



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO.266 OF 2012

ALFRED SAGERO OMWERI PLAINTIFF

VERSUS

KENNEDY OMWERI ONDIEKI DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant on 4th July 2012 seeking the following reliefs against the defendant:-

- i. **A declaration that the plaintiff is the lawful owner of land parcel No. Ekerubo Settlement Scheme/159.**
- ii. **An order that the Nyamira Land Registrar do cancel the certificate of title issued to the defendant in respect of land parcel No. Ekerubo Settlement Scheme/159 and proceed to register the plaintiff as the lawful owner of the same and to issue him with the relevant certificate of title.**
- iii. **A declaration that the decision of Borabu Land Disputes Tribunal in case No. 001 of 2009 is void and unconstitutional.**
- iv. **An injunction to restrain the defendant by himself or through his servants, agents and/or any other person claiming under him from interfering with the plaintiff's quiet possession of land parcel No. Ekerubo Settlement Scheme/159.**
- v. **The costs of the suit to be paid by the defendant.**
- vi. **Any other relief that the court may deem fit to grant.**

2. In his plaint dated 3rd July 2012, the plaintiff averred that he was at all material times the registered proprietor of all that parcel of land known as LR No. Ekerubo Settlement Scheme/12 (hereinafter referred to as "Plot No. 12"). The plaintiff averred that on or about 14th January 2009, the defendant lodged a claim against him before Borabu District Land Disputes Tribunal (hereinafter referred to only as "the tribunal") with respect to the said parcel of land. The tribunal heard the claim against him and awarded the defendant a portion measuring 5 acres of Plot No. 12 in a decision that was made on 10th February 2009. The tribunal's decision was filed in the Resident Magistrate's court at Keroka in Misc. Civil Suit No. 16 of 2009 (hereinafter referred to only as "the Resident Magistrate's court") for adoption as a judgment of the court. The same was duly adopted on 18th June, 2009 and a decree issued on the same date. The plaintiff averred that the defendant proceeded and executed the said decree by causing Plot No. 12 to be sub-divided into two (2) portions namely, LR No. Ekerubo Settlement Scheme/158 (hereinafter referred to as "Plot No. 158") and LR No. Ekerubo Settlement Scheme/ 159 (hereinafter referred to as "Plot No. 159"). The defendant thereafter caused Plot No. 159 which measures 5 acres to be registered in

his name. The plaintiff averred that the sub-division of Plot No. 12 and the creation of Plot No. 158 and Plot No. 159 were carried out fraudulently. The plaintiff contended that he was not served with the documents relating to the claim that the defendant had filed against him at the tribunal. The plaintiff averred further that the decision of the tribunal is null and void to the extent that it interfered with the sanctity of his title over Plot No. 12. The plaintiff averred that the adoption of the tribunal's decision by the Resident Magistrate's Court was similarly null and void and amounted to an infringement on the plaintiff's right to own property. The plaintiff contended that being the first registered owner of Plot No. 12, the tribunal had no jurisdiction to interfere with his title over the same.

3. The defendant filed a statement of defence on 15th August 2012. In his defence, the defendant contended that he is the lawful owner of Plot No. 159. He denied that he acquired Plot No. 159 fraudulently or that the tribunal's decision pursuant to which the said property was registered in his name is null and void. The defendant contended that this suit is an abuse of the process of the court and that it discloses no or any reasonable cause of action against him.

4. When the suit came up for hearing, the parties gave evidence but did not call any witness. In his evidence in chief, the plaintiff told the court that the defendant who is his nephew lodged a claim against him at the tribunal with respect to Plot No. 12. The tribunal made a decision in favour of the defendant and ordered that the defendant be given a portion of Plot No. 12 measuring 5 acres. The said decision was adopted as a judgment of the court by the Resident Magistrate's Court at Keroka. Following the adoption of the said decision, Plot No. 12 was sub-divided into two portions namely, Plot No. 158 and Plot No. 159. Plot No. 159 was registered in the name of the defendant while Plot No. 158 was registered in his name. The plaintiff contended that the defendant did not acquire Plot No. 159 fairly.

5. In cross-examination, the plaintiff admitted that he participated in the proceedings of the tribunal and that decision of the tribunal was made in his presence. The plaintiff stated further that he was aware that the decision of the tribunal was adopted as a judgment of the court by the Resident Magistrate's Court and that his application to have the same quashed by the High Court through judicial review was dismissed. The plaintiff admitted further that he subsequently filed a civil suit in the High Court namely, Kisii HCCC No. 29 of 2010 which he withdrew. The plaintiff denied that he had any dealings with the defendant in relation to Plot No. 12. He also denied having entered into any agreement for sale of land with the defendant. He admitted that he had two civil cases with one, Truphena Obonyo Mogeni namely, Kisii HCCC No. 199 of 1995 and Kisii HCCC No. 177 of 2001 but denied that the defendant played any role in the said cases.

