



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL APPEAL NO. 120 OF 2009

JOHN ONDIEKI MASAI (substituted with ELIZABETH

NAMAEMBA MASAI).....PLAINTIFF

VERSUS

ALBERT C. MASAI.....DEFENDANT

J U D G M E N T

JOHN ONDIEK MASAI (Appellant herein) and **ALBERT C. MASAI** (Respondent herein) are siblings.

The Respondent moved to the **NDIVISI LAND DISPUTES TRIBUNAL** (the **TRIBUNAL**) claiming that the land parcel **NO NDIVISI/NDIVISI/1042** measuring 9.68 Hectares was family land and should be equally shared between him and the Appellant. The Appellant's case was that he bought the land without any help from their father and the Respondent has no share in the same.

After hearing the parties and their witnesses, the **TRIBUNAL** arrived at the following verdict: -

VERDICT:

“The L.D.T. members have awarded three (3) acres to the Claimant ALBERT C. MASAI from land NDIVISI/NDIVISI/1366 and NDIVISI/NDIVISI/1042.

The same be transferred to Claimant.”

That award was adopted as a Judgment of the **RESIDENT MAGISTRATE'S COURT WEBUYE** on 6th December 2005.

Aggrieved by that Judgment, the Appellant appealed to the **KAKAMEGA PROVINCIAL APPEALS COMMITTEE** (the Appeals Committee) which by its Judgment delivered on 18th August 2009 dismissed the appeal. A decree was thereafter issued in **BUNGOMA CHIEF MAGISTRATE'S COURT L.D.T. CASE No 37 of 2009** conveying the decision of the Appeals Committee. It is not clear why the decree was issued in the **CHIEF MAGISTRATE'S COURT BUNGOMA** and not at the **RESIDENT MAGISTRATE'S COURT at WEBUYE** where the Tribunal's award had been adopted as a Judgment of the Court.

Still aggrieved by the Appeals Committee's Judgment, the Appellant filed this appeal on 6th October 2009. The same was admitted by **MUCHEMI J** on 18th December 2009. In seeking to set aside the Appeals Committee's Judgment, the Appellant raised the following six (6) grounds: -

1. That the PROVINCIAL APPEALS COMMITTEE erred in law in upholding the proceedings and award of the NDIVISI LAND DISPUTES TRIBUNAL when the same had been obtained without jurisdiction and in violation of the requirements of Section 3 of the LAND DISPUTES TRIBUNAL ACT No 18 of 1990.

2. That the PROVINCIAL APPEALS COMMITTEE erred in law in upholding the proceedings and award of the NDIVISI LAND DISPUTES TRIBUNAL that were based on matters that were not canvassed by the parties.

3. That the PROVINCIAL APPEALS COMMITTEE erred in law in upholding the proceedings and award of the NDIVISI LAND DISPUTES TRIBUNAL over land parcel NO NDIVISI/NDIVISI/1042 which did not exist and the award thereof was incapable of execution.

4. That the APPEALS COMMITTEE erred in law in upholding the proceedings and award of the NDIVISI LAND

DISPUTES TRIBUNAL over a dispute that was statute barred.

5. That the PROVINCIAL APPEALS COMMITTEE acting on first appeal erred in law in failing to review and analyze the evidence from the TRIBUNAL and subject it to a fresh and exhaustive scrutiny.

6. That the CHIEF MAGISTRATE’S COURT BUNGOMA in LAND DISPUTE No 37 of 2009 erred in adopting as Judgment of the Court the Judgment of the PROVINCIAL APPEALS COMMITTEE and by extension the award of the NDISIVI LAND DISPUTES TRIBUNAL when the same was null and void ab-initio.

The Appellant therefore urged this Court to allow his appeal and set aside the Judgment/decision of the **APPEALS COMMITTEE**. He also sought an order awarding him costs of the appeal.

By an application dated 5th July 2018 and which was not opposed, the Appellant who had passed away on 10th August 2013 was substituted by his widow and legal representative **ELIZABETH NAMAEMBA MASAI**. Directions were thereafter taken that the appeal be canvassed by way of written submissions. However, only **MR KWEYU** instructed by the firm of **E. O. KWEYU & COMPANY ADVOCATES** for the Appellant filed his submissions. **MR OMUKUNDA** instructed by the firm of **OMUKUNDA & COMPANY ADVOCATES** for the Respondent did not file submissions.

I have considered the appeal, the record herein and the submissions by **MR KWEYU**.

It is clear from the record that the dispute herein was heard under the provisions of the repealed **LAND DISPUTES TRIBUNAL ACT CHAPTER 303A LAWS OF KENYA**. **Section 4** of the said Act provided for the establishment of the **TRIBUNAL** whose jurisdiction was circumscribed by **Section 3(1)** of Act as follows: -

3(1) “Subject to this Act, all cases of a civil nature involving a dispute as 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, shall be determined by a Tribunal established under Section 4.”

