



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CIVIL SUIT NO. 28 OF 2012

JACKTONE AGGREY ODINGA.....PLAINTIFF

VERSUS

MECHAEL NDEDA ODONGO DEFENDANT

JUDGMENT

1. **Jacktone Aggrey Odinga**, the Plaintiff, commenced this suit against **Michael Ndeda Odongo**, the Defendant, through the Plaint dated 21st February 2012, in which he seeks for the following orders;

- a) A declaration that the Siaya District Land Disputes Tribunal award in case number **8 of 2002** in respect of land parcel **North Sakwa/Nyawita/242** as adopted on 18th March 2011 in **Bondo SRMC MISC Land case No.4 of 2007** and the decrees issued thereof are unlawful, null and void.
- b) A permanent injunction restraining the Defendant and those claiming under him from executing the said award and or interfering with the Plaintiff's title and possession of the said land.
- c) Costs and interests.

The Plaintiff avers that he was the registered proprietor of the said land and that the Defendant lodged a claim over it with the **Siaya Land Disputes Tribunal case Number 8 of 2002**. That the tribunal awarded the land to the Defendant on 7th December 2006 which award was adopted by Bondo SRMC MISC Land Case No.4 of 2007 on the 18th March 2011. That he filed an appeal with the Nyanza Provincial Land Appeals Committee on 12th August 2011 but the appeals Committee was dissolved before it could decide on the appeal following the repealing of the enabling Act. That if the tribunal award as adopted is executed or implemented then the land will be illegally transferred to the Defendant leading him (Plaintiff) to suffer great prejudice, loss and damages as the award was in excess of tribunal jurisdiction and therefore unlawful, null and void.

2. The plaintiff's claim is opposed by the Defendant through his undated defence filed on 8th May 2012. The Defendant averred that he has since been registered as the proprietor of the suit land. That the Plaintiff had acknowledged the Defendant's claim to the land and attended the land control board for consent to transfer but on declining to sign the transfer form, he filed the tribunal case.

That the tribunal award in his favour was read to the parties on 7th December 2006 and adopted in Bondo Subordinate Court on 18th March 2011 and the Plaintiff did not lodge an appeal as required. That therefore this suit is res judicata as the Bondo Court decision has not been challenged.

3. During the hearing, Mr Orengo advocate appeared for the Plaintiff while the Defendant was in person. The Plaintiff testified as PW1 while the Defendant testified as DW1. Thereafter the Counsel for the

Plaintiff filed written submissions and further submission dated 9th March 2016 and 17th June 2016 respectively. The Defendant filed his written submissions dated 9th May 2016.

4. The following are the main issues for the court's determination;

a) Whether this suit is resjudicata in view of the Land Disputes Tribunal award of 7th December 2007 in case **No.8 of 2002** as adopted on 18th March 2011 in **Bondo SRM MISC Land Case No.4 of 2007**.

b) Whether the Plaintiff has proved his case on a balance of probabilities and if so what orders to issue.

c) Who pays the costs.

5. The court has carefully considered the averments in the pleadings filed by both parties, the oral evidence by both parties, the rival written submissions and come to the following determinations;

a) That even though both parties did not avail a copy of the register for land parcel **North Sakwa/Nyawita/242**, the copy of the certificate of official search produced as exhibit by PW1, the testimony adduced before the Bondo District Land Disputes Tribunal in claim **No.SYA/08/2002** as confirmed in the copy of proceedings also exhibited as evidence by PW1 and the parties oral evidence in this court confirms that the Plaintiff was the first registered proprietor of the suit land.

b) That the averments in the defence filed by the Defendant that the Plaintiff had acknowledged the Defendant's claim over the suit land is supported by Bondo District Land Disputes Tribunal proceedings where they observed that both the Plaintiff and Defendant had gone to Siaya to collect the title deed for the suit land after which the Plaintiff handed it over to the Defendant to proceed with the transfer to his names. That the claim by the Plaintiff in his evidence that his title deed had been taken from his house without his consent and that when he later saw it with the Defendant he did not lodge any complaints with the police or chief sounded unconvincing. That the Plaintiff must have been the one who had handed over the title deed to the Defendant to effect the transfer as found by the Tribunal. That the Defendant could however not do so as the Plaintiff thereafter declined to sign the transfer form. That in an effort to compel the Plaintiff to transfer the land to him, the Defendant filed the Bondo District Land Disputes Tribunal claim. **No SYA/08/2002**.

