



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT BUSIA

ELC APPEAL NO. 4 OF 2019

MARGARET NANGUYE IKONG.....APPELLANT

VERSUS

JUSTIS ETYANG ORODI.....1ST RESPONDENT

LAND REGISTRAR BUSIA.....2ND RESPONDENT

(An appeal from the ruling of Hon. Chepseba Chief Magistrate at Busia in the Busia Land Dispute No. 10 of 2007)

J U D G E M E N T

1. This appeal arises from the ruling of Hon. Chepseba esq., Chief Magistrate in the Busia Land Dispute No. 10 of 2007 delivered on 1st November, 2018. The Appellant raised the following grounds in their memorandum of appeal dated 14th July 2021;

- 1) *The Learned Magistrate erred in law and in fact by wrongly evaluating the evidence on record hence coming to a wrong determination;*
- 2) *The Learned Magistrate erred in law and fact coming to its conclusion as the provision of the law under which the application was brought was declared unconstitutional;*
- 3) *The Learned Magistrate erred in ruling when it failed to consider the legitimate grounds upon which the Land Registrar Busia had failed to comply with the Court Orders issues herein;*
- 4) *The Learned Magistrate erred in law and fact in failing to evaluate the uncontroverted evidence showing that at the time of the initial order the suit property had been transferred to a third party who was never a party to the suit nor the proceedings in the now defunct law tribunal;*
- 5) *The Learned Magistrate erred in law and fact in failing to evaluate the legal position that the defunct land tribunal did not have the mandate to determine ownership and to order the rectification of title with reference to ownership of land; and*
- 6) *The judgement is unlawful and contrary to law.*

2. The Appellant urged the court to find merit in her appeal and the judgement of the lower court be set aside and its place an order be made dismissing the 1st Respondent's application dated 15th February, 2018 with costs.

3. The Record of Appeal was filed on the 4th of March, 2021 and on the 23rd of March, 2021 the Court issued directions for the appeal to be canvassed via written submissions.

4. The Appellant filed her submissions on the 10th of June, 2021. She submitted that the trial court failed to appreciate that the 1st Respondent sought to enforce an award given under the repealed Land Dispute Tribunal CAP 303A which award had been stayed therefore the court could not find the Land Registrar in contempt of the order. The appellant submitted further that at the time the award was given the suit parcel was not in any of the names of either parties to the suit. The parcels had already been sold to third parties which was one of the grounds of the appeal to the Western Province Appeals Committee. She concluded by stating that at the time the ruling was delivered the Contempt of Court Act had been declared unconstitutional and it was therefore in error for the trial Court to rely on the same. Lastly, the Appellant argues that the court's jurisdiction was limited only to adopt the award and not conduct any further proceedings.

5. The Appellant relied on the holdings in **Peter Ouma Mitai vs. John Nyarara (2008) eKLR** that reiterated the holding in **Zedekia M. Mwale Vs. Bikeke Farm Directors and Another** "that provision of the law does not leave any room for a magistrate to review, alter,

amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided for under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise." The Appellant also supported their argument by decision in **Kenya Human Rights Commission vs. Attorney General & another (2018) eKLR** it was held that;

"A declaration is hereby issued that sections 30, and 35 of the impugned contempt of court Act No. 46 of 2010 are inconsistent with the Constitution and are therefore null and void.

A declaration is hereby issued that the entire contempt of court Act No. 46 of 2016 is invalid for lack of public participation required by Articles 10 and 118(b) of the Constitution and encroaches on the independence of the Judiciary."

6. The 1st Respondent filed his submissions on the 1st of July, 2021, submitting that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. He submits on the fact that since the parties have taken more than 10 years to comply with a court order is a clear indication of blatant disregard of the orders. That the conduct of the Appellant and the 2nd Respondent are deliberate and were aimed at defeating the decree which was properly issued.

7. The 1st Respondent relied on the following cases: **B vs. Attorney General (2004) eKLR** where the court stated thus; ***"the Court does not, and ought not to be seen to, make Orders in Vain; otherwise the Court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people"*** and **Basil Criticos vs. Attorney General & 8 others (2012) eKLR** thus; ***"it is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors"***.