Among the documents attached to the decision of the **APPEALS COMMITTEE** is the Certificate of Search in respect of the land parcel **NO NDISIVI/NDIVISI /1366** showing that it was first registered in the names of the Appellant on 28th February 1989. There is also the Green Card to the land parcel **NO NDISIVI/ NDISIVI/1042** showing that it was first registered on 1st February 1964 in the names of **JOHN MASAI**. Then on 18th August 1980, it was registered in the names of the Appellant following a name change. That title was closed on 27th January 1982 upon sub – division to give rise to parcels **NO NDISIVI/NDIVISI /1180** and **1170** although the numbers appear to have been interfered with. However, while that may be relevant for other proceedings as will become clear later in this Judgment, those new numbers are of no consequence for purposes of this Judgment. What is important however is that although the award of the **TRIBUNAL** is not dated, the proceedings were filed in 2005. This is because they bear the following heading: -

“NDIVISI LAND DISPUTE TRIBUNAL SITTING AT SINOKO DISTRICT OFFICERS OFFICE IN ACCORDANCE WITH ACT NO 18/1990 CASE No 14 of 2005 NDISIVI/NDIVISI/1042”

As already indicated above, the Green Card to the land parcel **NO NDISIVI/ NDISIVI/1042** shows that the title thereto was closed on 27th January 1982. Therefore, by the time the Respondent was filing his claim at the **TRIBUNAL** seeking a share in the land parcel **NO NDISIVI/NDIVISI/1042**, that land had ceased to exist some twenty-three (23) years earlier. The **TRIBUNAL** was therefore exercising jurisdiction over a parcel of land which no longer existed and it is not even clear who were the registered proprietors of the resultant sub – divisions. The proceedings before the **TRIBUNAL** and in the **APPEALS COMMITTEE** were void ab – initio as the subject matter of the dispute no longer existed in the year 2005 when the Respondent filed his claim.

It is also clear that by the time the Respondent filed his claim in the **TRIBUNAL**, it was already statute barred. **Section 13(3)** of the repealed Act makes it clear that the **TRIBUNAL** was also governed by the Law of Limitation. It stated that: -

13(3): “For avoidance of doubt, it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which time for bringing such proceedings is barred under any law relating to Limitation of Actions or to any proceedings which had been heard and determined by any Court.”

Section 7 of the **Limitation of Actions Act** provides as follows: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

As stated earlier in this Judgment, the Appellant was registered as the proprietor of the suit land on 18th August 1980 by way of change of name. When he testified at the **TRIBUNAL**, the Respondent made it clear that he knew as far back as 1980 that the Appellant had registered the land parcel **NO NDISIVI/NDIVISI/1042** in his names but had refused to give him his share. This is what he said: -

“The land is measuring 9.68 Ha NDIVISI/NDIVISI/1042. I got married here in MULACHI and therefore I asked my brother JOHN for my share in the said parcel. This was in the year 1977. I have kept on asking him for my share ever since my father died in the year 1980. My father too requested him to give me my share. He consented to give me my share before my father but upto date he has not.”

The cause of action therefore arose in 1980 and by the time the Respondent filed his claim before the **TRIBUNAL** in the year 2005, it was well in contravention of the relevant provisions of the Limitation of Actions Act. The **TRIBUNAL** erred in law in entertaining a dispute that was statute barred and so too did the **APPEALS COMMITTEE** in upholding that decision.

Earlier in this Judgment, I have referred to the verdict that the **TRIBUNAL** arrived at. It shows that the Appellant was directed to transfer three (3) acres to the Respondent out of both the land parcels **NO NDIVISI/NDIVISI/1366** and **NDIVISI/NDIVISI/1042**. Land parcel **NO NDIVISI/NDIVISI/1366** was not in dispute at the **TRIBUNAL**. The opening sentence in the proceedings before the **TRIBUNAL** reads: -

“CLAIM: The piece of land NDIVISI/NDIVISI/1042 being a family land measuring 9.68 Ha. Be sub-divided into halves and thereafter transfer the half to me from the herein number.”

That being the claim filed by the Respondent before the **TRIBUNAL**, there was no basis upon which a verdict could be made touching on the land parcel **NO NDIVISI/NDIVISI/1366**. By directing the Appellant to transfer to the Respondent three (3) acres from land parcel **NO NDIVISI/NDIVISI/1366** and by up-holding that award, both the **TRIBUNAL** and the **APPEALS COMMITTEE** erred in law by exercising jurisdiction over a matter that was not before them.

Finally, the award of the **TRIBUNAL** and which was upheld by the **APPEALS COMMITTEE** directed the Appellant to **“transfer to the Claimant”** three (3) acres out of both the land parcels **NO NDIVISI/NDIVISI/1046** and **1366**. The **TRIBUNAL** therefore determined a dispute over ownership of registered land and by so doing, exceeded its jurisdiction. In **JONATHAN AMUNAVI .V. THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL C.A CIVIL APPEAL No 256 of 2002**, the Court of Appeal held that the Land Disputes Tribunal exercising the powers conferred upon it by **Section 3(1)** of the repealed Act has no jurisdiction to determine a dispute relating to ownership of registered land.

This appeal is therefore will merited and must be allowed.

Having said so however, it is clear from the Green Card to the land parcel **NO NDIVISI/NDIVISI/1042** that it was first registered in the names of **JOHN MASAI** on 1st February 1964. It was later registered in the names of the Appellant on 18th August 1980 by way of change of names. It is clear from the proceedings in the **APPEALS COMMITTEE** that the father to the parties herein was called **MASAI**. His first name is not indicated. During the proceedings in the **TRIBUNAL**, the Respondent stated that the land parcel **NO NDIVISI/NDIVISI/1042** was bought by his father after selling his other land in **MARAGOLI** from where they migrated to **BUNGOMA**. The Respondent may very well have a good claim in trust given those circumstances.

However, the less I say about that, the better so as not to prejudice the Court which may eventually hear that case. All I can say for now is that that claim be pursued by the Respondent in another forum.

Ultimately therefore, this appeal is allowed. The decision of the **APPEALS COMMITTEE** as adopted by the **CHIEF MAGISTRATE’S COURT BUNGOMA** in its decree dated 30th September 2009 is set aside. As the parties are siblings, each shall meet their own costs.

Boaz N. Olao.

J U D G E

25th February 2021.

Judgment dated, signed and delivered at BUNGOMA this 25th day of February 2021 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.

Boaz N. Olao.

J U D G E

25th February 2021.