



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL APPEAL NO. 84 OF 2011.

PIUS OUMA WANGA APPELLANT

=VERSUS=

SYLVESTER ODHIAMBO WANGA..... RESPONDENT.

(An appeal from the decision of the Western Provincial Land Disputes Appeals Tribunal in Land Disputes Appeal No. 42 of 2011 read on 17/10/2011)

J U D G M E N T.

PIUS OUMA, hereinafter referred to as the Appellant, being dissatisfied with the decision of the Western Provincial Land Disputes Appeal Committee of 17th November, 2011 in land Disputes Appeal No. 40 of 2011, preferred this appeal through the memorandum of appeal dated 14th December, 2011 setting out of five grounds. The grounds are as follows:

” 1. That the Western Provincial Land Disputes Appeals Tribunal erred in law in failing to note and rule that the suit land was registered on 8/10/1967 in the name of Wanga Sieunda who died on 11/3/1987 and that the respondent’s claim before the Butula Division Land Disputes Tribunal was instituted out of time and was statute-barred and it ought to have allowed the appellant’s appeal before it and proceeded to dismiss the respondent’s claim as filed before the tribunal.

1. That the Western Provincial Land Disputes Appeals Tribunal erred in law in rejecting the appellant’s appeal yet the Butula Division Land Disputes Tribunal had erred by purporting to arbitrate over the issue of succession and apportionment of the estate of the deceased Wanga Sieunda, the father of parties hereto, which issue was not within its jurisdiction and when succession proceedings were yet to be instituted in respect of the estate of the said deceased.
2. The composition of the Western Province land Disputes Appeals Tribunal was improper and unlawful and its proceedings and ruling and or orders were irregular, illegal, incompetent and of no legal efficacy.
3. The Western Province Land Disputes Appeals Tribunal erred in upholding the verdict of the Butula Division Land Disputes Tribunal when the proceedings and verdict of both the latter tribunal and the appeals committee were both a nullity, ultra vires, incompetent, null and void *ab initio* and ought not be allowed to stand.
4. The Western Provincial Land Disputes Appeals Tribunal failed to analyse the issues before it lawfully, critically, wholly or properly and its decision and that of the tribunal were evidently pre-determined, based, and indefensible and were arrived at in a cursory and perfunctory manner and have occasioned a serious miscarriage of justice.”

The Appellant prays for the appeal to be allowed with costs by setting aside the orders in Bulula

Land Disputes Tribunal in respect of Marach/Elukongo/1316.

The record of appeal was served on Sylvester Odhiambo Wanga, hereinafter referred to as the Respondent, who appointed M/S. Namatsi & company advocates to represent him. M/S. Akwala & co. Advocates appeared for the Appellant.

The parties counsel appeared before the Deputy Registrar on 22nd October, 2014 and recorded a consent that the parties file written submission. The Appellant's counsel filed their written submission dated 4th November, 2014 on the 6th November. The counsel for the Respondent filed their written submissions dated 5th November also on 6th November, 2014.

SUMMARY OF APPELLANT'S SUBMISSIONS.

1. That Respondent's claim for a resubdivision of land parcel Marchi/Elukongo/1316, before the Butula Land Disputes Tribunal, was filed 42 years after the land was registered after adjudication on 8th October, 1967. As no leave to extend time was obtained, counsel submitted that the suit was statute barred, incompetent and un maintainable and that the Appeals Committee ought to have allowed the Appellants appeal and dismissed the Respondent's claim.
2. That the suit land was registered in the names of the late Wanga Sieunda and therefore the tribunal had no jurisdiction to deal with the dispute before it as that was the preserve of a succession Court.
3. That the Western Provincial Land Dispute Appeals Committee that heard the Appellant's appeal was improperly constituted as it had five members instead of three contrary to sections 8 (5) and 9 (2) of the Land Disputes Tribunal Act (Repealed). The counsel submitted that this rendered the proceedings and verdict of the Appeal Committee a nullity, unlawful and or illegal and should not be allowed to stand.

SUMMARY OF RESPONDENT'S SUBMISSIONS.

1. That the fact relating to the time the suit land got registered is irrelevant as it was only discovered recently.
2. That the Butula Land Disputes Tribunal only recommended the method of sharing the land among the six sons of the deceased and therefore the Appeal's Committee was fair in dismissing the appeal. The counsel submitted that the tribunal did not apportion the estate.
3. That the issue of the Appeal's Committee composition was not raised by the Appellant during the hearing of the appeal even though he was present. The counsel submitted that the Respondent had no say in the composition of the Appeal's Committee and that justice should be done without undue regard to technicalities as required under Article 159 (2) (d) of the Constitution.
4. That as the suit land was ancestral property and the tribunal's conclusion was that it be shared equally among the brothers, the tribunal had acted within its jurisdiction and the decision was therefore competent and in conformity with the law. The counsel submitted that the appeal should be dismissed with costs.

