



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 42 of 2001

M'RUKARIA M'MBUI.....APPELLANT

V E R S U S

PRISCILLA GITONGA MUGAMBI.....RESPONDENT

(Being an Appeal from the Ruling of N. Ithiga Senior Principal Magistrate in CMCC No. 54 of 2000 dated 20.3.2001)

JUDGMENT

1. The Appeal herein is based on the following grounds;

That;

- (a) The Learned Magistrate erred in law in disclaiming jurisdiction to implement the law under which he was acting.**
- (b) The Learned Magistrate erred in law in failing to recognize that he could not enter judgment according to the award which award was materially and legally defective.**
- (c) The Learned Magistrate erred in law in failing to recognize the limits set out under the Land Disputes Act upon the Tribunals hearing the matters which the Magistrate could only effect if the award and the procedure of the tribunals comply with parent law and not otherwise (*Sic*)**
- (d) The learned Senior Principal Magistrate contradicted his own logic in stating that he would Enter Judgment but could not set it aside though the same was done ex-parte.**
- (e) The Learned Magistrate erred in law and in fact in failing to recognize that the provisions of the Land Disputes Act were materially flouted by the so-called Tribunals in respect of;-**
 - i. assuming jurisdiction which they did not have.**
 - ii. failing to follow procedure provided as to institution of the suit.**

iii. Failing to follow procedure as to service of the process.

f. That since these proceedings were a complete nullity, the learned Magistrate should not have given them credence by Entering Judgment as per the award and worse still doing so ex-parte without proper service to the appellant.

2. During arguments and for clarity's sake, all the grounds actually center on this single point; what are the powers of a magistrate's court when exercising jurisdiction under S.7 (2) of the Land Disputes Tribunals Act? For avoidance of doubt s. 7 of the Act provides as follows:

"S.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 depositions or documents which have been taken or proved before the Tribunal.

(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".

3. Mr. Kioga submitted forcefully that where a decision of a Land Disputes Tribunal is illegal, materially defective or otherwise irregular in law, then a magistrate's Court in exercise of powers conferred by s.7(2) aforesaid cannot act as an automaton and merely enter Judgment as the sub-section states. That such a court must scrutinise the decision of the Tribunal and determine that it is proper and within known legal procedures before adopting it as a judgment of its own.

4. The arguments leading to the submissions by Mr. Kioga include the assertion that the Tribunal had no jurisdiction to determine questions of ownership of land and that the Respondent had not in any way given concrete evidence that he had title to the land and to warrant an order of eviction of the Appellant. In addition, that all the proceedings of the Tribunal and the magistrate's court were conducted in the absence of the Appellant and the final decision was reached against the dictates of natural justice.

5. When questioned as to other remedies available to a party dissatisfied with the decision of a Land Disputes Tribunal, Mr. Kioga conceded that an appeal to the Provincial Appeals Committee is one such remedy as is an application to the High Court for Judicial Review Orders.

6. Mrs. Ndorongo for the Respondent and with equal force argued that the magistrate's court in invoking s.7(2) of the Act as it did, acted lawfully and could only adopt the decision without interfering with it. Thereafter it would be the forum of enforcement of the decision by the successful party.

7. As regards the mandate of the Tribunal regarding the dispute, Mrs Ndorongo's argument was that the issue before the Tribunal was one of trespass to land and that matter is within the jurisdiction conferred by s.3(1) of the Land Disputes Tribunal Act. An order of eviction is a reasonable consequence of a finding that one party has trespassed into another party's land. In the alternative that if indeed there was no jurisdiction, the place to challenge that lack of jurisdiction would be the High Court and not the Magistrate's court.

8. What necessitated the Appeal and so that the above arguments can find a seating place is this; the Respondent was the Claimant in Meru Central Land Disputes Tribunal Case No. 64/2000 while the Appellant was the objector. Her case was that she was the registered proprietor of title number Ntima/Igoji/4177 and that the Appellant was a trespasser who should be evicted. The objector who was not present was not heard and the members of the Tribunal were careful to note that summons for attendance were issued to the Appellant through the area Chief, but he never attended. The Appellant was apparently aware of the hearings because his advocates wrote to the Tribunal saying that the hearing was improper and should not go on because there was a pending suit between the parties in the High Court which was yet to be heard. The letter was part of the record of the Tribunal and is not contested and my view is that any complaint that the Appellant was denied a hearing at the Tribunal would be unfounded and an unjustified allegation.

9. In any event, the Tribunal decided that based on the evidence before it and since the Respondent had proved title, having legally purchased the land, the Appellant should vacate the land and remove any cautions he had lodged against the title.

10. The Appellant on 17.1.2001 moved the Magistrate's court by way of a Notice of Motion and that Application I think should best be set out hereunder;

“APPLICATION TO SET ASIDE THE ORDERS OF THE COURT AND ALL CONSEQUENTIAL DECREES OR ORDERS EMANATING THEREFROM.

1. That this court deem it fit to stay any execution and also to set aside the following orders:

(a) Order dated 14.9.2000

(b) Order dated 23.11.2000

(c) Order dated 28.11.2000

(d) All consequential orders and decrees arising thereof.

2. That this court find it and to declare that any execution carried on in pursuance of the above orders to be illegal and unlawful and also be set aside.(Sic)

3. That the costs of this application be paid to the applicant herein.

Grounds

(a) That the suit before the so-called Land Disputes Tribunal is illegal and that the said Tribunal had no jurisdiction to hear or entertain any such suits.

