or for remitting the same to the high court for purposes of disposal of the appeal.**

This court has dully applied that mandate to the conclusions reached by he lower court as set out above, and it is satisfied that the conclusions reached by the lower court cannot stand and the appeal is allowed for the following reasons:-

**(i) It is evident that land parcel number KSM/SONGHOR / 220 existed before the appellant moved to the land dispute tribunal to seek relief it is now trite that the mandate of the land dispute tribunal is limited to matters specified in Section 3 of the land disputes tribunal Act No. 18 of 1990 now Cap 303 A Laws of Kenya that this court has judicial notice of namely:-**

**(a) Right to work land**

**(b) Boundary disputes.**

**(c) Beneficial interest short of claim to ownership of title.**

There is no jurisdiction to adjudicate over issues relating to ownership of registered land. This court has judicial notice of the fact that these provisions have been construed by both the court of appeal and the superior court and there is agreed consensus concerning the law on this aspect that the land disputes tribunal as well as the provincial appeals board have no mandate to adjudicate over issues relating to registered land. This court has no doubt that this is the reason as to why the provincial appeals board declined jurisdiction and referred the parties to the high court.

**(ii) The net result of the position in number 1 above means that although the appellant had a genuine complaint she directed the same to a wrong forum which had no jurisdiction to entertain the same and confer benefits It therefore means that although the appellant has an award from the tribunal proceedings which was adapted as a judgment of the court, the same is in capable of passing title to her by reason of it being an empty shell for it being a nullity and courts of law cannot shield nullities.**

**(iii) These issues should have been tackled at the preliminary objection level where by the lower**

**court could have revisited the law and determined whether there was a prima facie case with a probability of success or not and then give directions on the way forward.**

**(iv) The court agrees with the lower court that it had no jurisdiction to issue final orders at an interlocutory stage, but faults it for not being bold enough to advise the parties that the relief being sought was in fact in vain in law.**

**(v) For the reason given in number 1 – 4 above although this court is inclined to allow the appeal, it is being done solely to bring litigation to an end and for purposes of re-opening the lower court proceedings so that parties can be restored back to their position ante in the lower court, conclude the lower court proceedings by way of termination of the lower court proceedings, and then commence proceedings which will enable the appellant realize her rights.**

**(vi) From the record it is clear that the appellant was pursuing rights of a beneficial interest based on trust and adverse possession. These are rights reserved for adjudication by the high court via originating summons proceedings and not by way of a plaint addressed to the lower court.**

**(vii) Upon presentation of the originating summons in the high court the appellant will be at liberty to seek interim protective orders therein to protect her interests until her rights are finally determined.**

**(viii) Since the appellants claim in the lower court was based on nullity each party will bear own costs**

**Dated, signed and delivered at Kisumu this 8<sup>th</sup> day of July 2011.**

**R. N. NAMBUYE  
JUDGE**

RNN/aao