6. In his evidence, the defendant stated that he is in occupation of Plot No. 159 and that he has occupied the said parcel of land since the year 2000. The defendant told the court that he entered onto and occupied the parcel of land which is now comprised in Plot No. 159 as a purchaser thereof from the plaintiff. He stated that, the plaintiff acquired Plot No. 12 through his financial assistance and in consideration thereof, the plaintiff had agreed to give him a portion of the said parcel of land measuring 5 acres. This agreement that was made orally was reduced into writing in the year 2006. The defendant stated that after the plaintiff acquired title to Plot No.12, he allocated him a portion thereof measuring 5 acres pursuant to the agreement aforesaid. The portion of the said parcel of land that was allocated to him by the plaintiff was near the border of Nyamira and Bomet Districts. During the post-election violence, the houses that he had put up on that portion of Plot No. 12 were burnt down. He however rebuilt the same with the humanitarian assistance from the Catholic Church with the knowledge of the plaintiff. The defendant stated that his problems with the plaintiff started in the year 2008 when the plaintiff's wife blocked his access to the main road from the portion of Plot No.12 that the plaintiff had allocated him. The plaintiff thereafter demanded that he surrenders one (1) acre from the five (5) acres that he had given him pursuant to the agreement mentioned herein earlier. Due to this development, he decided to lodge a claim against the plaintiff at the tribunal which ordered that he be given 5 acres from Plot No. 12 together with a road of access. That decision was adopted as a judgment of the court and the plaintiff did not prefer an appeal against the same. It is pursuant to that decision of the tribunal that he acquired title to Plot No. 159 on 12th August 2009. After the close of the defendant's case, the parties agreed to make closing submissions in writing. The submissions were filed as agreed together with authorities in support thereof.

7. I have considered the pleadings filed herein and evidence that was adduced by the parties in proof of their respective cases. I have also considered the parties' respective submissions. The parties had agreed on the following issues for determination by the court;

- i. What is the legal effect of the withdrawal with costs of Kisii HCCC No. 29 of 2010 on this suit having regard to the provisions of Order 3 Rule 4 (1) (2) and (3) of the Civil Procedure Rules, 2010?
- ii. Whether the closure of the title for Plot No. 12 and the creation of Plot No. 158 and Plot No. 159 were fraudulent?
- iii. Whether the decision of the tribunal was null and void and if so what is the effect thereof?
- iv. Whether the plaint filed herein discloses no cause of action against the defendant and whether the same is defective, misconceived and contrary to the rules guiding pleadings?
- v. Whether the plaintiff is entitled to the reliefs sought?
- vi. Who should bear the costs of the suit?

8. Some of these issues particularly the issues set out numbers (i) and (iv) were not addressed by the parties in their evidence and in the submissions. From the issues that the parties had agreed upon set out above, the pleadings and the closing submissions by the advocates for the parties, I would summarize the issues that arise herein for determination as follows;-

- i. Whether the decision of the tribunal through which the defendant was awarded a portion of Plot No. 12 measuring 5 acres was null and void.
- ii. Whether the closure of the title for Plot No. 12 and the creation of Plot No. 158 and Plot No. 159 were carried out fraudulently?
- iii. Whether the plaintiff is entitled to the prayers sought in the plaint?

9. The first issue;

The plaintiff produced in evidence as exhibits; a copy of the proceedings and decision of the tribunal dated 10th February 2009 (PEXh.1), a copy of the order (decree) of the Resident Magistrate's Court issued on 18th June 2009 (PEXh.2), a copy of the title deed for Plot No. 12 (PEXh.3), a copy of the certificate of official search dated 11th February 2009 on the register for Plot No. 12 (PEXh.4), a copy of a certificate of official search on the register for Plot No. 159 (PEXh.6) and a copy of certificate of official search on the title of Plot No. 158 (PEXh. 5). The parties did not produce in evidence a copy of the claim form that was filed by the defendant at the tribunal. The nature of the claim that the defendant had made against the plaintiff at the tribunal can therefore be gleaned only from the proceedings and the decision of the tribunal. According to the tribunal's summary of the defendant's testimony before it, what the defendant had sought from the tribunal was an order barring the plaintiff from trespassing onto the portion of land measuring 5 acres that the plaintiff is said to have given him. The tribunal stated as follows in its summary of the defendant's testimony;

“...Therefore what he needed is that his uncle should not trespass to his land of five acres that he gave him...”.