8. The 2nd Respondent filed its submissions on the 4th of August, 2021 stating that the trial court erred in relying on an Act of Parliament that had been declared unconstitutional to render its ruling. That the application should have been brought under the Judicature Act, Cap 8 Laws of Kenya which Act places the jurisdiction to entertain contempt proceedings in the High Court and the Court of Appeal. That the trial court failed to consider reasons advanced by the Land Registrar as to why the orders were not capable of being executed. He urged this Court to allow the appeal on the grounds stated.

Determination

9. The decree to be executed is dated 9th August, 2007 and is found at page 38 of the record of appeal. The Decree read as follows:

Upon this matter coming up for reading and adoption of the Elders Award in respect of LR No. NORTH TESO/KOCHOLIA/1949 and NORTH TESO/KOCHOLIA/1950 before the Resident Magistrate Mr. D. Abdulrahman. It is hereby ordered that:

- 1) THAT based on Iteso Customary Law under inheritance, occupation and working land, the Tribunal awards JUSTUS ETYANG ORODI ownership of the northern portion of YOKOSOFAT OTWANE's land on which currently stands JUSTUS ETYANG's homestead.***
- 2) THAT the Land Registrar is therefore requested to recall the land title deed for the above portion and alter the same to read JUSTUS ETYANG ORODI as sole proprietor.***
- 3) THAT each party to meet its costs.***

10. From the record, the 1st Respondent's impugned application dated 15th February, 2021 sought the following orders:

- a) That the Honourable Court be pleased to issue an order directing both Mrs. Margaret Nanguye Ikong and the Land Registrar Busia County be arrested and detained in prison for six months for disobeying the orders of this Court dated 9th August, 2007;***
- b) That this Court be pleased to issue an order for cost to the Plaintiff/Applicant***

11. In the replying affidavit dated 26th March, 2018, in page 40 of the record of appeal, the Appellant, in response to the application for committal to civil jail, swore in part THAT:

- a) On 7/2/1986 land parcel No. North Teso/Kocholia/139 was transferred to the Appellant and she was issued with a valid title to the said parcel;***
- b) On 10/7/1998 land parcel No. North Teso/Kocholia/139 was subdivided giving rise to land parcel No. North Teso/Kocholia/1950 and land parcel No. North Teso/Kocholia/1949;***
- c) Sometimes in the years 1998, the Appellant entered into an agreement with one Zakayo Iteba Epus and transferred land parcel No. North Teso/Kocholia/1950 to him and a title deed was issued in his name;***
- d) In 1999 the Appellant also transferred land parcel No. North Teso/Kocholia/1949 to Zakayo Iteba Epus;***

e) That at the time of ruling of the elder the parcels had already been transferred and it was eight years after the transfer when the decree was made.

12. The impugned ruling of the trial court reads in part thus:

“...I have looked at the application, the replying affidavit and the submissions by both parties together with the authorities herein. I have looked at paragraph 6 of the replying affidavit of the interested party where he avers that it would be practically impossible to effect the orders since the status of the parcel changed hands. This shows that the interested party is aware of the orders but has refused to effect the orders. The interested party has no excuse for not complying with the orders...”

13. One of the grounds of appeal was the fact that the trial magistrate wrongly evaluated the evidence on record and the evidence referred to was in respect of an order of stay of execution made on 13th of November 2007 which stayed the implementation of the award pending hearing and determination of the Appellant’s appeal lodged before the Western Province Appeals Committee. In the case of **Hadkinson V. Hadkinson (1952) 2 All E.R. 567** it was held that;

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

14. The 1st Respondent did not address the trial magistrate on the status of the orders of stay when he filed the contempt proceedings nor did he make mention of the same in his arguments to this appeal as nothing about the order is stated in his submissions. He has rightly submitted that obedience of court orders is fundamental to the rule of law in society. The obedience is two-way and granted that the stay of execution was in force as at the time the application for contempt was filed, heard and determined, the trial magistrate would have reached a different conclusion had he perused the record.

