



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 399 OF 2016

(FORMERLY H.C.C NO. 16 OF 2011)

ASHWIN RAMJI GUDKA.....PLAINTIFF

VERSUS

ANCHELA KWAMBOKA MBOGA1ST DEFENDANT

PETER OGWORA KIBOSA.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated 8th February 2011 the Plaintiff instituted this suit against the Defendant seeking a declaration that the decision of the Mosochi Land Disputes Tribunal in case No. 20 of 2010 which was adopted as a judgment of the court in Kisii CM Miscellaneous Application No. 127 of 2010 revoking or cancelling the Plaintiff's title in land parcel number WEST KITUTU/BOGEKA/529 and subdividing the same among the family members of the 1st and 2nd Defendants was and/is unlawful, illegal and/or improper and unconstitutional and the same is a nullity. He also sought a permanent injunction restraining the 1st and 2nd Defendants from subdividing or in any way interfering with the Plaintiff's title No. WEST KITUTU/BOGEKA/529.

2. Despite being served with the Plaint and summons to enter appearance, the 1st and 3rd Defendants did not file any documents. The 2nd Defendant entered appearance and filed a Replying affidavit sworn on 19th July 2011 admitting that he sold the suit property to the plaintiff. The 2nd Defendant passed away before the hearing date.

PLAINTIFF'S CASE

3. The suit was set down for hearing and the Plaintiff testified and produced the documents in his List of documents. He testified that he entered into a sale agreement whereby the 2nd Defendant agreed to sell him the suit property. He stated that prior to entering into the sale agreement he conducted a physical search of the suit property and found that the 2nd defendant was in occupation thereof. He then conducted an official search and confirmed that the land was registered in the name of the Defendant and it had no encumbrances. He produced a copy of the sale agreement dated 24th August 2010.

4. The Plaintiff testified that the 2nd Defendant subsequently transferred the land to him. He then took possession of the land and fenced it. The Plaintiff stated that the 2nd Defendant continued living on the land until he died. He stated that sometime in the year 2011 the 1st Defendant trespassed into the suit property and occupied a portion thereof. She later lodged a claim over the land at Mosochi Land Disputes Tribunal whereby she sought to have a portion of the land transferred to her as she claimed she was a daughter-in-law to the 2nd defendant.

5. The Plaintiff stated that by the time the 1st Defendant lodged her complaint at the Land Dispute's Tribunal, he had already been registered as the owner of the land though he was not enjoined in the Tribunal proceedings. He produced a copy of the proceedings of the Tribunal as an exhibit. The Tribunal decided that the suit property be given to the 1st Defendant. The award of the Tribunal was subsequently adopted as a judgment of the court.

6. It was the Plaintiff's testimony that he only learnt of the Tribunal proceedings when the District surveyor wrote to him to inform him that he would visit the suit property to implement the court order. He then instructed his advocate to respond to the Surveyor that he was opposed to the intended survey since he was the registered owner of the land. It was his testimony that the proceedings before the tribunal were illegal.

7. Upon cross examination by the 1st Defendant, he stated that the 2nd Defendant never informed him that he had sons who were staying on the suit property. He denied that the 1st Defendant was occupying the land when he bought it. He stated the 2nd defendant never informed him that he had been sued over the land.

8. Since the 1st Defendant did not file any defence she could not lead any evidence and her case was therefore closed. The Plaintiff filed his submissions on 16th December 2019.

ISSUES FOR DETERMINATION

9.
 - i. Whether the Plaintiff is the registered proprietor of the suit property
 - ii. Whether the 1st Defendant has any lawful claim over the suit property
 - iii. Whether the award by Mosochi Land Disputes Tribunal in Land Tribunal Case no.20 of 2010 which was adopted a judgment of the court vide Kisii CM Misc Application no. 127 of 2010 was lawful
 - iv. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

10. It was the Plaintiff's uncontroverted evidence that he is the registered proprietor of Land Parcel No. WEST KITUTU/BOGEKA/529. He produced a title deed in his name on the 25th day of August 2010. He purchased the suit property from the 2nd Defendant through a land sale agreement dated 24th August 2010. By virtue of the said registration, the Plaintiff was vested with the rights and privileges contained in sections 24, 25 and 26 of the Land Registration Act, no. 3 of 2012.

