



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 84 of 2003

TERESIA CHELAGAT TUWEI..... 1st APPELLANT

SIMION KIRWA KENEI..... 2ND APPELLANT

VERSUS

ALBERT SAINA..... RESPONDENT

JUDGMENT

Teresia Chelagat Tuwei and Simon Kirwa Kenei (appellants) being aggrieved by the decision of the Principal Magistrate Kapsabet Mr. F. O. Mabele delivered on 6th July 2000 in Kapsabet Land Dispute's Tribunal No. 48 of 1997 now appeal against that decision to this Court. The Respondent is ALBERT SAINA who did not come to Court.

The subject matter of this appeal is L.R. Nandi/Ndubeneti/63 and it relates to a dispute between the appellants and the Respondent which was heard and determined by the Kilibwoni Land Disputes Tribunal from 4th April 1997 and the following award was announced and signed by the panel of elders:

"JUDGMENT: 15/5/1997

After listening to both parties and having visited the disputed parcel to ascertain the truth, Mr, Saina (complainant) is awarded 1 ½ acres he had been shown earlier by the defendants. The land should have an access road out. The panel of elders pray the Honourable Court to effect the (transfer) of the said piece of land to complainants"

That award was read and adopted by the Principal Magistrate Kapsabet in LDT Case No. 48 of 1997 as the Judgment of the Court. A decree was duly drawn on 17th July 1997 and issued by the Court on 23rd July 1997. It appears on page 22 of the record of appeal and it reads:

DECREE

This dispute coming up before C.O Moitui Esq. SRM on 17th July 1997 for reading of the Tribunal's award dated 15th May 1997 in the presence of the plaintiff and in the absence of the defendants were duly served to attend. IT IS HEREBY ORDERED AND DECREED THAT:

(a) Judgment is entered for the plaintiff in terms of the Tribunal's award.

(b) *The plaintiff is awarded 1 1/2 acres out of Parcel No. Nandi/Ndubeneti/63,*

(c) *The Court shall sign all the transfer documents in favour of the plaintiff if the defendants fail to do so".*

The above decree was amended and another decree was drawn on 28th August 1997 and issued on 4th September 1997. This second decree appears on page 23 of the Record of Appeal and it reads:

DECREE

This dispute coming up for amendment of decree dated 17th July 1997 IT IS HEREBY ORDER AND DECREED THAT:

(a) *The decree dated 17th July 1997 is hereby amended to read NANDI/NDUBENETI/549 instead of NANDI/NDUBENETI/63.*

(b) *The Court shall sign all the transfer documents in favour of the plaintiff if the defendants fail to do so."*

The effect of this second decree is to transfer 1 ½ acres out of L.R. Nandi/Ndubeneti/549 owned by the appellants to the Respondent. This amendment was apparently necessitated by discovery that the original land Ref. Nandi/Ndubeneti/63 had been subdivided into two parcels Nandi/Ndubeneti/548 measuring 4.6 Ha and Nandi/Ndubeneti/549 measuring 0.6 Ha (equivalent of 1 ½ acres) which was still intact. This information is contained in a letter written to the Senior Resident Magistrate Kapsabet by the District Officer Kilibwoni Division Mr. Victor Kemboi on 25th July 1997. That letter is found on pages 24 and 25 of the Record of Appeal.

The appellants then moved the Principal Magistrate Kapsabet by an application dated 27th April 2000 for review and setting aside of the second decree on grounds essentially that the said amendment of the first decree was done in the absence of the appellants. In a ruling delivered on 6th July 2000 that application was dismissed. The ruling is on pages 20 and 21 of the Record of Appeal. This appeal now is against that order of dismissal.

In my view the amendment of the first decree done at the instance of a letter dated 25th July 1997 signed by the District Officer was wrong. The proper procedure to follow ought to have been through an application for Review at the instance of the plaintiff/Respondent, supported by his affidavit to which would have been annexed the said letter dated 25th July 1997.

In addition, there is no proof that the appellants were served with any notice to appear before the Court for the amendment of the first decree dated 17th July 1997.

For the above reasons this appeal is allowed, the orders of the Principal Magistrate of 6th July 2000 dismissing application dated 27th April 2000 is set aside, the said application is now reinstated and prayers therein are granted. Consequently the decree purported to have been amended and re-issued on 28th August 1997 is hereby set aside, with all consequential orders which followed. The decree dated 17th July 1997 is hereby reinstated.

I award the appellants the costs of this appeal.

It is so ordered.

Dated and delivered at Eldoret this 30th April 2003.

A.G.A ETYANG

JUDGE