



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 149 OF 2012

DENNIS RADING MUDHUNE.....1ST APPELLANT

LOLWE HOUSING CO-OPERATIVE SOCIETY LIMITED.....2ND APPELLANT

VERSUS

FELGONA A. NDEDA.....RESPONDENT

[Appeal from the award of the Co-operative Tribunal delivered on 6th December 2012]

JUDGMENT

The Appellants, **DENNIS RADING MUDHUNE** and **LOLWE HOUSING CO-OPERATIVE SOCIETY LIMITED** have filed this appeal against the Award of the Co-operative Tribunal.

1. Through that Award, the Tribunal had declared that the Claimant, **FELGONA A. NDEDA** was the legitimate and lawful owner of Plot No. 120 at Lolwe Housing Estate, Kisumu.
2. The Tribunal had also given orders, by way of a Permanent Injunction, restraining the Appellants from trespassing or from carrying out any activities on the said Plot 120.
3. Finally, the Tribunal had ordered the 2nd Appellant to pay to the Respondent herein, the costs of the suit.
4. By their appeal, the Appellants asserted that the Tribunal had made an error of law, by making a determination in a dispute which was about the ownership and occupation of land, as the Tribunal did not have jurisdiction.
5. The first Appellant described himself as a bona fide purchaser for value, without any Notice of the claims being made by the Respondent.
6. Having purchased the plot in question, the 1st Appellant says that he was given a Valid and Legal title from the Ministry of Lands.
7. Furthermore, the 1st Appellant said that it was wrong for the Tribunal to issue orders against him, restraining him from trespassing upon the Plot, whereas the said Appellant was in occupation of the said property.
8. The Appellants faulted the Respondent for failing to have her claim resolved through the process of verification of membership, which was being undertaken by the Cooperative Society. It was the contention of the Appellants that it was the said Society which was best-suited to know whether or not a person was a genuine member.
9. When canvassing the appeal the Appellants narrowed down the issues to two, as follows;

“1. Whether the Honourable Tribunal erred in law in handling a matter that touches an ownership and occupation of land on grounds of jurisdiction?

2. Whether the Honourable Tribunal erred in law and fact in holding that the respondent herein is the legal owner of Plot No. 120, Lolwe estate.”

10. In determining the appeal, the first appellate court is under an obligation to re-evaluate all the evidence on record.

11. The evidence is obviously a part of the record of the proceedings which were recorded by the trial court.
12. Other parts of the record includes the pleadings and the submissions, if any.
13. In this case, the suit was commenced by a Complaint dated 20th June 2011,
14. The prayers sought by the Respondent, in the said Complaint were for;

“(a) An order of this court declaring the Plaintiff as the owner of the Plot No. 120 in Lolwe estate in the location as shown to her by Elizabeth Abongo and the 2nd Defendant.

(b) An order of permanent injunction restraining either of the Defendants from their illegal, unlawful actions to stop them from trespassing from the Plaintiff’s parcel of land.

(c) Costs incidental to this suit.”

15. When responding to the appeal, the Respondent submitted that;

“The prayers before the Honourable Tribunal are not on title of land but on the process of allocation of shares by the 2nd appellant to its members.”

16. I find that the Respondent’s said submission is not supported by either her pleadings in the Complaint or the prayers she sought from the Tribunal.

17. She had specifically asked the Tribunal to make a declaration that she was **THE OWNER** of the plot in issue.

18. Matters of ownership of land are now expressly within the purview of the **LAND AND ENVIRONMENT COURT**.

19. The jurisdiction of the Co-operative Tribunal is spelt out at **Section 76** of the **Co-operative Societies Act**. Thus the Tribunal has the mandate to determine disputes concerning the business of a Co-operative Society, if such dispute was among members or between members or between the society and its members, or between the society and its members, or between the society and any other Co-operative Society.

20. The Act specifically defines members to also include past members, persons claiming through members or deceased members.

21. Therefore, each of the parties to this appeal had the requisite locus to bring a dispute before the Tribunal.

22. However, that is not the only issue to be looked at when determining whether or not the Tribunal had jurisdiction.

23. **Section 76(2)** of the **Co-operative Societies Act** specifies the kind of disputes which feuding parties may place before the Tribunal, as follows;

“(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.”

24. A careful reading of that statutory provision confirms that the Co-operative Tribunal does not have jurisdiction to determine disputes about ownership of land.

25. It does appear to me that the Respondent is well aware of that fact, hence the submission that the Tribunal had not been called upon to determine an issue of ownership of land.

26. The Tribunal appears to have carefully and in a subtle manner, avoided an express declaration that the Respondent was the owner of the land in issue. I say so because the Tribunal expressed itself thus;

“The Claimant may consider seeking appropriate orders in the appropriate court for the revocation of the Certificate of Lease in respect of the parcel of the parcel of land known as Kisumu Municipality/ Block 14/120 which certificate was issued subsequent to the said deceitful action on the part of the 2nd Respondent.”

27. Notwithstanding the recognition of its lack of authority and mandate to revoke the title issued to the 1st Appellant herein, the Tribunal proceeded to declare that the Claimant;

“is the legitimate and lawful owner of Plot No. 120 at Lolwe Housing estate at Kisumu Municipality”.

28. By making that declaration the Tribunal acted in excess of its jurisdiction.

29. I further find that the Tribunal’s said declaration would lead to an absurdity, if it were retained because on the one hand the Respondent has been pronounced the owner of the land in issue, yet on the other hand, the Tribunal appreciates that it lacked the mandate to revoke the title currently held by the 1st Appellant.

30. That situation further fortifies my view that the Tribunal ought not to have made a determination which is literally in vain, as the said declaration cannot give to the Respondent the title to the land in question.

31. Accordingly, the appeal has merit and is allowed. I therefore set aside the Award dated 6th December 2012.

32. As regards the costs of the appeal, I order that each of the parties will pay his own costs. I so order because the Appellants had, in their Defence, expressly admitted that the Tribunal had jurisdiction to hear and determine the matters which the parties had placed before it.

33. In the circumstances, the Tribunal was not called upon to determine whether or not it had jurisdiction. It cannot be said that the Tribunal erred by doing the very thing which the parties asked it to do.

34. Nonetheless, the fact that parties appeared to be in agreement, concerning the jurisdiction of the Tribunal, such an agreement cannot confer jurisdiction if such jurisdiction had not been conferred by law.

35. In conclusion, I reiterate that each party will bear his own costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 4th day of June 2019

FRED A. OCHIENG

JUDGE