



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO. 1 OF 2019

JOHN NJENGA MWANGI.....APPELLANT

VERSUS

- 1. CHEA BAYA AND BAYA THOYA AND FAMILY**
- 2. KATANA KITHI AND FAMILY**
- 3. KAMBI MASHA AND FAMILY**
- 4. KARISA CHARO MWABAYA**
- 5. SAID OMAR LEWA**
- 6. KAZUNGU CHARO**
- 7. KATANA CHARO MWABAYA & FAMILY**
- 8. CHARO BAGANDA**
- 9. JUSTIN KAMBI**
- 10. KAHINDI MATOLE & FAMILY**
- 11. CHARO MATOLE & FAMILY**
- 12. NGUMBAO MWABAYA**
- 13. MRS. KENGA YAA**
- 14. CHARO NDORO**
- 15. JUMWA MWABAYA**
- 16. KITSAO KARISA**
- 17. CHENGO KARISA.....RESPONDENTS**

JUDGMENT

1. This is an Appeal arising from the decision of the Magarini Land Disputes Tribunal dated 22nd September 2004. The Appellant herein John Njenga Mwangi as the Claimant had instituted a claim against the 17 Respondents herein seeking a number of reliefs. In its decision adopted as an order of the Court in *Malindi PMCC Land Case No. 15 of 2004* on 2nd September 2005, the Tribunal determined a number of issues appearing on the record as follows: -

i. The Claimant, Mr. John Njenga Mwangi did not have enough facts to explain his case beyond doubt, therefore has lost the case to the objectors numbering (17) seventeen together with their families and he (Claimant) must pay the objectors general damages to the (tune) of Kshs 1,000,000/- One Million.

ii. Failure by the Claimant without good reasons for two different Tribunal sessions and coupled with non-availability of original title and Land Control Board consent documents proved his untrustworthiness.

iii. The Land Title No. CR 10978 Plot No. 135 on Form B (as per photocopy) attached to Plan No. 83273 Locality- Mambrui – measuring Eight Nought Decimal Nought (80.0) acres approximately and registered in the name John Njenga Mwangi is confiscated to the Registrar of Titles- Coast Region- Mombasa with immediate effect.

iv. The Land Adjudication and Settlement Department, Malindi District must embark on demarcating (sub-division) the Plot No. 135 measuring 80.0 acres approximately in view to having the Objectors (17 families) own that parcel of land individually, solely and absolutely.”

2. It is apparent from the face of the record that being dissatisfied by the decision, the Appellant initially appealed the decision to the Provincial Land Disputes Tribunal in *Tribunal Appeal Case No. 368 of 2005*. Following the abolishment of the Tribunals and Vide a Memorandum of Appeal dated and filed herein on 6th August 2019, the Appellant filed this Appeal based on some five (5) grounds as follows: -

1. That the Tribunal erred in law by purporting to cancel the Appellant’s Title by exercising powers that it did not have;
2. That the defunct Tribunal erred in law in issuing an order directing the Land and Adjudication Department to demarcate the Appellant’s land amongst the Respondents without any legal foundation;
3. That the Tribunal erred both in law and in fact by awarding the Respondents damages against the Appellant without any basis in law whatsoever and indeed without any evidence;
4. (That the) Tribunal erred in not recording proceedings properly and with the sole aim of assisting the Respondents to unlawfully acquire the Appellant’s land; and
5. (That) the Tribunal proceedings and findings are a nullity in law and against the Rules of Natural Justice.

3. Accordingly, the Appellant urges this Court to set aside the Tribunal’s findings and decision in its entirety and to enter Judgment in his favour in the following terms: -

- a. A declaration that the Appellant is the lawful owner of the suit property being Plot No. 134 CR No. 10978 Mambrui;
- b. A declaration that the Respondent and their families are trespassers on the Appellant’s land;
- c. Eviction orders against the Respondents and their families from the suit property;
- d. Costs of both the Land Tribunal Proceedings and this Appeal be awarded to the Appellant’s; and
- e. Any other or further relief the Honourable Court may deem fit and just to grant.

4. I have given full consideration to the proceedings before the Tribunal and the Appeal herein. I have similarly considered the submissions placed before me by the Learned Advocates for the parties.

5. It is on record that the Appellant herein filed a claim before the Magarini Division Land Disputes Tribunal being *Tribunal Case No. 16/4 of 2004*. An award was thereafter on 22nd September 2004- issued but in favour of the 17 Respondents herein. That award was adopted as an order of the Court before the then Malindi Senior Resident Magistrate Honourable Daniel Ogembo on 22nd September 2005 in *Malindi PMCC Land Case No. 15 of 2005*.