This being a second appeal, this court is only obliged to deal with issues of law as provided under section 8 (9) of the Land Disputes Tribunal Act, now repealed, which stated as follows;

“ 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 for hearing by the High court unless a judge of that court has certified that an issue of law (other than customary law) is involved.

BACKGROUND.

1. The parties to this appeal are sons to the late Wanga Sieunda who died in 1987. The said deceased had three wives namely, Angelina Nduri, Maria Achieno and Alice Nekesa. He also owned land parcel Marachi/Elukongo/1316.
2. That the late Wanga had six sons namely, Silvester Odhiambo Wanga, Jacob Bwire, Johnstone Okello, Pius Ouma, Jackton Queen and Charles Odhiambo.
3. That before his death, the late Wanga shared the suit land among the houses of his three wives and appointed a son from each of the three houses to be in charge of the portion for that house.
4. That the Respondent herein has not been given a specific portion of the suit land and after failing to get a solution through the elders efforts, filed a claim with the Butula Land Disputes Tribunal on 12th January, 2009 (See copy of the proceeding in the record of appeal) The Tribunal, after hearing verbal evidence made the following order on 9th February, 2009;

“ Having heard and considered the representations of all the parties (and their witnesses) and having considered all documents submitted to us, we hereby decide as follows;

0. ***That the boundaries planted by the late Wanga Sieunda between his three wives be removed.***
0. ***The six next of kin of the late Wanga Sieunda (Silverster Odhiambo, Jackton Okello Wanga, widow – Rosebella Bwire, Charles Odhiambo, James Oduor and Pius Ouma Wanga) to process the succession of land No. Marachi/Elukongo/1316 and share equally.***
0. ***Costs to be shared among plaintiff/objectors.”***

5. That Johnston Okello Wanga, Pius Ouma Wanga, Sebella Anyongo Bwire, Charles Odhiambo Wanga and James Owuor, not being satisfied with the tribunal’s decision filed appeal No. 42 of 2011, before the Western Province Land Disputes Appeals Committee, naming Silverster Odhiambo Wanga as the objector (Respondent) (See copy of the proceedings in the record of appeal).

6. The Appeals Committee heard the parties and passed the following verdict which is subject matter of this appeal;

- “ 1. The appeal fails due to lack of new evidence.**
- 2. The Butula Tribunal court ruling stands as ordered.**
- 3. Costs to costs.**
- 4. The parties to keep peace.”**

The verdict was signed and read on 17th October, 2011 by the following; Wilson Orunja as chairperson and four members namely, Rebecca Jendeka Evelia, Sarah Nasimiyu Shallo, Jonathan Bomij and Salim Esegeri Bilali.

CONCLUSION.

1. That the composition of the Appeals Committee is as set out in section 9 of the Land Disputes Tribunal Act (Now repealed) which requires a panel of three members (see subsection 2) out of the six members including the chairperson appointed under subsection 1. It is important to set out subsection 2 of section 9 in details as hereunder;

“2. For the purpose of hearing appeals from Tribunals in the province for which the Committee is constituted the Committee shall sit in a panel of three members and in such places as may be determined by the Provincial Commissioner.”

The copy of the proceedings and award of the Appeals Committee is signed by Chairman and four members which is beyond the three set under section 9 (2) of the Land Disputes Tribunal Act (Repealed). The Appellant has not suggested that he suffered any prejudice by the Appeals Committee sitting in a

panel of five instead of three. The court is of the view that the panel must be consisted of an odd number like 3 or 5 out of the total membership of six. There was no objection raised by any of the parties against the membership of the panel and that ground fails.

2. That section 3 (1) of the Land Disputes Tribunal Act (Repealed) limited the jurisdiction of the tribunals as follows;

“ 3. (1) *Subject to this Act, all cases of a Civil nature involving a dispute as to-*

- a. *the division of, or the determination of boundaries to land, including land held in common;*
- b. *a claim to occupy or work land; or*
- c. *trespass to land,*

shall be heard and determined by a Tribunal established under section 4.”