10. In his evidence in chief, the defendant stated that:-

“My problem with the plaintiff started in December, 2008 when his wife blocked my road of access. The road was only serving me. The plaintiff told me that he wanted me to surrender one (1) acre to him so that I can only use 4 acres of the 5 acres that we had agreed on. I then lodged a complaint against the plaintiff at the tribunal.”

In his evidence in cross examination, the defendant stated that:-

“I went to the tribunal to lodge a complaint in January, 2009. The complaint was actually over access road.”

It appears from the foregoing that the defendant's claim against the plaintiff before the tribunal concerned trespass to land. In his evidence before this court that was not contested by the plaintiff, the defendant stated that the plaintiff had given him a portion of land measuring 5 acres and had put him in possession of the same in the year 2000. His residence on the said portion of land was destroyed during the post-election violence and was restored with the assistance of the Catholic Church thereafter with the knowledge of the plaintiff. From the foregoing statement, the defendant could not have gone to the tribunal to seek from the plaintiff a portion of Plot No.12 measuring five (5) acres. He already had the land and he was in occupation thereof. His complaint was that the plaintiff and his wife had entered the said portion of land, blocked his access and were making unreasonable demands. As submitted by the plaintiff, the jurisdiction of the tribunal was set out in section 3 (1) of the Land Disputes Tribunal Act, No. 18 of 1990 (now repealed) (hereinafter referred to as "the Act"). Under that section of the Act, the tribunal had jurisdiction to hear 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.**

11. It is clear from the foregoing that the tribunal had jurisdiction to determine the claim that was filed before it by the defendant against the plaintiff which concerned alleged trespass by the plaintiff and his wife on the parcel of land that the plaintiff had already given to the defendant and which was under the defendant's occupation. The tribunal however seems to have fallen into error and granted reliefs that it had no power to grant. As rightly submitted by the plaintiff, the tribunal had no jurisdiction to rectify the register for Plot No.12 by directing that Plot No. 12 be sub-divided and a portion thereof measuring 5 acres transferred to the defendant. That power was only reserved for the court under section 143 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). I am in agreement with the decisions in the cases of, **Kabita Karanja vs. Attorney General, Nyeri Court of Appeal, Civil Appeal No.310 of 1997 (unreported)** and **Samwel Chacha Rioba vs. George Joseph Kaginga, Kisii HCCC No.174 of 2008(unreported)** that were cited by the plaintiff in which it was held that any order made without jurisdiction in a nullity. As I have stated hereinabove, the tribunal had jurisdiction to determine the dispute that was taken before it by the defendant. The tribunal however proceeded after hearing the dispute to make orders that it had no jurisdiction to make. Although it had jurisdiction to make a decision having heard the dispute, it had no powers to grant the reliefs that it purported to grant to the defendant. I have agonized over the issue as to whether this decision by the tribunal is void or is merely erroneous. I have found it difficult to separate the decision of the tribunal as a whole which it had jurisdiction to make and the reliefs that it granted without jurisdiction. In **Black's Law Dictionary, 8th Edition at page 859**, an erroneous judgment is defined as "**A judgment issued by a court with jurisdiction to issue it, but containing an improper application of law. This type of judgment is not void, but can be corrected by a trial court while the court retains plenary jurisdiction or in direct appeal.**" I have come to the conclusion that it is not possible to divorce a judgment or a ruling from the reliefs granted therein. The reliefs granted are part and parcel of the ruling or judgement in which they are made. It follows from the foregoing that although the tribunal had jurisdiction to determine the dispute between the plaintiff and the defendant that was referred to it by the defendant, it lacked jurisdiction to grant the reliefs that it purported to grant to the defendant. The decision was therefore ultra vires its powers and as such null and void.

12. The plaintiff has submitted further that the proceedings of the tribunal were conducted in secrecy. He has contended that he had no notice of the same and as such he was condemned him unheard in breach of the rules of natural justice. This contention is contrary to the evidence on record. The proceedings of the tribunal that were produced in evidence by the plaintiff show clearly that the plaintiff had notice of the defendant's claim and participated fully in the proceedings before the tribunal. In his evidence, the plaintiff admitted that he participated in the said proceedings and that he was present when the tribunal gave its decision. The said decision cannot therefore be said to be void on account of having been reached in violation of the rules of natural justice. I would therefore hold that the decision of the tribunal is void for want of jurisdiction but not on account of breach of the rules of natural justice.