11. The 1st Defendant did not file any defence or counterclaim to assert her right to the suit property. According to the Plaintiff, the 1st Defendant only trespassed onto the Plaintiff's land after he had fenced it in the year 2010. The Defendant can therefore not lay any lawful claim to the suit property. Learned counsel for the Plaintiff cited the case of **David Ogutu Onda V Walter Ndede Owino (2014) eKLR** where the court defined trespass as follows:

“Trespass has been defined as any unjustified intrusion by one person upon the land in the possession of another. To be able to establish the tort of trespass, the plaintiff had to establish his ownership of the suit property and the fact that the Defendant's occupation of the property is unjustified.

12. Counsel further relied on the case of **Fredrick Joshua Onyiego v Robert Sanganyi (2014) eKLR** where the court observed as follows:

“The Plaintiff has proved that he is the registered proprietor of the suit property. The Plaintiff has proved that the Defendant entered the suit property and has remained in occupation of the suit property without the plaintiff’s permission. The Defendant has admitted that he is in occupation of the suit property. Although the Defendant claims to have purchased the suit property from one Cremencia Onyiego, the Defendant did not tender any evidence in proof of his title over the suit property. The Plaintiff’s evidence regarding his proprietorship of the suit property has therefore not been controverted. It is therefore my finding that the Plaintiff is the registered lawful owner of the suit property. The Defendant has not shown any lawful cause or justification for his entry and remainder in occupation of the suit property. in the circumstances, I am in agreement with the Plaintiff that the Defendant is a trespasser on the suit property.”

13. Before making a finding on whether the 1st Defendant is a trespasser it is important to determine the third issue which is whether the decision of the Mosochi Land Disputes Tribunal in Land Tribunal Case No.20 of 2010 which was adopted a judgment of the court vide Kisii CM Misc Application no. 127 of 2010 was lawful.

14. The case at the Tribunal was filed by the 1st Defendant against the 2nd Defendant. The 1st Defendant who is the 2nd Defendant’s daughter-in-law claimed that the suit property was family land and she was therefore entitled to a portion thereof by virtue of her marriage to the 2nd Defendant’s late son. From the proceedings of the Tribunal which were produced by the plaintiff, the 1st Defendant informed the Tribunal that the 2nd Defendant was in the process of selling the suit property to the Plaintiff. The 2nd Defendant did not deny the allegations. After hearing the evidence of the 1st and 2nd Defendant the Tribunal arrived at the decision that the land be sub-divided among the 2nd Defendant’s family so that the 1st Defendant could get her share. The said decision was adopted a judgment of the court vide Kisii CM Misc Application no. 127 of 2010.

15. The Plaintiff testified that at the time the Tribunal case was filed in September 2010, the suit property had already been transferred to him. He produced a title deed indicating that the transfer was effected on 10th August 2010 while the title deed was issued on 24th August 2010. The Plaintiff stated that despite being the registered owner of the suit property, he was not enjoined in the suit nor was he invited to appear before the Tribunal.

16. Counsel for the Plaintiff submitted that the issues that were ventilated before the Tribunal touched on title to land in respect of the suit property as the complainant sought to have the said title cancelled. He submitted that the Tribunal did not have the mandate to adjudicate upon issues pertaining to rectification and/or cancellation of titles as such jurisdiction was vested in the court. It is therefore his contention that the proceedings and resultant award rendered by the Tribunal was a nullity. He cited the case of **Stanley Atira Odera v Johnstone Odera Ambuli & 5 Others (2019) eKLR** where the Appellant challenged the jurisdiction of the Tribunal to order sub-division of the 1st Respondent’s land and the Court of appeal held as follows:

“The Land Disputes Tribunal was established pursuant to section 4 of the now repealed Land Disputes Tribunal Act. Section 3(1) of the Act provides for the limitation of the jurisdiction of the Tribunal. It states:

“Subject to this Act, all cases of a civil nature involving a dispute to:

(a) the division of, or determination of boundaries to land, including land held in common;

(b) A claim to occupy or work land; or trespass to land:

(c) Shall be heard and determined by a Tribunal established under section 4”

17. The court further observed that:

“From the above provision it is clear that the powers of the Tribunal were limited and it could only deal with disputes of the nature

captured under the above quoted section of the Act”.

