



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 56 OF 2011

JOHN MBUGUA NGANGA

JOSEPH MGUBUA NGANGA.....APPELLANTS

VERSUS

NELSON NGETHE NGANGA.....RESPONDENTS

(An appeal against the ruling and order of Mrs. C. Oluoch SRM in and Kiambu Land Case No. 20 of 2000 delivered on 19th January,2011)

JUDGMENT

1. The Appellants and the Respondent are step-brothers. Sometime in the year 1998, the Respondent the filed a matter before the Land Dispute Tribunal at Karuri claiming that after their father's demise, the Appellants secretly filed a succession cause which enable them to have their father's property registered to them and he was disentitled. He thereby claimed interest in Plots No. Kiambaa/Muchatha/T297 and Kiambaa/Thimbigia/723. The tribunal gave a ruling to the effect that the properties be shared equally amongst the deceased's three families. This ruling of the tribunal was adopted by the court in Kiambu CMCC No. 20 of 2000 on 12th June,2000. Aggrieved by the said adoption, the Appellants filed an application dated 30th March, 2010 seeking to set aside the judgment vide which the tribunal's award was adopted. The application was based on grounds that the judgment was entered in their absence and without notice to them; that by the time they learnt of the award they were already out of the prescribed time for filing an appeal before the Provincial Land Tribunal; that they had filed a judicial review application to quash the tribunal's decision and that the proceedings before the tribunal and the award were res judicata. The Appellants also contended that the tribunal had no jurisdiction to deal with matters arising from registered land.

2. In his replying affidavit to the application, the Respondent contested that the application was brought to court 10 years after the award; that the Appellants filed a notice of appeal but have never pursued the appeal; that the issue of the judgment and decree being a nullity could only be challenged on appeal; that the time within which to file an appeal had already lapsed and that the tribunal had the jurisdiction to deal with the matter presented before them.

3. It was the Appellants submissions that despite their objection to the tribunal's lack of jurisdiction, the tribunal proceeded to hear the matter. They held the opinion that the court should have dismissed the award because whatever was filed was a nullity considering that the tribunal lacked jurisdiction. The Respondent reiterated its averments in the replying affidavit.

4. The trial court heard the application and dismissed it two essential grounds. That the application was

brought to late in the day after seeking redress by filing an ex parte application for stay pending appeal rather than filing an application to set aside the judgment and that the trial court had no powers to question a tribunal's jurisdiction. She further stated that delving into why her sister magistrate adopted the award without inquiring into its legality would amount to sitting on a ppeal. It is the aforesaid ruling that aggrieved the Appellants and they have filed this appeal on the following grounds:-

- i. The learned trial magistrate erred in both law and in fact in failing to exercise her discretion judicially, to set aside the orders made on 12th June,2000 adopting the Land Dispute's Tribunal award as an award of the court.
- ii. The learned trial magistrate erred in both law and in fact in failing to appreciate that the Land Dispute Tribunal's award was a nullity and could not have been adopted by the court and thereby failed to exercise her discretion judicially by setting aside the said award.
- iii. The learned trial magistrate erred in both law and in fact in dismissing the appellant's application for setting aside the award on the grounds that there was undue delay in bringing the application and thereby failed to appreciate that the appellants had been litigating with the Respondent both in the High Court and in the lower court.
- iv. The trial magistrate erred in both law and in fact in holding that the court had no jurisdiction to question the validity of the Tribunal's award when it was very clear from the record that:-
 - a. The Respondent's claim was time barred and could not have been entertained by the Tribunal.
 - b. The issue of land ownership had been determined by the High Court in Succession Cause No. 87 of 1980.
 - c. There was already pending in the High Court Civil Suit No. 4205 of 1983 filed by the Respondent.
- v. The learned trial magistrate erred in both law and fact in reaching a wrong finding of fact that the appellants knew of the reading of the award when there was no notice on the record, or any affidavit of service to that effect.

5. The Appellants' submissions were that the trial court did not factor in the fact that there was no evidence on record that they were present at the time of the delivery of the ruling before the tribunal or that they were served with such notice. That being so, the trial court should have exercised her discretion in their favour. On the issue of delay, the Appellants argued that it was occasioned by the numerous applications litigated upon by the parties and finally that it being clear that the issue of ownership having been determined in Probate Administration Cause No. 87 of 1980, the tribunal could not act against the decision of the High Court and thereby had no jurisdiction. They argued that the trial court ought to have factored in the aforesaid and set aside the judgment. The Respondent reiterated the averments in the affidavit.

6. The question that arises here is whether a magistrate's court can decline to adopt the award made by a Land Disputes Tribunal under Section 7(2) of the Land Disputes Act. That section provides that "the court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall be enforceable in the manner provided for under the Civil Procedure Act." From the above provision, it is clear that the mandate of the magistrate's court is very limited. However one of the cardinal principles which the court must satisfy itself is whether or not the other party was served. The idea is to ensure that the adversary is made aware of the existence of the proceedings. It therefore follows that the court adopting the tribunal's award is not a rubber stamp by all standards. It has to be convinced that the application was served. If the other side is served, it is possible for that party to show the adopting court that the dispute was time barred hence the tribunal had no jurisdiction to entertain the same. In the same breath, it also gives the adversary a chance to inform the court adopting the award that the tribunal acted without jurisdiction hence the award is and null void ab initio. If the adopting court felt it had no power to set aside the award it would as well stay further proceedings and refer the matter to the High Court. In this appeal, it is quite clear that the application for adopting the award was not served upon the Appellant hence the appellant was not heard. In his submissions, the Respondent admits that he has not processed titles to the suit land hence it cannot be said that the decree has been executed. I find merits in the appeal. Consequently, the appeal is allowed.

The order dismissing the Appellant's chamber summons dated 30.3.2010 is set aside and is substituted with an order allowing the aforesaid summons with costs to the appellant

For the avoidance of doubt, the net result of the appeal is that the order adopting the award made on 10th June 2000 is set aside on the basis that the application dated 28th April 2000 which gave rise to the adoptive order had not been served upon the Appellant. Consequently the application dated 28th April 2000 is reinstated to be heard afresh before another magistrate of competent jurisdiction other than Hon. M. Mlanga RM.

7. Dated, Signed and Delivered in open court this 8th day of May, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents