



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**HCCA. NO. 35 OF 2013.**

**POLCARP NYONGESA NANZALA .....APPELLANT**

**VERSUS**

**WILLIAM ONYANGO OMONDI..... RESPONDENT.**

***(An appeal from Butula Land Dispute Tribunal award of 4<sup>th</sup> day of April, 2011 adopted in Busia PMC Land Dispute No. 54 of 2011 on 21<sup>st</sup> day of July, 2011)***

**J U D G M E N T.**

**POLYCARP NYONGESA NANZALA** hereinafter, referred to as the Appellant, being dissatisfied with Butula Land Disputes Tribunal award of 4<sup>th</sup> April, 2011 and adopted in Busia PM.CC. Land Case No. 54 of 2011 on 21<sup>st</sup> July, 2011 filed this appeal through the memorandum of appeal dated 13<sup>th</sup> August, 2013 setting out four grounds summarized as follows;-

1. That he had filed an appeal before the Provincial Land Disputes Appeal Committee which ruled in his favour on 18<sup>th</sup> January, 2012 but by then the committee had been disbanded.
2. That the Land Disputes Tribunal acted beyond its powers by ordering the subdivision of registered land.
3. That the Land Disputes Tribunal award was contrary to section 6 of the Land Control Act, Cap 302 of Laws of Kenya as the suit land was agricultural and the requisite consent had not been obtained.
4. That the Land Dispute Tribunal failed to observe that the Respondent had bought land from a person who was not the registered owner of the suit land.

The Appellant named William Onyango Omondi as the Respondent. Appellant filed written submissions dated 14<sup>th</sup> January, 2015 and on hearing date both parties made verbal submissions.

This being a first appeal, the court has an obligation to assess the evidence tendered afresh and come to its own conclusion having regard to the fact that it never saw or heard the witnesses testify (*see Seller – vs- Associated motor boat company ltd [1968]E.A 123*)

**BACKGROUND FACTS.**

1. That the Respondent filed Butula Land Disputes Tribunal case No. 24 of 2010 claiming one acre of land from Marachi/Elukhari/1387 which he had bought from one Peter Ngolo Owuor who was named the 1<sup>st</sup> objector in those proceedings. The Appellant herein was named as the 2<sup>nd</sup> objector.

2. The Respondent explained how he and the 1<sup>st</sup> objector entered into an agreement under which he was to get one acre for Kshs.30,000/= on the 18<sup>th</sup> February, 2001. The agreement showed that he paid Kshs.13,000/= leaving a balance of Kshs.17,000/= which he claimed to have cleared later. The Respondent took possession of the one acre and have been using it but the 1<sup>st</sup> objector did not transfer the title to him. The Respondent had filed the claim after discovering that the 1<sup>st</sup> objector had transferred the title from his late brother's names to those of the 2<sup>nd</sup> objector who is his nephew.
3. The said Peter Ngolo (1<sup>st</sup> objector ) confirmed entering into a sale agreement with Respondent in 2001 but said the Respondent cleared the purchase price on 6<sup>th</sup> October, 2009 contrary to his expectation. The 2<sup>nd</sup> objector , who is the Appellant herein, confirmed having seen the Respondent working on the land but neither him nor the 1<sup>st</sup> objector told him about their relationship.
4. The evidence tendered before the tribunal clearly shows that Peter Ngolo Owuor (1<sup>st</sup> objector) was never the registered proprietor of the suit land. As at the time of the sale agreement in 2001, the suit land was registered in the names of the late Mathias Muruka Owuor. Later, vide Busia Succession Cause No. 119 of 2006, Polcarp Nyongesa Nanzala, the Appellant herein was appointed the administrator of the estate of the late Mathias Muruka Owuor and the grant was confirmed on 30<sup>th</sup> November, 2009 showing that the suit land was to be distributed as follows:
  - Polycarp Nyongesa Nanzala to get 4.94 acres.
  - Ronald Ochieng Ong'ang'a to get a plot of 100 feet by 50 feet.

There was no provision made for the one acre the Respondent bought from Peter Ngolo Owuor under the 2001 agreement and whose purchase price the Respondent cleared in 2009. There is also nothing to suggest that the Respondent, or Peter Ngolo Owuor, had lodged any objection proceedings in the said succession cause filed by the Appellant under which the estate of Mathias Muruka Owuor was distributed.

## **CONCLUSION.**

1. That flowing from the finding above, the said Peter Ngolo Owuor had no capacity to enter into any sale agreement over the suit land as he never had title to the land. It is also clear that the Appellant was never a party to the sale agreement between Peter Ngolo Owuor and the Respondent and there was no legal basis for the tribunal to order him to transfer an acre of land he inherited from the late Mathias to the Respondent.
2. That the power of the Tribunal was as limited under section 3 (1) of the Land Disputes Tribunal Act (Now repealed under section 31 of Environment and Land Court Act, 2011). The power of the tribunal did not include determining suits for breaches and enforcement of contracts for sale of registered land. The tribunal's power did not including conferring title to registered land as their award in this case attempted to do. The tribunal order of 4<sup>th</sup> April, 2011 and adopted in Busia SRM C. Land case No. 54 of 2011 on 21<sup>st</sup> July, 2011 was therefore ultra vires the powers granted by the statute and hence null and void.
3. That the Appellant had correctly filed an appeal before the Provincial Land Disputes Appeals Committee who allowed it on 18<sup>th</sup> January, 2012 but by that date the tribunal had ceased to exist following the repeal of the statute establishing it by Section 31 of the Environment and Land Court Act, 2011. The appeal committee decision though correct to the extent that it had set aside the tribunal's award, was a nullity.
4. That noting that there was confusion on the fate of the matters pending before the Tribunals and appeals Committees in the transition period, and in view of the provision of Article 159 of the Constitution 2010, the court allowed the Appellant to file the record of Appeal on 22<sup>nd</sup> July, 2013. This was to enable the court to do substantial justice in the circumstances of this case instead of over emphasizing on technicalities. No party was prejudiced by this direction.
5. That having heard both the Appellant and the Respondent, and on analyzing the evidence tendered before Butula Land Disputes Tribunal, the court finds that the tribunal did not have

jurisdiction to entertain the claim based on contract for sale of registered land. Their order was therefore ultra vires their powers and hence a nullity. The appeal is therefore meritorious and is allowed and the following orders issued:

- a. The appeal allowed.
- b. The decision of Butula Land Disputes Tribunal of 4<sup>th</sup> April, 2011 and adopted in Busia SRM.C Land case No. 54 of 2011 on 21<sup>st</sup> July, 2011 concerning Marachi/Elukhari/1387 is hereby set aside.
- c. The Respondent to pay the Appellant costs of this appeal and that before Butula land Disputes Tribunal.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 4<sup>TH</sup> DAY OF MARCH 2015.**

**IN THE PRESENCE OF ;.....APPELLANT**

**..... RESPONDENT**

**JUDGE.**