



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 29 OF 1998

APPELATE SIDE

STEPHEN KORIR APPELLANT

V E R S U S

KIPSANG BITOK RESPONDENT

**(Being an appeal from the Judgment and Decree of 4/10/1995 and/or 5/10/95 in
Kapsabet SRMCC No. 15 of 1988 by C. O. MOITUI Esq. S. R. M.)**

JUDGMENT

The appeal before me, which has been preferred by Stephen Korir arises from the decision of the Senior Resident Magistrate, Kapsabet. It is not clear from the proceedings whether the decision was made on 4/10/1995, or 5/10/1995, as will be seen later.

However, briefly, Kipsaina A. Bitok filed his suit against Stephen Korir at the aforementioned court sometimes in April, 1988, by virtue of which, he sought orders inter alia, to have Korir excise a portion of 2.8 acres from parcel NANDI/SARORA/236 (hereinafter called 'the subject property') and to have the same transferred to him at his parcel of land, namely, NANDI/SARORA/237. He based his claim on the fact that Korir who was his brother, was originally registered as the proprietor of the aforementioned plot No. 236, then 30 acres in total, which it was claimed was held by Korir in trust for himself and his other brothers, that each of the brothers was entitled to get a portion of 7.4 acres, but that Korir was erroneously allocated with 10 acres, while he, Bitok, only got 4.8, instead of 7.4 acres. His prayer was that Korir be ordered to transfer to him an extra portion of 2.6 acres, to balance the equation.

Korir who denied the allegations and filed a counterclaim averred that he was allocated with only 8.8 acres and not 10 acres, that the land in question was originally divided amongst three brothers as he had not been a party to the agreement, which was being referred to, as he had already been allocated with a different parcel of land, that even then, the matter had been referred to the Nandi District Land Registrar who had confirmed that the boundaries were in order, and that in any event, Bitok had already been allocated with a different parcel of land and should therefore not lay any claim to the portion which Korir held. It was therefore his prayer that not only should the suit be dismissed, but that the boundaries between the two parcels be reinstated, and that Bitok be ordered to vacate 2 acres of the subject property, whose possession he claimed, was illegal.

When the parties appeared before the learned Resident Magistrate on 24.11.1998 Korir's Counsel informed the court that the matter revolved around a boundary, and the learned Magistrate referred it to the Nandi Land Registrar, with an order that the

boundaries be fixed. The District Land Registrar failed to comply with the said orders, and on 16/2/1995 the Magistrate vacated his earlier orders, and instead ordered that the matter do proceed to trial, which was not to be, as on 27.7/1995, the day when the trial was set to commence, the learned Senior Resident Magistrate, ordered that the matter be referred to the Land Disputes Tribunal for hearing and disposal.

The records reveal that Mr. Chumo, Korir's learned Counsel, appeared before the Magistrate on 4.10.1995, and on the same day, the Magistrate entered Judgment for Bitok in line with terms of the Land Disputes Tribunal Award filed in Court on '5th October, 1995' after which a decree was drawn out in the following terms:

“THIS CASE having been heard by the Land Disputes Tribunal's Panel of Elders on 13th September 1995 and award having been filed in Court on 5th October, 1995:

IT IS HEREBY ORDERED THAT:-

(a) Judgment is hereby entered for the plaintiff in terms of Land Disputes Tribunal's Award filed in court on 5/10/1995.

(b) The plaintiff to get 2.7 acres out of parcel of land NANDI/SARORA/236.

(c) The court to sign all the conveyance documents in favour of the plaintiff if the defendant refuses or fails to do so.

Sealed and dated at Kapsabet this 15th day of October 1995.

C. O. MOITUI
SENIOR RESIDENT MAGISTRATE

Issued at Kapsabet in 5th day of October 1995.

C. O. MOITUI

SENIOR RESIDENT MAGISTRATE”

It is important that I point out that Bitok was the plaintiff at the Tribunal, while Korir was the defendant.

Korir who I shall now refer to as the appellant who felt aggrieved by the said decision and order has now preferred this appeal. Bitok shall appear as 'the respondent'.

I have taken the submissions by both able Counsel and it is clear from the proceedings that though the award was 'adopted' as a decree of the court on 4/10/1995, there was no award to adopt at that date, as the same was not issued until a day later on 5/10/1995, in any event, the decision had not been upon the parties in compliance with the requirements of rule 20 of the Land Disputes Tribunals (Forms and Procedure) Rules 1993, which mandates at *“the conclusion of every dispute the Tribunal shall make a determination to be served on the person affected by the decision and such determination shall be filed in the Magistrate's court, and the court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and be enforceable in the manner provided for under the Civil Procedure Act.”*

In my understanding the above legal provisions are mandatory and should be complied with to the letter otherwise, any proceedings which contravene the requirements are null and void.

But I could be wrong in the above finding, and in which case, the other issue for my determination would be whether the Land Disputes Tribunal had jurisdiction to entertain the matter in the manner that it did.

Section 3 of the Land Disputes Tribunals Act, which defines the jurisdiction of the Tribunal limits it to, inter alia “*all cases of a civil nature involving a dispute as to the division of, or the determination of boundaries to land, including land held in common.....*”, and that ‘*notwithstanding any other written law no magistrate’s court shall have or exercise jurisdiction or powers in cases involving*’ any of the above issues.

It is evident from the pleadings that by the time when the matter was referred to the Tribunal, the land in question was already registered under the Registered Land Act, a fact which was clearly pleaded by the appellant who maintained in paragraph 6 of his defence and counterclaim that he obtained the title to the subject land on first registration and that it was not subject to challenge. Indeed that contention is supported by Section 27 (a) of the Registered Land Act Cap 300 which stipulates that ‘*the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto*’.

It being clear that by the time when the matter was referred to the Tribunal, the respondent had an indefeasible title, such title could only be challenged by a party on grounds of fraud or mistake, which were not the issues in the matter before the lower court, and even if they were, they should have been determined by the trial Magistrate and not the Tribunal which lacked the necessary jurisdiction. The proceedings by the Tribunal were thus a nullity ab initio and the fact that it was the Magistrate who had preferred the matter to the Tribunal, could not confer any jurisdiction on it.

It is for the above reasons that I find that this appeal is meritorious. The same is allowed, and the judgment and decree of the aforementioned decree of the subordinate court and all consequential orders are hereby set aside. It is ordered that the matter be referred back to the Kapsabet court and the local District Land Registrar for adjudication. However due to the fact that neither party is to blame, each party shall bear its own costs of this appeal

Dated and delivered at Eldoret this 15th day of March 2005.

JEANNE GACHECHE

JUDGE