



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Appeal 175 of 2007

**DANIEL WALTER RASUGU OMARIBA
(suing through his Attorney**

**BEUTAH ONSOMU RASUGU)..... APPELLANT
AND**

**JOHANA NYOKWOYO BUTI1ST RESPONDENT
JOSEPH ONDIMU OENDO.....2ND RESPONDENT**

JUDGMENT

The appellant is the registered absolute proprietor of a parcel of land known as **Kitaru Settlement Scheme/55** measuring approximately 1.36 hectares, hereinafter referred to as “**the suit land.**” He was so registered on the 22nd day of December 2003 when a title deed was issued to him pursuant to the provisions of the **Registered Land Act Cap 300 Laws of Kenya.**

On 9th May 2004 the 1st respondent filed a dispute against the 2nd respondent before the Borabu Division Land Disputes Tribunal. The dispute related to the suit land. The appellant was not a party to the said dispute. The said tribunal decided the dispute in favour of the 1st respondent and purported to nullify the appellant’s title deed over the suit land. The award was lodged in Nyamira Senior Resident Magistrate’s court vide Nyamira SRMCC Misc. Application No. 2 of 2005. On 16th February 2005, the award was adopted as a judgment of the court. Subsequently the court record was misplaced and as a result the 1st respondent filed an application dated 21st November 2006 seeking reconstruction of the court file. The orders sought were granted on 25th January 2007. The court also allowed execution of the tribunal’s award.

On 19th February 2007, the appellant, having become aware of the proceedings and award made by the Borabu Division Land Disputes Tribunal which had already been adopted, filed an application seeking, *inter alia*, a review and/or setting aside of the orders made on 25th January 2007. He argued that the Borabu Divisional Land Disputes Tribunal had acted unlawfully by purporting to nullify his title deed without giving him any audience. By that time he had filed a judicial review application vide HCCC No. 38 of 2005 at Kisii seeking to have the tribunal’s decision

quashed. The application was subsequently disallowed because leave had been sought outside the statutory period. Thereafter the appellant filed a civil suit, **HCCC No. 15 of 2006** in the High Court of Kenya at Kisii seeking various declaratory orders. The suit is still pending before this court but the proceedings were stayed awaiting determination of an appeal pending before the Court of Appeal.

In a ruling delivered on 8th of August 2007, Komingoi, SRM, dismissed the appellant's application for review. She held that the tribunal's award, having been adopted as a judgment of the court on 16th February 2005, the court became *functus officio* and therefore had no jurisdiction to entertain the application. It is that ruling that triggered this appeal. In the ruling, the court, on its own motion, granted the appellant a right of appeal to be exercised within 28 days from the date of the ruling. The memorandum of appeal was filed on 31st August 2007.

The appellant set out the following grounds of appeal:

- “1. The Hon. trial magistrate erred in law and fact in adopting a decision of the tribunal when it was manifest that the appellant was not made a party to either the proceedings before the tribunal or those before the Senior Resident Magistrate's court and thus condemning him unheard.**
- 2. The Hon. trial magistrate erred in law and fact in adopting a decision of the tribunal well knowing that the tribunal did not have the jurisdiction to hear and determine dispute over title to a registered land.**
- 3. In adopting the award of the tribunal which did not have jurisdiction the honourable trial magistrate was adopting and enforcing an illegality something which he ought not to have done.**
- 4. In adopting the award of a tribunal which did not afford the interested party a hearing before condemning him the honourable trial magistrate acted in utter disregard of the tenets of the rule of law.**
- 5. The honourable trial magistrate erred and misdirected himself in ordering for the opening and reconstruction of a skeleton file without first demanding that the interested party be served with the hearing notice thereof.**
- 6. The learned trial magistrate failed to appreciate that there was an error on the face of the record in that the appellant was not made a party to the proceedings and the application thereof and the court therefore did not have jurisdiction to alienate the land namely L.R. No. Kitaru Settlement Scheme/55 and have it registered in the names of the 1st respondent without making the appellant a party.**
- 7. The honourable trial magistrate misconstrued and disregarded clear provisions of the Civil Procedure Rules and in particular Order XX rule 6 which provides in effect that it is only parties to a suit against whom execution should issue. In the circumstances of the foregoing the trial magistrate improperly applied the law to the prejudice of the appellant's interest in the aforesaid land.**
- 8. The learned honourable trial magistrate erred in law and fact by allowing the respondent to proceed to execution in utter disregard of the clear provisions of Order XXI rule 18 of the Civil Procedure Rules.**
- 9. In allowing the respondent to execute the decree without the participation of the interested party the honourable trial magistrate had the appellant condemned unheard in the matter.”**

