



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Civil Appeal 3 of 2003

(From original Busia SRM Civil case no.25 of 2001)

WAFULA OUMA KUTORO APPELLANT

VS

JEREMIAH ODULI OMA RESPONDENT

JUDGMENT

Wafula Ouma Kutoro, the appellant herein, is seeking to upset on appeal the Funyula land disputes tribunal's decision of 22.2.2001 as adopted by the Senior Resident Magistrate's court at Busia on 13th February 2003. The appeal is resisted by Jeremiah Oduli Ouma the Respondent in this Appeal.

The claim that was before the Funyula Land disputes Tribunal was filed by Jeremiah Oduli Ouma, the Respondent herein. He claimed for the recovery of land measuring 0.5 Hectares to be excised from L.R.NO.SAMIA/BUBURI/475 in the name of Wafula Ouma Kutoro, the appellant herein. He said the appellant had encroached his land in 1971 but that he detected the mistake in 1975. The Respondent claimed for the recovery of 0.7 Hectares to be excised from L.R. NO.SAMIA/BUBURI/477 in the name of Ongamo Oduli Kutoro, deceased. The Respondent detected the mistake against the deceased in 1975 that he encroached his land in 1973.

The Respondent said that he started the recovery process in 1989 when he reported the dispute to the village elders then to the Chief and finally to the district Land Registrar who visited the disputed pieces of land between 1992 and 1996. The Respondent appears to have filed a suit before the Resident magistrate's Court at Busia in 1997. However the suit was struck out. It is from there that he proceeded to commence a claim before the Funyula Land disputes Tribunal. The Tribunal gave the Respondent an award in terms of the claim i.e 0.5 Hectares to be excised from L.R.NO.SAMIA/BUBURI/475 and another 0.7 Hectares from L.R.NO.SAMIA/BUBURI/477.

The tribunal's award was adopted by the Senior resident magistrate sitting at Busia on 23rd February 2003. This is the decision which the appellant is now challenging.

The first ground raised on appeal is that the Funyula land disputes Tribunal acted in excess of jurisdiction in the matter. Mr. Balongo advocate for the appellant urged this court to set aside the decision on appeal on the ground that

L.R.NO.SAMIA/BUBURI/477 had been closed on sub division giving rise to L.R. NO.SAMIA/BUBURI/823, 824 AND 825. He argued that the tribunal's adoptive order cannot be executed because of that. Mr. Balongo further pointed out that the tribunal acted in excess of its jurisdiction when it dealt with a dispute against Ongamo Kutoro Oduli deceased without giving a right of

hearing to the legal representatives of his Estate.

On his part Mr. Ipapu advocate for the Respondent urged this Court to disregard the appellant's arguments on the ground that he did not prefer an appeal before the Provincial appeals committee. He argued that the learned Senior Resident magistrate acted within her powers to make the adoptive order. Mr. Ipapu further argued that the validity of the proceedings was not pointed out to the trial Senior Resident magistrate.

I have considered the able arguments raised by the learned advocates of the appellant and the Respondent. On the first ground as to whether or not the decree issued by the Senior resident magistrate is enforceable in view of the fact that title NO.SAMIA/BUBURI/477 had been closed upon sub division. The record shows that this matter was raised before the Senior Resident magistrate but she over ruled the objection on the ground that there was no evidence to establish that the aforesaid parcel of land had been sub divided. The learned Senior resident magistrate was also of the view that since there was no appeal before the provincial Appeals Committee then the elders' award stood unchallenged and executable. It is a well settled principle of law that Courts of law do not issue orders in vain. The orders issued must be capable of execution and that is why the tribunal's decisions are taken before Court for adoption. I am of the view that where the adoptive order would result in some alteration to the title of land duly registered under any law, a certified copy of the title must be produced to the Court before such an order is made. This is my view in keeping with order XX rule 5A of the Civil Procedure rules. In this matter the attention of the adopting Magistrate was drawn to this issue but she decided to ignore. Had she seriously considered the issue raised she would have ruled otherwise. A Court which is about to pronounce a decision which will affect or alter in certain respects a title is bound by law to call for a certified copy of the title or register regarding such land. The order issued by the Senior Resident magistrate's court by way of an adoption cannot be executed because the title which the order affected no longer exists. It has been closed upon subdivision. The court therefore issued an order in vain. Had the learned Senior Resident Magistrate considered the issues raised before her, she would not have adopted the tribunal's decision. The purpose of sending the tribunal's decision for adoption is to enable the adopting Court to satisfy itself that the decision was capable of execution. Where the decision is incapable of execution, it is the duty of such a Court to send the decision back for reconsideration to conform with the law. The adopting Court in my view was not meant to act mechanically by rubber stamping the decision.

The other issue raised by the appellant is that the tribunal made a decision affecting the property of a deceased person without giving the legal representatives of his Estate a right of hearing. I have perused the proceedings before the tribunal. It is clear that the panel of elders were aware that one Ongoma Oduli Kutoro had passed away by the time they were hearing the dispute over L.R.NO.SAMIA/BUBURI/477 which was registered in the deceased's name. The tribunal went ahead and made a decision without affording the legal representatives of the deceased's estate a right of hearing. The tribunal therefore acted contrary to the provisions of section 3 (7) of the Land Disputes Tribunal's Act no.18 of 1990.

I have also perused the record of appeal and it is clear that the tribunal handled a dispute which was obviously time barred. The evidence of the Respondent shows that the dispute came to his knowledge in 1975. He only took action in 1989. the law is very clear that any one who wishes to commence an action for recovery of land can only do so within a period of 12 years. It is obvious that the respondent took out recovery proceedings outside the period provided by law. The tribunal therefore acted without jurisdiction in the dispute.

It has been stated that the appellant did not appeal to the Provincial appeals Committee against the tribunal's decision. I agree with that submission but with great respect, that did not preclude the appellant from approaching this court on a point of law. In the end, I am satisfied that the appeal has merit. The appeal is allowed with the result that the Tribunal's decision as adopted by the Senior Resident magistrate is set aside. Costs of the appeal shall be paid to the appellant.

Dated and Delivered this 3rd day of November 2005.

J. K. SERGON

JUDGE

In open Court but in the absence of the parties.