



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO. 147 OF 2009**

**SECRETARY KATEN  
ASSOCIATION.....PLAINTIFF**

**VERSUS**

**GRACE AYUGI & MARCELLA  
MAHULO.....RESPONDENT**

**J U D G M E N T**

The appellant herein moved to the seat of justice vide a memorandum of appeal dated 14<sup>th</sup> day of September 2009 and filed in October 2009. Four grounds of appeal are raised namely:-

- (1) That the judgment delivered by the honourable tribunal is a nullity in law.**
- (2) That the honourable tribunal erred in referring the matter to the high court.**
- (3) That the honourable tribunal's decision is contrary to law.**
- (4) That the honourable tribunal erred in making a decision that it is incapable of being executed.**

In his written submissions to court counsel for the appellant reiterated the grounds of appeal and then stressed the following:-

- There is in place Kisumu district land disputes tribunal case number 24 of 2006 in which the

respondents were claimants and the appellant was a respondent. The claimants were awarded parcel number Kanyakwar A/27 to the respondent family who held land parcel number 148.

- The appellant being aggrieved by the said decision filed appeal to the Nyanza provincial appeals committee.
- Contends that the tribunal committed an error in that instead of determining the appeal it abdicated that hearing to the high court.
- That this court should exercise its appellate jurisdiction and determine the matter finally.

The respondents filed brief submissions to the effect that the Nyanza provincial appeals committee was entitled to decline jurisdiction and refer the matter to the high court as it lacked jurisdiction on account of the land having two titles.

On case law, the court was referred to the case of Asumani Maloba –VS- Peter Juma Matumbai, Kisumu CA 105 of 2002 delivered by the court of appeal on the 10<sup>th</sup> day of March 2005. The central theme in this judgment is found at page 4 of the judgment which is to the effect that **“if the learned judge felt that the issue of jurisdiction of the high court over the said matter was an issue, then she should have dealt with the same as a preliminary issue”**.

The case of Julius Oduor Odhiambo administrator of the estate of the late Nyando Ayoo Oguda – VS- Regina Akoth Omondi Kisumu HCCA No. 55 of 2007 delivered by J.R. Karanja judge on the 23<sup>rd</sup> day of October 2009. At page 9 line 6 from the bottom the learned judge made the following observations:-

**“Issue pertaining to the tribunals jurisdiction to deal with ownership of land which is registered is a point of law which may render a decision of the tribunal null and void. Jurisdiction is every thing and while a court or tribunal exercises a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”**.

At page 8 line 2 from the top the learned judge set out the mandate of the land disputes tribunal jurisdiction thus:-

**“The jurisdiction of a land tribunal is limited to what is specified under section 3 (1) of Act No. 18 of 1990 in that:- “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 mark land, or**
- (c) **Trespass to land shall be held and determined by a tribunal established under section 4”**.

Then at line 10 from the bottom went on thus:-

**“Therefore any decision of a land tribunal made in excess of or without necessary jurisdiction would be null and void abinitio”.**

**There would be nothing to appeal from and if there was an appeal to the appeals committee the decision of the committee would also be null and void. A tribunal which purports to adjudicate on a matter of ownership of registered land would be acting in excess of jurisdiction.**

At page 9 line 13 from the bottom the learned judge drew inspiration from the case of Sir Ali Bin Salim – VS- Shariff Mohamed Shary [1938]KLR 9 where it had been held inter alia that:-

**“If a court has no jurisdiction over the subject matter of the litigation, its judgment and orders however precisely certain and technically correct are made nullities and not only voidable, they are void and may not only be set aside at any time by the court in which they are rendered but be declared void by every court in which they may be presented. It is well established that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or deficit of jurisdiction”.**

At page 11 thereof also drew inspiration from a court of appeal decision in the case of Jotham Amunavi- VS – The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002, where the court of appeal observed that:-

**“If the implementation of the decision of the tribunal entails the sub-division of the suit land into two parcels opening a register in respect of each sub-division and thereafter the transfer of  $\frac{1}{2}$  acre it is clear that the proceedings before the tribunal related to both title to land and not to the beneficial interest of the land and for this reason it did not fall within the jurisdiction of the land disputes tribunal”.**

This court has given due consideration to the afore set out rival arguments and in this court’s opinion this being an appeal the mandate of this court is as set out in section 78 of the Civil Procedure Act. It reads:-

**“Section 78 (1). subject to such conditions and limitation as may be prescribed an appellate court shall have power:-**

- (a) To determine a case finally.**
- (b) To remand a case.**
- (c) To frame issues and refer them for trial.**
- (d) To take additional evidence or to require the evidence to be taken.**

**(e) To order a new trial.**

(2). Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein”.