(b) That the Tribunal case was No. 64/2000 yet the court case which are the orders purported to be executed was No. 54/2000 a total contradiction of the situation.

(c) That no service was ever effected on the applicant either by the Tribunal or by the court and therefore all orders were obtained ex-parte contrary to all rules of natural justice.

(d) That there are two previously instituted suits before the High Court and before the Chief Magistrate's Court which are still parallel to this Tribunal Case which is an illegal usurpation of the Courts Jurisdiction.

(e) That all the Court Orders were effected without jurisdiction of any court.

11 . It is clear from the above that no law was quoted to support the Application but nonetheless the same was heard on 12.3.2001 and in a brief Ruling delivered on 20.3.2001, N. Ithiga Esq., Senior Principal Magistrate determined that the Magistrates court had no jurisdiction to set aside an award of the Tribunal and dismissed the Motion.

12. That order is now the subject of this Appeal but as is clear from the Memorandum of Appeal and submissions by Mr. Kioga many more matters were added to beef up that one question which I earlier framed; what is the mandate of courts under s.7(2) of the Land Disputes Act?

13. The Preamble to the Land Disputes Act No.18 of 1990 reads as follows:-

“An Act of Parliament to Limit the Jurisdiction of Magistrate’s courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes”. (emphasis added).

14. The Act by its preamble sets its purpose and one is to oust certain powers and by limiting the Jurisdiction of Magistrate’s court. An important pointer to the intention of the Legislature in this regard is that by S.11 of the Land Disputes Tribunal Act, the Magistrates Jurisdiction (Amendment) Act 1981 was repealed once Act No. 18 of 1990 came into operation. Another such limit in jurisdiction would be seen in the provisions of s.159 of the Registered Land Act which provides as follows

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident magistrate’s court or

where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.”

15. S. 159 of the Registered Land Act must always be read with the corresponding provisions of s. 12 of the Land Disputes Tribunals Act. To make the limits in jurisdiction even more graphic s. 13(1) and (2) of the Land Disputes Act provides as follows:

“13(1) where any proceedings to which section 3(1) of this Act applies have at the commencement of this Act, been filed in a magistrate’s court, then unless the court has at that time heard and pronounced judgment thereon, the proceedings shall be discontinued until the dispute has been referred to the Tribunal and determined in accordance with this act.

(2) Where the court has at the commencement of this Act heard the case and pronounced judgment thereon, any appeal there from shall proceed as if this Act had not been enacted.

16. What I am trying to illustrate is that matters falling within s.3(1) of the Land Disputes Tribunal shall be heard by the Tribunals and the magistrates’ court have no jurisdiction as to the merits or demerits of those matters. To do so would amount to assuming Jurisdiction which such a court cannot does not have. What a magistrate’s court can do by law is in mandatory terms:- it “shall enter Judgment in accordance with the decision of the Tribunal”. I shall pause here and return to the arguments by Mr. Kioga. I agree that it is an attractive proposition to say that a court of law seized of a decision of another competent legal body can in certain situations overturn that decision if it is a nullity, irregular or unlawful. However, where statute sets the limits by which such a court can operate, then that court can only operate within those limits and however unreasonable the law in that regard is, it cannot go outside the set parameters. In any event, generally it is only on appeal that the merits or demerits of a decision can be challenged as also is true that the High Court by power of Judicial Review may interrogate the process leading to and

the manner in which a decision is reached.

17. If Magistrate's courts were to start delving into and enquiring into decisions of the Land Disputes Tribunals, then they would be in breach of all the sections of the law I have cited above and the whole purpose for which the Land Disputes Tribunals Act was enacted would be lost. A court such as this may well take the same view as Mr. Kioga based on the logic and reasonability of the position taken by the Appellant but it would not be a view supported by law and the court would then be sabotaging the very law it is supposed to enforce. The answer to the Appellants predicament lies in the Legislature empowering the Magistrate's courts in the manner suggested by the Appellant or taking the following two options amongst others known to law;

(a) filing an appeal to the Provincial Appeals Committee under s.8(1) of the Land Disputes Tribunals Act which provides as follows:-

“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.”

18. The section uses the term “aggrieved” which is defined as “Afflicted, distressed, disturbed, harmed, hurt, injured, saddened unhappy, woeful, wronged”-Concise Thesaurus, Collins, 2000. If the Appellant had any of these issues affecting his impression of the judgment as he clearly did and still does, the avenue of appeal was and is still open to him. The appeal to the Appeals committee would not be the end because all the points of law raised before the lower court and now in this appeal could be raised in the High Court an appeal from the decision of the Provincial Appeals Committee if the Appellant would still be aggrieved.

(b) Seek orders of Judicial Review in the High Court. One of the Complaints raised before the lower court was that the Appellant was not given a chance to be heard at the Tribunal and therefore the Tribunal acted in breach of the Rules of Natural Justice. If that be so, then he still had a remedy known to law instead of imposing jurisdiction on a court without such jurisdiction being properly conferred by law.

19. In conclusion, and in spite of Mr. Kioga's powerful and very persuasive submissions, I do not find that any of the grounds of appeal have merit and the Appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED THIS 22ND DAY OF FEBRUARY 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

Mr. K. Lampo holding brief for Mr. Kioga Advocate for the Appellant

Mr. Riungu holding brief for Mrs Ndorongo Advocate for the Respondent

ISAAC LENAOLA

JUDGE