REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC APPEAL CASE NO. 11 OF 2019

(Formerly Migori HCC Civil Appeal No. 19 of 2016)

ZEDEKIA KABARA OSIRE.....APPELLANT

-VERSUS-

NAHASHON ONYANGO OTONDO (Suing on

behalf of the estate of Otondo Msamba Msuba (deceased)....1ST RESPONDENT

KENYA SUGAR BOARD.....2ND RESPONDENT

(Being an Appeal from the ruling of Honourable E.M. Nyagah Senior Resident Magistrate (SRM) and delivered on 5th November 2015 in Migori Principal Magistrate's Court in Civil Suit No. 316 of 2007)

JUDGMENT

A. Introduction

1. The dispute in the instant appeal was initially filed before the High Court of Kenya at Migori on 26th April, 2016. However, by a ruling dated 23rd May 2019, Honourable Mrima J. transferred it to this Court for hearing and determination for want of jurisdiction.

2. Notably, on 30th July, 2018, the court directed that this appeal be argued by way of written submissions. Accordingly, the appellant and the respondents canvassed the appeal by their submissions dated 30th January 2019 and 14th February 2019 respectively.

B.The Appellant's Case

3. The Appellant, **Zedekiah Osire through Odhiambo and company Advocates** moved the trial Court through his Notice of Motion dated 21st September 2015 (the application) whereby he sought to have the Court review its Judgment and Decree adopted from an award made by Migori District Land Disputes Tribunal (the Tribunal) . He also sought that the case be heard afresh on the basis that he had discovered new and important matters or evidence which were not within his knowledge during hearing in the Tribunal and when the decree was passed.

4. He further asserted that there were mistakes and errors on the award and the subsequent judgment and decree that rendered it unlawful and unconstitutional. To that end, he claimed that the he was not notified of the date of entry of judgment.

5. In his ruling of 5th November 2015, the learned trial Magistrate noted that the Appellant herein had actively participated in the Tribunal to the point when the award was made. The trial court observed that if the Appellant was aggrieved, he could have appealed the award to the then Provincial Appeals Committee. The court further held that there was no sufficient reason advanced to demonstrate that the Appellant had discovered new information which after due diligence could not be produced so as to warrant the Review sought. In addition, the trial court found that the application for Review being brought 9 years after the award was inordinately long. Accordingly, the court dismissed the said application.

6. The Appellant being dissatisfied with the trial court's ruling, mounted the instant appeal is by way of memorandum of Appeal dated 22nd April, 2016 and filed in court on 26th April, 2016 whereby he prayed that the appeal and the Application dated 21/09/2015 be allowed with Costs. The appeal is anchored on the following grounds;

> ***1. The learned magistrate erred in law and in fact in failing to find that there was a new and important matter of evidence which after due diligence was not within the knowledge of the Appellant or could not be produced at the time yet this was adequately***

demonstrated in the application for review and the annexture therein and this made the Hon. Learned Magistrate reach the wrong decision in the ruling.

2. That the learned Magistrate erred in law and fact in failing to find that there were no errors apparent on the records while there were glaring errors apparent on the face of the record and this made the learned magistrate reach wrong findings and ruling.

3. That the learned magistrate erred in law and fact in finding that there was inordinate delay in filing the Application for review as the pleadings that gave rise to the Application were only closed on 26/6/2014 and the application for review was made on 21/07/2015 i.e within less than one calendar year.

4. That the learned Magistrate failed to appreciate that the Tribunal had no Jurisdiction to entertain and make findings and an award in the matter hence the whole exercise by the Tribunal was unlawful and unconstitutional hence a nullity ab initio.

5. That decision and ruling dismissing the application was a furtherance of illegality, as once a Court or Tribunal lacks jurisdiction it should immediately down its tools either on motion or on its own initiative.

6. The learned magistrate failed to appreciate that in allowing the Application for Review the Appellant stands prejudiced in the case in the lower court as the Plaintiff will invoke the judgment confirming the award to sustain his claim.

7. The award of the Tribunal and the subsequent Judgment are unconstitutional as they breach the provisions of a fair trial.

8. The award of the tribunal and the subsequent judgment of the lower court are a breach of the Appellant's Constitutional right to own and enjoy the property hence unlawful.

7. By his written submissions dated 30th January 2019 and filed on even date, the appellant submitted that the Respondent filed two Plaints; the original one dated 5/12/2007 and an amended one dated 26/06/2014. That the respondent prosecuted the suit before the trial court on the basis of the original plaint only. That as such, the amended plaint was an entirely new entity that presented facts that were not within his knowledge at the time the tribunal proceeded, rendered the award on which Judgment, the subject of the application or review, was anchored.

8. To buttress the ground that there was error apparent of the face of the record, he referred the Court to page 52 of the Record of Appeal where it is indicated that the case was fixed for reading of the Tribunal's award in his absence. He submitted that the fact that he was not made aware of the judgment denied him the opportunity to appeal to the provincial appeals committee.