This court has given due construction of this provision and applied it to the rival arguments herein and in its opinion the following are own framed question for determination in the disposal of this appeal.

**(1) What are the general observations made by this court on the appeal herein?**

**(2) What concluding orders are to be made by the court herein?**

In respect to questions the general observations on the case as gathered from both sets of the record of appeal are as follows:-

(1) That the root of the proceedings start from Kisumu district land tribunal case number 241 of 2006 in respect of land parcel number Kisumu/Kanyakwar “A”/27.

(2) The first respondent and another moved to the land disputes tribunal seeking claim on the suit land which had been registered in the name of the claimants and a deceased son. The claim was against the appellant Karateng welfare.

(3) The elders awarded land parcel number “A”/27 to the first respondent and his Co. claimant who were alleged to be having land parcel number A/148.

(4) It is alleged the appellant became aggrieved and appealed to the provincial land appeals board vide land case number 36 of 2006. A perusal of a copy of the proceedings reveals that the appeals board made observations that the parties had refused to agree, and had refused to be sworn and since the land has two title deeds, the appeals board referred the matter to the high court for further arbitration.

(5) The said appeals board decision was filed in the CM’s court at Kisumu and adopted as an order of the court on the 10-9-2009, and a decree to that effect extracted.

(6) That the said proceedings had been initiated in pursuance to the provisions of the Land Disputes Tribunal Act No. 18 of 1990.

(7) That the mandate of the land disputes tribunal under the said Act has been clearly spelt out in section 3 of the said relevant act and as already setout herein is simply to adjudicate over disputes relating to boundary disputes, rights to mark the land, claims to beneficial interest on the land.

(8) That it has transpired from a perusal of the proceedings before the tribunal and appeals board, that the land in dispute has two titles but it is not clear as to whether the titles are in different names of the claimants or in one name.

(9) That there is no doubt that the competing interests were over the same parcel of land.

(10) That the appeal from the land disputes tribunals decision to the provincial appeals board was lodged under the provisions of section 8 of the land disputes tribunal act No. 18 of 1990 now chapter 303 A. It reads:-

**8 (1) Any party to a dispute under section 3 who is aggrieved by the decision of the tribunal may within thirty days of the decision appeal to the appeals committee constituted for the province in which the land which is the subject matter of the dispute is situated.**

(2) .....

(3) .....

(4) .....

(5) .....

(6) .....

(7) .....

**(8) The decision of the appeals committee shall be final on any issue of fact and**

**No appeal shall lie there from to any court.**

**(9) Either party to the appeal may appeal from the decision of the appeals**

**Committee to the high court on a point of law within sixty days from the date of the decision complained of provided that no appeal shall be admitted to hearing by the high court unless a judge of that court has certified that an issue of law other than customary law is involved.**

(10) A question of customary law shall for all purposes under this act be deemed to be a question of fact.

(11) A perusal of the record of appeal reveals that the land disputes case No. 24 of 2006 decision was made on the 15-12-2006. The record is silent as to when the appeal was lodged to the provincial appeals board. It is not even clear when parties appeared before the provincial appeals board or when the remarks of the provincial appeals board was made.

(12) It is also not clear when the findings of the provincial appeals board were filed in court but there is an entry to the effect that the matter was mentioned on 21-8-2009 and a date fixed for the reading of the award.

(13) A perusal of the record further reveals that the award was read in court on the 10-9-2009 and that is when the court gave right of appeal within 30 days.

(14) The memorandum of appeal was lodged in this appellate court on the 13<sup>th</sup> day of October 2009 within the 30 days given.

