



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 297 of 2005

PETER OUMA MITAI APPELLANT

VERSUS

JOHN NYARARA RESPONDENT

**(Appeal from the Ruling/Decision of Hon. L. Komingoi (SRM) in
original Nyamira SRMCC MISC. APPLICATION NO.26 OF 2004)**

JUDGMENT

The respondent filed an application by way a notice of motion seeking, inter alia, stay of execution of a decree and review of a judgment and a decree issued on 13th October 2004 and all subsequent orders made thereunder. The application was made on the grounds that the judgment contained serious mistakes and/or errors apparent on the face of the record. It was further contended that the judgment and decree were emanated from a decision of a tribunal, which had acted beyond its jurisdiction.

The application was opposed by the appellant who filed a replying affidavit to the same. The trial court had earlier adopted an award by Nyamusi Divisional Land Tribunal that was issued sometimes in August 2004. The respondent's advocate submitted before the learned magistrate that the said land tribunal acted beyond its jurisdiction as provided and under section 3 of the Land Disputes Tribunal Act. The tribunal had ordered that a disputed parcel of land be given to the appellant.

The appellant's advocate argued that the respondent participated fully in the deliberations before the said tribunal and did not raise an objection. The respondent had also not preferred any appeal from the decision from the said tribunal, the appellant's counsel added. Counsel further argued that if the respondent was contending that the tribunal had no jurisdiction he ought to have filed an application for judicial review before the High Court.

The learned magistrate held that the tribunal had exceeded its powers and for that reason proceeded to set aside the judgment that had been entered on 13th October 2004. The applicant was aggrieved by the said

ruling and preferred an appeal to this court. He raised the following grounds of appeal.

“1. The learned trial magistrate erred in law and in entertaining an application for review and indeed reviewing an order of a court of a coordinate jurisdiction, adopting the decision of Nyamusi Land Disputes Tribunal as a judgment of the court contrary to the provisions of section 7 of the Land Disputes Tribunal Act No.18 of 1990 the learned trial magistrate erred in and in entertaining the application for review when she was devoid of jurisdiction to do so.

2. The learned trial magistrate misapprehended The extent and limit of her statutory jurisdiction as donated by the Land Disputes Tribunal Act No.18 of 1990, hence the decision appealed against is legally untenable.

2. By hearing and/or entertaining the application for review, the learned trial magistrate sat on appeal on the decision of a court of coordinate jurisdiction and thus acted ultra vires.

3. That the ruling and/or decision of the learned trial magistrate exceeded her statutory jurisdiction, hence is void ab initio, thus deserving to be quashed ex debito justitiae.

4. The learned trial magistrate grossly misapprehended the provisions of Order XLIV of the Civil Procedure Rules and thus arrived at an erroneous decision, contrary to the established principles of law.

5. That in making a decision that the Nyamusi Land Disputes Tribunal had exceeded its powers in arriving at the decision which formed the basis of Nyamira Misc. Civil application 26 of 2004, the learned trial magistrate assumed the special jurisdiction of the High Court without lawful basis.”

In support of his submissions, Mr. Oguttu for the appellant cited the decision of W. Karanja J in ZEDEKIA M. MWALE VS. BIKEKE FARM DIRECTORS AND ANOTHER, Civil appeal No. 25 of 1998 at Kitale. In the decision, the learned Judge held that a magistrate had no jurisdiction to alter, amend, set aside, review or in any manner interfere with a tribunal’s award filed and adopted by a magistrate’s court. She emphasized that section 7(2) of the Land Disputes Tribunal Act compels a magistrate to merely adopt a decision of a Land Disputes Tribunal irrespective of how unjust the

magistrate may deem the award to be.

In response Mr. Bosire for the respondent submitted that the learned trial magistrate was correct in reviewing the said judgment. He added that no award had been filed by the chairman of Nyamusi Division Land Disputes Tribunal. What was filed before the court was an application made by a party. He reiterated that the aforesaid tribunal acted beyond its jurisdiction.

I have considered the submissions made by counsel herein. The jurisdiction of Land Disputes Tribunals is clearly set out in section 3 of the Land Disputes Tribunals Act. The tribunals have power to deal with all cases of a civil nature involving a dispute as to:

- (a) the division of, or all the determination of boundaries to land, including land held in common;
- (b) a claim to occupy or work land; or
- (c) trespass to land

Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal. The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate's court.

“(2). 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.”

That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided for under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise. With respect, I entirely agree with the ruling of W. Karanja J in ZEDEKIA M. MWALE VS. BIKEKE FARM DIRECTORS AND ANOTHER [supra]

In this case the learned trial magistrate was clearly wrong in purporting to review the decision of another magistrate who had lawfully made an adoption order of the Land Disputes Tribunal.

The magistrate's decision was a nullity and this appeal must be allowed with costs, which I hereby do.

DATED, SIGNED and DELIVERED at KISII this 11th day of July, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Ochwangi for the Appellant

Mr. Momanyi HB for Mr. Bosire for the Respondent.

D. MUSINGA

JUDGE