15. The second ground raised was that the orders issued by the elders and adopted by the Resident Magistrate Court were incapable of being executed by the Land Registrar or the Appellant. On pages 43, 44 and 45 of the record of appeal are copies of the green card for land parcel No. North Teso/Kocholia/139 which indicates that the same was closed on subdivision on 10th July 1998, and new title deeds for land parcel No. North Teso/Kocholia/1950 and land parcel No. North Teso/Kocholia/1949 respectively issued and registered in the name Zakayo Iteba Epus. From the proceedings at the Tribunal and before the subordinate court it is noted that the registered proprietor of the suit parcels was not involved in the proceedings at any time.

16. The 1st Respondent was awarded the northern portion of the land comprised of Yokosofat Otwane’s land according to the decree. Although the elders were aware of the new numbers (N. Teso/Kocholia/1949 & 1950) as mentioned in the opening statement of the decree extracted, they did not go further to mention which of the two numbers was the northern part of the land. In the application for contempt found at pages 33 - 35 of the record to the, the 1st Respondent does not plead which of the two titles fall on the northern part of the land. My opinion and I so hold that the decree was not clear as it required a survey report to identify which portion was to be registered in the name of the 1st Respondent. In the case of **Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR** at paragraph 61, the Court quoted the judge in Cromwell writing for the Supreme of Canada in **Carey v Laiken**, 2015 SCC 17 (16th April 2015), expounding on the three elements of **civil contempt** of court which must be established to the satisfaction of the court, thus:

“The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.”

17. The third ground raised was concerned with whether or not the trial magistrate had jurisdiction to entertain the contempt application. The impugned application was brought under the provisions section 4 of the Contempt of Court Act No 46 of 2016 and sections 3A and 63 of the Civil Procedure Act Cap 21 of the Laws of Kenya. The date of commencement of the Contempt of Court Act is given as 13th January 2017. The Appellant submitted that the trial Court relied on the Contempt Act which was declared unconstitutional on 9th November 2018 in the case of **Kenya Human Rights Commission vs A.G. supra**. In determining the issue of jurisdiction, I proceed on the premise that this decision may not have been brought to the attention of the Court when the application was argued. The record does show that the parties filed their submissions in May and September 2018 respectively before the said decision in Kenya Human Rights case was rendered. The trial magistrate cannot thus be faulted for relying on the provisions of the said Act when there was no evidence he was aware of its status.

18. However, section 6 of the Contempt Act granted the subordinate courts jurisdiction to deal with contempt committed on the face of the court. The said section provides thus;

“6. Every subordinate court shall have power to punish Jurisdiction of subordinate courts to for contempt of court on the face of the court in any case punish for contempt where a person-

- (a) Court assaults, threatens, intimidates, or willfully insults a judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court to whom any relevant proceedings relate;**
- (b) Willfully interrupts or obstructs the proceedings of a subordinate court; or**
- (c) Willfully disobeys an order or direction of a subordinate court.”**

19. The contempt complained of herein was not on the face of the court therefore the trial magistrate did not have jurisdiction. The Judicature Act which also confers jurisdiction for conducting contempt proceedings state thus at section 5(1) **The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.** In the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**, the Court of Appeal held that *jurisdiction belonged to the High Court or Court of Appeal. It is instructive that when the High Court and the Court of Appeal exercise that jurisdiction, it extends to the contempt committed in the subordinate court. The only jurisdiction the magistrate's court could exercise when dealing with contempt of court is, if it is committed in the face of the court.*

20. In light of the analysis given herein above, I find that this Appeal has merit and hold that the Learned Magistrate misdirected himself in allowing the 1st Respondent's application. I therefore allow the appeal with consequences that:

(i) The order made on 20th December 2018 be and is hereby set aside and in its place substitute it with an order striking out the application dated 15th February 2018.

(ii) The costs of the struck out application be borne by each party while the costs of this appeal is awarded to the Appellant to be paid by the 1st Respondent.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 24TH DAY OF NOVEMBER, 2021.

A. OMOLLO

JUDGE