18. With regard to sub-division the court held as follows:

*“What then would be the effect of sub-dividing the 1st Respondent’s land as ordered by the Tribunal? To our mind in order to put into effect the ruling of the Tribunal, the 1st respondent would have been forced to transfer his land to the appellant failing thereto the court registrar would have signed the transfer documents on his behalf. We do not think that under the Act the Tribunal has jurisdiction to transfer a person’s land to another person. See **Asman Maloba Wepukhulu & Another V Francis Wakhwabubi Biket Ca No. 157 of 2001**. We are therefore of the view that the Tribunal acted ultra vires and beyond its jurisdiction when it ordered the sub-division and transfer of the portion of the 1st Respondent’s land to the appellant and his family. The jurisdiction of a Court is conferred either by the Constitution or by statute and as was held in the case of **Owners of Motor Vessel Lilian S v Caltex Oil Kenya Ltd (1989) KLR**, jurisdiction is everything and once a court forms the opinion that it has no jurisdiction, it must immediately down its tools because it has no power to make one more step in the matter before it”*

19. In view of the provisions of the foregoing, particularly the provisions of section 3(1) of the Land Disputes Tribunal Act (now repealed) I agree with the Plaintiff’s counsel that the Tribunal had no jurisdiction to order the sub-division of the suit property herein.

20. The next question is whether this court can issue a declaration that the decision of the Tribunal was null and void. Under the Land Disputes Tribunal Act (repealed) the procedure for challenging the decision of the Tribunal was by way of an Appeal to the Provincial Appeals Committee or by Judicial Review Proceedings within a period of 6 months from the time the decision was made. It has been submitted on behalf of the Plaintiff that he was not able to file an appeal to the Provincial Appeals Committee or institute Judicial Review proceeding as he was not aware of the proceedings until much later and that is what prompted him to file this suit seeking a declaration that the Tribunal award was null and void. Counsel referred to the case of **Joana Nyokwoyo Buti v Walter Rasugu Omariba (2011) eKLR** where the Court of Appeal held as follows:

*“A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceeding are and which has no coercive force- that is it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter. In the present case the 1st Respondent sought a declaration in essence that the decision of the tribunal was unlawful as it was made without jurisdiction. If such a declaration is granted, the result will be that the decision of the tribunal would be a nullity. The 1st Respondent was not a party to the tribunal proceedings. The decision of the Tribunal came to his notice long after the 30 days stipulated by section 8 (1) of the Land Disputes Tribunal Act for appealing to the Provincial Appeal’s Committee had elapsed, and also long after the six months stipulated for seeking a judicial review remedy of an order of certiorari had expired. It is true that the 1st Respondent filed a judicial review application but it was dismissed on the ground that the application for leave was made outside the stipulated six months. Since the application for judicial review was not determined on the merits, the doctrine of res judicata does not apply. Moreover, although the Resident Magistrate’ Court entered judgment in accordance with the decision of the tribunal, such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc –See paragraph 1210 of Halsbury’s Laws of England, 4th Edition – reissue page 353. In **Jonesco v Beard (1930AC 293)** the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in **Kuwait Airways Corporation v Araqi Airways Co & Another (No. 2) [2001] 1WLR 429**. The decision of the Tribunal has of course been merged in the judgment of the magistrate’s court.”*

21. From the above decision, it is clear that the court can make a declaratory order nullifying a decision based on an award by a Tribunal that had no jurisdiction. The said decision is binding on this court.

22. The facts of this case are somewhat similar to those in the case of **Joana Nyakwoyo Buti (supra)** in the sense that the Plaintiff was not a party to the Tribunal case and learnt about it when the time for filing an appeal to the Provincial Appeal’s Committee or Judicial Review had elapsed. Consequently, he is entitled to a declaratory order that the award of the Tribunal was arrived at without jurisdiction is null and void. This in turn means that the 1st Defendant has no lawful claim over the suit property and her continued stay therein which was founded on the

decision of the Tribunal cannot be justified. To the extent that she is occupying the suit property without the consent of the Plaintiff who is the registered owner thereof, she is a trespasser.

23. In the final analysis the Plaintiff has proved his case on a balance of probabilities. I therefore enter judgment for the Plaintiff and make the following final orders:

- a. A declaration is hereby issued that the decision of the Mosocho Land Disputes Tribunal in Tribunal Case No. 20 of 2010 which was adopted as a judgment of the court in Kisii CM Miscellaneous Application No. 127 of 2010 revoking or cancelling the Plaintiff's title in land parcel number WEST KITUTU/BOGEKA/529 and sub-dividing the same among the family members of the 1st and 2nd Defendants is null and void.
- b. A permanent injunction is hereby issued restraining the 1st Defendant from sub-dividing or in any way interfering with the Plaintiff's title No. WEST KITUTU/BOGEKA/529.

24. The costs of this suit shall be borne by the 1st Defendant

Dated, signed and delivered electronically via zoom this 23rd day of April, 2020.

J.M ONYANGO

JUDGE