6. However, being dissatisfied with the decision, the Appellant lodged an appeal before the Provincial Appeals Tribunal No. 368 of 2005 listing some ten grounds of appeal therein. Nothing much appears to have happened thereafter until some 13 years later when the Ministry of Interior and Coordination of National Government wrote to the Environment and Land Court Malindi transferring the file that was before the Provincial Appeals Tribunal to this Court.

7. The letter of transfer dated 5th December 2018 from the Ministry’s Coast Region Coordinator and copied to the parties herein stated as follows: -

“Forwarded herewith please find the above mentioned file for your further necessary action as per the Environment and Land Court Act No. 19 of 2011.”

8. Apparently following the letter, this Court’s Registry in acknowledgement of the receipt designated the file as *ELC Appeal No. 1 of 2019*. On 15th January 2019, Messrs Mouko & Company Advocates filed a Notice of Appointment of Advocates indicating that the

Appellant had henceforth appointed the Law Firm to act for him in the matter. It is that Law Firm that on 6th August 2019, some seven (7) months after their appointment filed the formal Memorandum of Appeal herein dated 6th August 2019. In their submissions herein, the Respondents protest the filing of the appeal 14 years after the award was adopted by the Magistrates Court.

9. As it were, the Environment and Land Court Act No. 19 of 2011 had come into effect on 30th August 2011. Section 31 thereof repealed the Land Disputes Tribunal Act (No. 18 of 1990) under which the Tribunals had hitherto operated. Section 30 of the new legislation provides as follows: -

1. All proceedings relating to the environment or the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same Court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

2. The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

10. Pursuant to those provisions, the then Chief Justice the Honourable Dr. Willy Mutunga did vide Gazette Notice No. 16268 of 9th November 2012 issue Practice Directions on various aspects of the Act. Practice Direction No. 13 directed that appeals from Magistrates and Tribunals shall lie in the Environment and Land Court pursuant to Section 13 (4) of the Environment and Land Court Act.

11. While the Memorandum of Appeal appears to have been filed many years after the adoption of the award before the Magistrates Court, this Court takes judicial notice of the fact that there was a lot of confusion following the repeal of the Land Disputes Tribunal Act. Indeed, even the directions given pursuant to the aforementioned Gazette Notice did not specifically deal with matters that were pending before the Provincial Appeals Tribunal.

12. That notwithstanding, I did not think the Appellant's right of appeal which had accrued under the repealed Land Disputes Tribunal Act should be abrogated without justifiable cause. I did not hear the Respondents to state that the Appellant's appeal before the Provincial Appeals Tribunal had been filed out of time. In my considered view, given that this Court has both original and appellate jurisdiction, it must of necessity follow that all appeals that were pending before the Provincial Appeals Board are deemed to be taken over by this Court under its appellate jurisdiction.

13. That being the case, the Appellant is entitled to pursue his rights of appeal as they accrued under the repealed Act before this Court. Accordingly, granted that the Appellant had in person already filed some ten grounds of appeal before the Appeals Tribunal, this Court will consider and construe the five grounds in the Memorandum of Appeal filed herein on 6th August 2019 as an amendment to the initial grounds of appeal.

14. While they lasted, the jurisdiction of the Land Disputes Tribunals was provided for under Section 3 (1) of the repealed Act as follows: -

“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 heard and determined by a Tribunal established under Section 4”.

15. Arising from the foregoing, I would readily agree with the Appellant that the Tribunal acted outside its jurisdiction when it purported to cancel the Appellant's title and to direct the Land Adjudication Department to confiscate the Appellant's title and to sub-divide the land amongst the Respondents herein.

16. Be that as it may, it was clear to me that it was the Appellant who had taken his claim to the wrong forum. The Tribunal then wrongly assumed it had jurisdiction to settle a claim in regard to title to land and made the impugned orders herein. On account of the misdirection by the Tribunal, the Appellant now urges this Court to declare that he is the rightful owner of the land and to declare that the Respondents are trespassers and proceed to direct their eviction therefrom.

17. Unfortunately however, the record of proceedings provided to this Court did not appear to be complete and reliable as to what transpired before the Tribunal. In his own submissions filed herein on 23rd July 2019, the Appellant discredits the Tribunal's record and in fact accuses the Tribunal of manufacturing certain portions of the proceedings. In fact the Appellant denies having testified at all before the Tribunal as shown in the proceedings. Having looked at the proceedings, this Court was itself unable to follow certain portions thereof especially between pages 11 to 13.

18. At any rate, having found that the Appellant's claim had been instituted in the wrong forum, I did not think it was tenable to grant the far-reaching orders sought herein.

19. In the premises, I hereby set aside the findings and determination by the Tribunal in their entirety. The Appellant shall be at liberty to pursue his claim in the right forum.

20. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER, 2021

J.O. OLOLA

JUDGE