9. As regards the delay in lodging the Review, it was his submission that the learned trial magistrate misdirected himself in holding that there was inordinate delay in the filing of the Application for Review. That the computation of time for Review as beginning to run from 21/02/2007 was erroneous. That the Amended Plaint which was the subject of review is dated 28/02/2014 and the Application for Review is dated 25/07/2015. He also submitted that the 9-year period was a misdirection on the part of the learned magistrate.

10. The Appellant further submitted that the Tribunal did not have jurisdiction to hear and determine the suit hence it acted in vain. That the award and the subsequent judgment and decree were null and void ab initio. It was his submission therefore that the award could not stand the Constitutional threshold of sanctity of property and fair trial.

C.The 1st Respondent's Case

11. The 1st Respondent represented by Ngala Awino and company Advocates, based his entire case on Order 45 of the Civil Procedure Rules 2010. It was his submission that the appellant never brought out any mistake, new or important matter or evidence in its application for review. That learned magistrate was therefore right in dismissing the application for neither finding new information nor errors.

12. In a bid to demonstrate that the Appellant had inordinately delayed in lodging the Application, the 1st Respondent relied on the case of **The Executive Committee Chelimo Plot Owners Welfare Group & 288 Others -vs- Langat Joel & 4 Others Kericho ELC No. 12 of 2016** which highlighted and made findings on occasions when an application for review may be disallowed. It further set out the conditions that a party must satisfy before being granted Review. In the end, he prayed that he Application be dismissed with costs.

D.The 2nd Respondent's Case

13. The 2nd, Respondent, **Kenya Sugar Board, through Mulando, Oundo , Miriuki and company Advocates** submitted that pursuant to Order 50 Rule 6 of the Civil Procedure Rules, 2010, the learned Magistrate should have exercised his discretion to enlarge the time for the Appellant in the application for Review.

14. In support of the Appellant's position that the Amended plaint resulted in unfair hearing, the 2nd Respondent relied on the decision in **Moses Wachira -vs- Niels Bruel & 2 Others [2013] eKLR** to buttress the importance of natural justice. It was therefore, submitted that the Appellant ought to have been accorded an opportunity to correct or contradict any relevant statement in response to the 1st Respondent's case. That the trial Court's failure to do so was a violation of the right to be heard.

15. The salient issues that have consistently stood out for determination from the forgone discourse, are whether;-

i. There were errors, mistakes and new matters of evidence to entitle the Applicant to Review of the award and subsequent Judgment rendered by the Tribunal and the trial court respectively.

ii. The Amended Plaint denied the Appellant the right to respond.

iii. There was inordinate delay in filing the application for Review.

iv. The Tribunal and Trial Court did not have jurisdiction in making the award and its adoption as Judgment respectively.

v. The Trial Court was right in dismissing the Application for Review.

E. Analysis and Determination

16. Bearing in mind the Court of Appeal decision in **Selle and another -vs- Associated Motor Limited Company [1968] E.A 123**, this Court has the obligation to analyse and re-evaluate the evidence of the trial court and come to it's own conclusions as I did not have the privilege of seeing the witnesses testify. However, I make allowance for the same.

17. This Court has studied the entire proceedings before the Trial Court and the Land Disputes Tribunal. It is clear that the whole dispute revolves around ownership of portion of land measuring 0.59 Ha (hereinafter referred to as "**the suit land"**) which is comprised of the larger piece registered as **Suna East/wasweta 1/1814** belonging to the Appellant.

18. The Tribunal adjudged the suit land in favour of the Respondent. It's award was consequently adopted as judgment by the trial court. However, in an interesting twist of events, the Appellant charged the entire land to the 2nd Respondent. He did so before surrendering the suit land measuring approximately zero point five nine hectares (0.59 Ha) to the 1st Respondent herein.

19. After the 1st Respondent learned of the sudden events, he instituted Migori SPM's court Civil Case No. 361 of 2007 by a plaint dated 4th December 2007 in a bid to realize the award and the consequent decree made by the Tribunal and Court Respectively. In response to the suit, the Appellant in person filed a Defence dated 4th March 2008 and later appointed an advocate who then filed an amended Defence dated 18th August 2008 to the original plaint.

20. On 28th February 2014, the 1st Respondent filed an Amended Plaint wherein he sought to substitute the original Plaintiff after his death and to include the 2nd Defendant for having charged the suit land. He also sought to have the 2nd defendant discharge the suit land that had been awarded to the Appellant. The Appellant herein did not oppose the Application for the amendment of the plaint. On 24th June 2016, by consent the parties, the application allowed. The suit was then fixed for hearing.

21. Prior to the hearing of the case, the Appellant herein filed the application for review of the judgement and decree of the trial court which was dismissed. It then provoked the instant appeal.