(15) It is clear that the appeal from the provincial appeals board was not filed direct from the provincial appeals board to the high court, but it arises from the confirmation of the award by the lower court hence the twining up of the heading of the appeal to read as appeal both from the provincial appeals board and from the confirmation of the award by the lower court.

This court has given due consideration to the afore setout general observations made by the high court and considered them in the light of arguments herein as well as the provisions of the land disputes act No. 18 of 1990 now cap 303 A and this court's opinion is that there is an issue that arises as to whether the proceedings are properly before this court on the one hand, and on the other hand whether the appeal has merits. This being the case it is prudent for this court to interrogate the technical aspect first because if it is upheld then there will be no need to interrogate the merits save for purposes of jurisprudence and completeness of the proceedings.

The technical aspect arises because there is no disputes that the proceedings arose and were granted by the land disputes tribunal act No. 18 of 1990 now cap 303 A which has provision on how proceedings should progress from one forum to another vide section 8 (1) of the said act, any aggrieved person has a right to appeal to the provincial appeals committee within 30 days of the making of the award. This process was exhausted and no issues arises.

It is not disputed that indeed the matter went to the provincial appeals committee and there were no deliberation because the parties failed to agree, refused to be sworn and were thus referred to the high court.

The reference to the high court by either party from this forum lies to the high court and the same lies under section 8 (a) of the said act. The appeal has to be lodged direct to the high court within 60 days. Form the record of the proceedings before the lower court the award of the provincial appeals board was made on 17-6-2009. Sixty days from this date would end on or about 17-8-2009. It is clear that no appeal was filed by either party directly from the decision of the provincial appeals board to the high court, in fact from the first entry of 21-8-2009 in the lower court proceedings record, the lower court became seized of the matter after right of direct appeal from the provincial appeals board to the high court had lapsed.

As mentioned, the award was read in court and the lower court gave right of appeal to the high court direct from its decision. The jurisdiction of the lower court is provided for in section 7 of the said Act. It reads:-

**“Section 7 (1) the chairman of the tribunal shall cause the decision of the tribunal to be filed in the magistrate's court together with any deposition or documents which have been taken or proved before the tribunal.**

**The court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall issue and should be enforced in the manner provided for in the Civil Procedure Act”.**

Section 8 is silent as to what is to happen to the decision of the appeals board short of an appeal to the high court. But the court has judicial notice of the fact that these too are usually filed in the magistrate's courts for adoption. Section 7 (2) of the Act does not give the magistrate's court the mandate to give a right of appeal. This means that the right of appeal given to the appellant herein by the lower court is superfluous and non-existent.

This is fore closure of procedure meant that the aggrieved party had no alternative but to turn to judicial review to quash the lower court's decision containing the provincial appeals board decision. In the absence of that procedural step being taken the procedure employed by the appellant to approach the seat of justice is non-existent as it is not provided for by law in view of the provisions of law under which the proceedings were initiated. Being non-existent, it means that the appeal actually does not lie. It is a nullity and for this reason it does not merit a decision on merit.

For the reasons given in the assessment the appellants appeal herein be and is hereby struck out because:-

- (1) Section 8 (a) of the land disputes tribunal act No. 18 of 1990 now cap 303 A only allows appeal to lie from the provincial appeals board to the high court within 60 day (sixty ) of the decision. The appeal herein was not filed in accordance with that provision.**
- (2) There is no mention as to what is to happen to a decision of the provincial appeals board as per the prescriptions in the act but this court has judicial notice of the fact that these too are usually filed in the magistrate's court for adoption.**
- (3) Section 7 (2) of the Act under which adoptions are done does not give the mandate to the magistrate's court to give a right of appeal to the high court.**
- (4) There is no provision for a right of appeal from the confirmation order to the high court.**
- (5) The practice that this court has judicial notice of is that after confirmation the aggrieved party has recourse to judicial review to quash both the confirmation order and the order from the tribunal appeals committee proceedings as the case may be.**
- (6) By reason of what has been stated in Nos. 1-5 above the appellant has no alternative but to turn to other avenue like declaratory orders to seek redress.**
- (7) The respondent will have costs of the appeal.**

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

**ROSELYN N. NAMBUYE**

**JUDGE**

RNN/va