c) That the tribunal powers were as limited under **Section 3(1)** of the repealed **Land Disputes Tribunal Act No.18 of 1990**. The jurisdiction is to deal with disputes of a civil nature, concerning the division of land, or the determination of boundaries to land, including land held in common, a claim to occupy or utilize land or trespass to land. The Bondo District Land Disputes Tribunal award dated 7th December 2006 appear to affirm another body's decision. It reads as follows;

“This Tribunal concurred with the decision of the Land Control Board and therefore allow Michael Ndeda Odondo to proceed with the transfer of the parcel number North Sakwa/Nyawita/242 with the use of the title deed for P/N0 242, of 26/1/87 and Bondo Land Board Consent No.358309 of 1/ 4/87.” [emphasizes mine]

That the Land Disputes Tribunal Act (supra) did not grant the tribunals appellate or supervisory jurisdiction over the land control boards and the decision of 7th December 2006, must have been the tribunal's award.

d) That if the Tribunal read the award on 7th December 2006 to the parties, then any dissatisfied party had 30 days to file an appeal with the **Provincial Land Disputes Committee** in accordance with **Section 8(1) of the said Act**. That there was no appeal preferred on the tribunal award within the time set by any of the parties.

e) That if the Bondo Land Disputes Tribunal award dated 7th December 2006 was not read to the

parties until during the adoption proceedings in **Misc. Land Case No.4 of 2007**, then the copy of the order attached to the Plaintiff's list of documents confirms that the reading of the award was done in open court on 18th March 2011. That any party desiring to lodge an appeal with the Appeals Committee would have done so before the expiry of 30 days from that date in accordance with **Section 8(1) of the said Act** and no appeal was lodged within that period.

f) That the Plaintiff has not annexed any documentary evidence to confirm that he had indeed filed an appeal with Nyanza Land Disputes Appeals Committee by the time the Land Disputes Tribunal Act was repealed on 30th August 2011 under **Section 31 of the Environment and Land Court Act No.19 of 2011**.

That even if the Plaintiff had a pending appeal with the Appeal's Committee by the time it was disbanded, then his recourse would have been either to invoke this court special jurisdiction of judicial review as provided for under **Order 53 of Civil Procedure Rules** or the appellate jurisdiction in accordance with the law. The Defendant's contention that the Plaintiff did not invoke the Court's judicial review or appellate jurisdiction on the tribunal award or adoption proceedings has not been rebutted.

g) That this court has jurisdiction to issue declaratory orders in appropriate cases. The court of Appeal in the case of **Johana Nyokwoyo Buti -V- Walter Rasugu Omariba & 2 others C.A No.182 of 2006 Kisumu** while addressing whether or not a decision of a land disputes tribunal's (a quasi- judicial body) decision was amenable to the ordinary jurisdiction of a superior court the court made reference to **Order 3 Rule 9 of Civil Procedure Rules** which provides;

“No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declaration of right whether any consequential relief is or could be claimed or not”

And held as follows:

“A declaration or declaratory judgment is an order the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available to 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”.

The court further addressed whether a subordinate court's judgment entered in accordance with the tribunal's award could be challenged in fresh proceedings and held as follows:

“ ... such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc ... see paragraph 1210 of Halsbury's Law of England, 4th Edition – Re-issue page 353. In Jonesco -V- Beard [1930] AC 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 (No2) [2001] I WLR 429”.

(h) That having found as in (d) and (e) above that the Plaintiff herein could have filed an appeal with the Appeals Committee in accordance with **Section 8(1) of the Act** or alternatively commenced judicial review proceedings under **Order 53 of the Civil Procedure Rules** and did not, the option of approaching this court through a fresh suit for declaratory orders filed over five years after the Land disputes tribunal award had been adopted was not available to him. The court agrees with this court's decision which was later upheld by the court of Appeal in **Florence Nyaboke Machani-V- Mogere Almosi Ombui & 2 Others** [2015] eKLR where it was observed as follows:

“The appellant in this appeal did not challenge the decision of the tribunal in accordance with

the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file the suit for declaratory orders and compensation.”

The court of appeal upheld the decision of the High court and dismissed the appeal.

6. That flowing from the foregoing, the court finds that the Plaintiff has failed to establish his case on a balance of probabilities and his suit is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF SEPTEMBER 2016

In presence of;

Plaintiff Present

Defendant Present

Counsel Mr Orengo for Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/9/2016

S.M. Kibunja J.

Oyugi court Assistant

Mr Orengo for the Plaintiff

The Defendant is present in person

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/9/2015

Court: Judgment delivered in open court in presence of both parties and

Mr Orengo for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/9/2015