22. It is important to note that **Order 45(1)(a) and (b)** of the Civil Procedure Rules provide as follows;

1. Any person considering himself aggrieved

(a) By a decree or an order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal has been allowed, and who from the discovery of new and important matter of evidence which after the exercise of due diligence, was not within his knowledge and could not be produced by him at a time when the decree was passed or the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desire to obtain a review of the decree or order, may apply for a review of the judgment to the Court which passed the decree or made the order without unreasonable delay. *(Emphasis added)*

23. From the foregone analysis of the chronology of events, this Court is at pains to pin point the new and important matters of evidence that were not within the Appellant's knowledge at the time of making the award. It is evident that the Applicant fully participated in the process before the Tribunal. This Court is further unable to identify the errors on the record as referred to by the applicant that led the Trial Court to reach the alleged wrong findings.

24. Quite clearly, no shred of evidence has been presented before this Court so as to bring the Applicant to the aid anticipated in **Order 45 Rule 1** of the Civil Procedure Rules 2010. On the first issue therefore, this Court finds it in the negative.

25. The second issue has its roots on the principles of natural justice. The right to fair hearing is enshrined under Article 50 (1) of the Constitution of Kenya 2010 ; see also the decision in **Re Hebtulla Properties Ltd (1976 – 80) 1KLR at 1209** on **audi alterma partem** (right to be heard) rule.

26. The Appellant claims that he will suffer an injustice in the Trial Court since the Amended Plaint is an entirely new entity presenting new facts. That the same was not within his knowledge at the time of the rendering the award by Tribunal.

27. At the outset, is the appellant's apprehension misplaced? The answer is in the affirmative anchored on two fronts.

28. Firstly, the proceedings in the lower indicate that by consent adopted as Court Order on 24th June 2016, the parties agreed to have the Amended Plaint as duly filed. At that point, the appellant had the liberty to file a further amended defence but he chose not to. It is this Court's assessment that he chose not to because it introduced nothing new save for substitution of the Plaintiff, joinder of the 2nd Respondent and prayer to have the 2nd Respondent discharge the charge on the suit land.

29. Secondly, the 1st Respondent has not been the subject of any prejudice as a result of the prosecution of the amended plaint. He was accorded an opportunity to defend the matter in the Tribunal and lower court. Therefore, the claim of being condemned unheard is an unfounded apprehension aimed at hoodwinking the Court.

30. The Jurisdiction of the Tribunal and that of the Trial Court in adopting the award as judgment has been challenged. Thus, it is first important to set out the provisions of **section 7 of Land Disputes Tribunals Act Cap 303A (the Repealed Act)** which sets out the role of the Magistrate's Court regarding the awards emanating from Disputes. The section reads:-

> ***"7(1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.***
>
> ***(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act." (****Emphasis laid)*

31. The said section indicates in mandatory terms that the Magistrate's Court did not have the jurisdiction and/or mandate to review an award made by the Tribunal. On that strength, the trial court cannot be faulted for not having reviewed the decision of the Tribunal as it's mandate as set out in the Repealed Act was very limited.

32. **Section 8(1)** of the Repealed Act further provided for a clear appellate procedure. Appeals from the Tribunal were preferred to the Appeals Committee. **Section 8(9)** of the Act provided for Appeals to the High Court from the decision of the Appeals Committee. It stated thus;

> ***"8 (1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision appeal to the Appeals Committee for the province in which the land which is the subject matter of the dispute is situated.***
>
> ***8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:-***
>
> ***Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved."***

33. From the foregone provisions, it is abundantly clear that the appellant would have made a case if he raised the issue of jurisdiction before the then provincial Appeals Committee. If he was further aggrieved by the decision of the Appeals committee, he had the option of escalating the matter to the High Court to ventilate issues of law. It is therefore a misdirection and a late call to claim that the Tribunal and the Magistrate's Court did not have Jurisdiction to make and adopt the award respectively. On that score, this Court is in no position jurisdictionally to declare the award a nullity since the same became a judgment of a competent court.

34. Last but not the least, the issue of inordinate delay was raised. The Appellant claims that the Application for Review was precipitated by the filing of the Amended Plaint as he filed his application within one year. Nothing could be further from the truth. The Application for Review is in respect of the judgment and decree as adopted by trial court on 21st February 2007 but not the Amended Plaint. That being so, this court finds that the delay of close to nine years is inordinate in the obtaining circumstances.

35. In the result, this court finds no fault in the reasoning and findings of the trial Court. Accordingly, the appeal is devoid of merit and is hereby dismissed in its entirety with Costs to the 1st Respondent.

36. It is so ordered.

DELIVERED, SIGNED and Dated in open court at Migori this 26th Day of FEBRUARY 2020.

G.M.A ONG'ONDO

JUDGE

In the presence of

Mr. Geoffrey Otieno holding brief for Odhiambo learned counsel for the appellant

No. appearance for the Respondent.

1st Respondent –Present