Mr. Migiro for the appellant and Mr. Oguttu for the 1st

respondent made their respective submissions which I have duly considered.

One of the grounds argued by Mr. Oguttu in opposing the appeal was that the appellant filed the appeal without leave of the court. I think counsel simply overlooked the leave that was granted by the subordinate court on its own motion and consequently the appellant did not require to seek any other leave.

With regard to grounds 1, 2, 3, 4, 5 and 6 of the appeal, it is apparent that the appellant's counsel misapprehended the contents of the ruling delivered on 8th August 2007. The learned magistrate did not deal with the merits or otherwise of the decision by the Borabu Division Land Disputes Tribunal. In any event, the court did not have jurisdiction to do so. The court did not also concern itself with the manner in which the tribunal's award was adopted. The court simply held that it was *functus officio* because the tribunal's award had been adopted as required under the provisions of **section 7 (2)** of the **Land Disputes Tribunals Act** which provides as follows:

“The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

In **PETER OUMA MITAI –VS- JOHN NYARARA**, Civil Appeal No. 297 of 2005 at Kisii (unreported), this court held that the provisions of **section 7 (2)** aforesaid do not leave any room for a magistrate to review, alter, amend or set aside a Land Disputes Tribunal's award. A party aggrieved by such an award can either prefer an appeal to the Appeals Committee as provided for under **section 8 (1)** of the **Land Disputes Tribunals Act** if there are reasonable grounds for challenging the decision, by way of a judicial review application before the High Court. A party may also appeal from the decision of the Appeals Committee to the High Court on a point of law. See also **ZEDEKIA M. MWALE –VS- BIKEKE FARM DIRECTORS & ANOTHER**, Civil Appeal No. 25 of 1998 at Kitale (unreported).

With respect to the appellant's counsel, the aforesaid grounds of appeal were not appropriately raised.

That notwithstanding, it is clear that the Borabu Land Disputes Tribunal exceeded its jurisdiction as donated under **section 3 (1)** of the **Land Disputes Tribunals Act**. Such a tribunal is given power to handle disputes of a civil nature relating 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.**

The tribunal did not have power to nullify a title deed and acted outside its jurisdiction. See **JOTHAM AMUNAVI –**

VS- THE CHAIRMAN, SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOTHER, Civil Appeal No. 256 of 2002 at Kisumu. “**Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order.**” It was so held in **KARANJA –VS- THE ATTORNEY-GENERAL**, Civil Appeal No. 310 of 1997 at Nyeri.

The tribunal, being aware that the suit land was registered in the name of the appellant who was not a party to the dispute that had been filed by the 1st respondent, acted contrary to the principles of natural justice by purporting to make orders that had very adverse effects to the appellant’s interests without affording him a right of hearing. But these are matters that will be canvassed in the pending suit before this court, **HCCC No. 15 of 2006**, and perhaps by the Court of Appeal in the pending appeal. They cannot be addressed in this appeal which, as earlier stated, emanated from the trial court’s ruling refusing a review of the orders made on 25th January 2007.

I have considerable sympathy for the appellant but I reiterate that he must pursue his claim in the appropriate manner. I find this appeal incompetent and dismiss the same with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF APRIL, 2010.

**D. MUSINGA
JUDGE.**

14/4/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Soire HB for Mr. Migiro for the appellant

Mr. Oguttu for the respondent

COURT: Judgment delivered in chambers.

**D. MUSINGA
JUDGE.**