When testifying before the Butula Land Disputes Tribunal, the Respondent inter alia stated as follows;

“ *I wish to state that I live in my father’s land as a squatter. I want to be given my share. We were born six brothers;-.....my father gave land to all my brothers.....except me because I was still young at the time of giving the land. I pray that the Butula Land Dispute Tribunal to urge my brother to give me my share.”*

During the hearing before the Appeals Committee, the Respondent, among others, stated;

“ 1. *I am a son to the late Wanga Sieunda who died in 1987, living six sons and mothers on the land under dispute No. Marachi/Elukongo/1316 and the Succession Cause has not been done to date.*

2. I am demanding to be given my share from my father’s land which is being used by only five brothers without me.

3. My brothers have shared portions of land living me without any land to cultivate and none was willing to listen to me.

4.....”

The evidence given by Johnstone Okello, Pius Ouma Wanga, Rosebella Bwire, Charles Odhiambo Wanga and James Oduor before Butula Land Disputes Tribunal shows that they were not opposed to the Respondent’s getting a portion of their father’s land. Other than Johnstone Okello, the other witnesses were of the view that the Respondent should get a portion from the share given to his mother. The witnesses restated similar positions during the hearing before the Appeals Committee. It is however instructive to note that two of the Appellants namely, Johnson Okello Wanga and Charles Odhiambo Wanga supported the Respondent’s claim and asked that the decision of Butula Land Disputes Tribunal be adopted/upheld.

The foregoing shows clearly that what the Respondent wanted the tribunal to do was to assist him get a portion of land from the land that belonged to his deceased father, the late Wanga Sieunda, as his brothers had declined to give him a share. This did not mean that the tribunal was being asked to take onto itself the jurisdiction of a Succession court under the *Law of Succession Act Chapter 160 of the laws of Kenya*. The decision of the tribunal was alive to the fact that formal and legal distribution would be through the process of succession when it directed that the “ *six next of kin..... to process the succession of land No. Marachi/Elukongo/1316 and share equally.*” The Law of Succession Act commenced on 1st July, 1981 and as the late Wanga Sieunda is said to have died in 1987, his estate is subject to the processes prescribed under the Act. Section 40 of the said Act states;

“ 40 9 (1) where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the not interstate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

The tribunal having been told that the heirs of the late Wanga Sieunda had not commenced succession cause for their father’s estate, and the Respondent having sought assistance to be given a portion of land like his brothers, the tribunal had the power to make a provision for the Respondent. He needed a specified portion of land to occupy and work pending the final distribution of the estate through a succession cause. The whole suit land was occupied by the Respondent’s brothers, who included the Appellant, and to accommodate the Respondent, the existing boundaries fixed by the late Wanga Sieunda would be affected. The tribunal decision was therefore within its powers and in accordance with section 3 (1) (b) of the Land Disputes Tribunal Act (Repealed).

3. That for reasons set out in (2) above, I find that as the Respondent’s claim before the tribunal was for a portion of his father’s land to occupy and work like his brothers. That considering the unchallenged evidence that he had not been given a share by his father before his death due to age, I find that the tribunal was within its powers to issue the orders as it did on 9th February, 2009. Needless to say, the Western Province Land Disputes Appeals Committee decision to dismiss the appeal filed before it cannot therefore be faulted.
4. That the claim by the Respondent’s was against his brothers and not against the estate of Wanga Sieunda. The Respondent’s claim is for land to occupy and work like his brothers and not to be registered as the proprietor. The Respondent, like the other brothers, have a common interest over the estate of the late Wanga Sieunda and his claim was not statutes barred. The evidence the Respondent adduced was that he was living on the suit property as a squatter and wanted a specified portion just like his brothers and that was not rebutted.
5. That for reasons set out above, I see no merit in the appeal and the following orders are issued;
 - a. The appeal is dismissed with costs.
 - b. The decision of Western Province Land disputes Appeals Committee upholding the decision of Butula Land Dispute Tribunal decision of 9th February, 2009 is upheld.
 - c. That so as to give effect to the orders of the Tribunal, the parties are directed to consult among themselves and within 60 days agree on the portion of land to be occupied by the Respondent. In case the parties are unable to agree among themselves, the Area Chief is mandated to summon the parties for a hearing and thereafter point out the portion of land to be occupied by the Respondent out of the suit land Marachi/Elukongo/1316 awaiting the formal distribution through a succession cause in accordance with the Law of Succession Act.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON ...5THDAY OF FEBRUARY, 2015.

IN THE PRESENCE OF...PRESENT IN PERSON...APPELLANT

PRESENT IN PERSON...RESPONDENT.

MR. FWAYA FOR MR. AKWALA FOR APPELLANT.