



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 8 OF 2018

JANE NJERI MURIITHI (Substituted appellant for

MURIITHI N. TITUS..... APPELLANT

VERSUS

PETER GITHINJI MUTHIGANI.....RESPONDENT

JUDGMENT

(APPEAL FROM THE RULING/ORDER OF HON. J. N. MWANIKI ESQ. - SENIOR RESIDENT MAGISTRATE BARICHO IN L.D.T NO.3 OF 2008 DELIVERED ON 18.8.2010)

BACKGROUND

This appeal arises from a ruling issued by the Senior Resident Magistrate Hon. J.N. Mwaniki vide L.D. T No.3 of 2008 (Baricho) issued on 18.8.2010. The proceedings and award giving rise to the application before the Learned Magistrate was forwarded by the District officer, Ndia Division to the Magistrate's Court Baricho for purposes of adoption on 16th June 2008. The award of the panel of Elders reads in part as follows:

“..... After going through the evidence adduced in this case, the Court came to understand that, the Objector recognized the Claimant as his son from the first wife and also stresses that he had another wife who he lives with and have children. The first wife was GLADYS WAMWARI and the second was ESTHER KANGUNYU. Therefore the Court rules that the land be sub divided into two equal portions one bearing the name of PETER GITHINJI and the other ESTHER KANGUNYU and the Objectors name to be joint to the two parcels.

It is therefore ordered that TITUS MUREITHI the Objector to sign all the necessary documents to warrant the sub-division and transfer. The same to the Claimant failure to which the Executive officer to sign the same”.

On 12.11.2008, the said award was heard in the open Court and adopted as a judgment of the Court. On 26.3.2010 the Respondent filed a notice of Motion dated 25.3.2010 seeking the following orders;

- 1. THAT this Honourable Court be pleased to Order cancellation of title deed numbers MWERUA/KANYOKORA/1361, 1361, 1363 AND 1364 and reinstate to the old title deed number MWERUA/KANYOKORA/118 and the said order be served upon the Land Registrar Kirinyaga District for implementation.***
- 2. THAT the Honourable Court do order the Land Registrar Kirinyaga District to dispense with the production of title deed numbers MWERUA/KANYOKORA/1361 and 1362 during the implementation of the cancellation.***
- 3. THAT the costs of this application be borne by the Objector.***

Upon considering the said application and the affidavit in support as well as the replying affidavit and the submissions by the counsels, the Learned Magistrate on 18.8.2010 allowed the application as prayed. That ruling aggrieved the Appellant who filed the instant Appeal citing the following grounds:

- 1. The Learned Magistrate erred in law and fact by ordering that title deed in respect of L.R. MWERUA/KANYOKORA/1361, 1362, 1363 and 1364 be cancelled and the same be reinstated to title No. MWERUA/KANYOKORA/118 which land was non-existent in law and fact at the time of such orders.***

2. *The Learned Magistrate erred in law and fact by ordering title deeds for Land parcel Nos. MWERUA/KANYOKORA/1361,w1361, 1361 and 1364 be cancelled notwithstanding that the said parcels belonged to 3rd parties who are in occupation and were not parties to the proceedings before the Court and hence breached the rules of natural justice.*

3. *That the Learned Magistrate erred in law and fact by making the orders dated 18.8.2010 which act was beyond the jurisdiction of the Honourable Court.*

4. *The Learned Magistrate erred in law and fact by granting the orders dated 18.8.2010 whose effect was to give effect to the award of the Land Disputes Tribunal Ndia dated 12.11.2008 and which award was illegal null and void abinitio and the Court had no jurisdiction to give effect to an illegal award.*

5. *The Learned Magistrate erred in law and fact by not finding that the provision of the Law cited by the Respondent would not avail the orders sought.*

6. *The Learned Magistrate erred in law and fact by not properly directing his mind to the decided case land and applicable law namely Section 142 and 143 of the registered Land Act while making the orders dated 18.8.2010.*

7. *The Learned Magistrate erred in law and fact by not considering the evidence tendered before him by the Appellant and the submissions by her counsel and hence called an injustice to the Applicant vide orders dated 18.8.2010.*

APPELLANT'S SUBMISSIONS

The Appellant made submissions on each of the seven (7) grounds of Appeal as follows;

On the first ground of Appeal the Appellant submitted that the jurisdiction of the Magistrate under the **repealed Land Disputes Act No.18 of 1990** was limited to reading and adopting the award. The Appellant also submitted that once the Magistrate read the award his hands were tied as he became fundus officio. By making furtherance to adopting the award of the tribunal, the Learned Magistrate exceeded his jurisdiction.

On the second ground of the appeal, the Appellant submitted that by ordering cancellation of title deed for Land Parcel Nos. MWERUA/KANYOKORA/1361, 1362, 1363 and 1364. The Learned Magistrate breached the Rules of Natural justice by not giving a hearing to third parties who were in occupation and who were not heard before being condemned.

On the 3rd and 4th ground combined the Appellant stated that **Section 3 of the Land Dispute Act No.18 of 1990 (repealed)** clearly stipulates that the Tribunal has no jurisdiction to adjudicate on ownership of registered land and any award that purported to determine ownership on a land that is registered is null and void abinitio. He cited the provisions of **Section 3 of the Land Disputes Tribunal (repealed)** as follows;

3(1) Subject to this Act, all cases of a civil nature involving a dispute as to:

a) The division of and determination of boundaries to land including land held in common.

b) A claim to occupy or work Land; or

c) Trespass to.

Regarding the 5th ground, the Appellant stated that the Learned Magistrate failed to direct his mind properly to **Section 142 and 143 of the Registered land Act** (repealed).

RESPONDENTS SUBMISSIONS

The Respondent on the other hand submitted that it's a cardinal principle of equity that he who comes to equity must come with clean hands. In that regard, the Respondent submitted that it is not in dispute that the Respondent was the rightful owner/proprietor of L.R. No. MWERUA/KANYOKORA/1474 in respect of the ruling of 18.8.2010 which ordered the sub-division of land parcel No. MWERUA/KANYOKORA/118 into two (2) equal portions.

The Appellant further submitted that land parcel No. MWERUA/KANYOKORA/1474 does not exist on the ground since the same was sub divided giving rise to MWERUA/KANYOKORA/1515, 1516, 1517 and 1518 and that the appellants appeal has been overtaken by events since the respective sub-divisions have been transferred to third parties.

The Respondent also submitted that the Appellant's appeal lacks merit and that the same be dismissed with costs.

ANALYSIS AND DECISION

I have considered the submissions by the Appellant and the rival submissions by the Respondent.

This appeal arises from the orders of the Senior Resident Magistrate, Baricho Law Courts adopting the proceedings and awarded of the Land Disputes Tribunal case No.5 of 2003 as an order of the Court in LDT No.3 of 2008 (Baricho). The said order read as follows;

1. That the land be divided into equal portions one bearing the name of PETER GITHINJI and the other ESTHER KANGUNYU and the objectors name to be joint to the two parcels.

2. That TITUS MUREITHI the objector to sign all the necessary documents to warrant the sub-division and transfer the same to the claimant failure to which the Executive officer to sign the same.

3. Any aggrieved party has 30 days to appeal to the Provincial appeals committee at Nyeri.

Section 3 of the *Land Disputes Act No.18 of 1990 (now repealed)* provides as follows;

“3 (1) subject to this Act, all cases of a civil nature involving a dispute as to:

a) The division of and determination of boundaries to land including land held in common.

b) A claim to occupy or work and; or

c) Trespass to land”.

It is not in doubt that the dispute that was being determined at Baricho Tribunal which was read and adopted by the Magistrate in Baricho Court was the ownership of land which was registered under a statute. The *Land Disputes Act No.18 of 1990 (now repealed)* did confer jurisdiction to the Tribunal to determine such issues. The Tribunal therefore acted in excess of the jurisdiction given by statute. I therefore agree with the Appellant on ground No. 4 of this appeal that the Learned Magistrate erred in law and in fact by granting orders dated 18th August, 2008 which was illegal null and void abinitio and the court had no jurisdiction to give effect to an illegal award.

In *OMEGA ENTERPRISES KENYA LTD VS KENYA TOURSIT DEVELOPMENT CORPORATION & 2 OTHERS (1998) e KLR*, the court held as follows;

“..... it follows therefore, in my judgment that all the proceedings before the Learned Judge which were based upon the null and void order having been allegedly disobeyed are a complete nullity since with such a faulty foundation the entire house of cards must collapse without much ado”.

Again in *MACFOY VS. UNITED AFRICA LTD (1961) 3 ALL ER 119 LORD DEMING* said at *Page 1172* as follows;

“If an act is void, then it is law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the Court to set it up aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

As the proceedings of 18th August, 2010 were in pursuance of the order of 25th March 2010, they were also of no legal effect and a nullity in law. It is immaterial for the purposes of this appeal whether or not the order of 18.8.2010 ought to be set up aside. The order is automatically null and void without much ado.

For the reasons I have given above, I would allow the appeal and set aside the said order of 18.8.2010 with costs. It is so ordered.

READ and DELIVERED in open Court at Kerugoya this 5th day of July, 2019.

E.C. CHERONO

ELC JUDGE

5TH JULY, 2019

In the presence of:

1. M/S Mohindi holding brief for Ann Thungu for the Appellant

2. Respondent – present

3. Appellant – present

4. Mbogo – Court clerk – present