13. The second issue;-

The tribunal awarded to the defendant a portion measuring 5 acres of Plot No. 12. The plaintiff did not appeal against that decision of the tribunal to the Provincial Appeals Committee pursuant to the provisions of section 8 of the Act. The said decision was adopted by the Resident Magistrate's Court on 18th June 2009 as a judgment of the court and an order (decree) was issued on the same date. Once the decision of the tribunal was adopted by the court, it became a judgment of the court and was executable as such. The plaintiff's attempt to challenge the decision of the tribunal and its adoption as a judgment of the court in the High Court through judicial review failed when his application for leave was dismissed by Musinga J. (as he then was) on 12th October 2009. It follows from the foregoing that the order or decree that was issued by the Resident Magistrate's court following the adoption of the decision of the tribunal was not reviewed or set aside. That order has not been challenged in these proceedings and I have not been called upon to declare the same invalid or void. I am in agreement with the decision in the case of, **Macfoy vs. United Africa Company Limited [C1961] 3All ER 1169** that was cited by the plaintiff. However, as was stated in that case it is convenient sometimes to have a void act declared so by the court. I am of the view that in the circumstances of this case, such declaration by the court was necessary. In the case of, **Republic vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another ex parte Kariuki [2005] 2 KLR10**, Khamoni J. held that, **"A court judgment or court order whether lawful or unlawful, regular or irregular, null or valid, void or legal must be respected and obeyed until lawfully discharged if it has to go."** I am fully in agreement with that statement of the law. Commenting on the case of **Macfoy vs. United Africa Company Limited (supra)**, more particularly whether it is necessary to have a void order or act declared so by the court, Khamoni J. stated that, **".....it is not just sometimes convenient to have the court declare it void. It is always desirable, it is important and it is mandatory if confusion or disorder is to be avoided."** Again, I am entirely in agreement.

14. It is clear from the foregoing that under our legal system, an order or decree of a court of law is binding unless varied or set aside. The closure of the register for Plot No. 12 upon sub-division thereof that gave rise to Plot No. 158 and Plot No. 159 was carried out pursuant to a court order that had not been set aside, varied or declared void. It is not correct therefore as contended by the plaintiff that the register for the said parcel of land was closed fraudulently. The onus was upon the plaintiff to prove fraud. In the case of **Kampala Bottlers Ltd -vs- Damanico (U) Ltd East Africa Law Reports [1990-1994] E. A 141 (SCU)**, the Supreme Court of Uganda held that:-

"To impeach the title of a registered proprietor of land, fraud must be attributable to the transferee either directly or by necessary implication. The transferee must be guilty of some fraudulent act or must have known of some act by somebody else and taken advantage of such act. The burden of proof must be heavier than a balance of probabilities generally applied in civil matters".

I am not satisfied that the closure of the register for Plot No. 12 and the creation of Plot No. 158 and Plot No. 159 were carried out fraudulently as claimed by the plaintiff.

15. The third issue;-

I have set out earlier in this judgment the reliefs that have been sought by the plaintiff herein. From the findings that I have made hereinabove, I am not satisfied that the plaintiff has proved his case against the defendant to the required standard. In the circumstances, the plaintiff is not entitled to the reliefs sought in the plaint dated 3rd July 2012. As I have stated above, the defendant acquired title to Plot No. 159 through a court order that has not been varied or set aside. The plaintiff has failed to prove that the said court order was obtained fraudulently. The process through which the defendant acquired Plot No. 159 was therefore lawful. I cannot in the circumstances, declare the plaintiff as the lawful owner of Plot No. 159 and that he be registered as such. Although I have made a finding earlier in this judgment that the decision of the tribunal is void for reasons that I have given, I am unable to make a declaration to that effect in these proceedings for two reasons. First, the plaintiff participated in the proceedings of the tribunal and was present when the tribunal's award was made. The plaintiff had a statutory right of appeal to the Provincial Appeals Committee against that decision. The plaintiff also had a right to challenge the said decision in the High Court by way of judicial review within the prescribed time. The plaintiff did not take any of these steps. There are no special reasons put forward by the plaintiff why he should be allowed to challenge the decision of the tribunal outside the said statutory and common law process that

were available to him. Secondly, the decision of the tribunal was adopted by the Resident Magistrate's Court as a judgment of the court. Upon adoption, it ceased to exist. What is now in existence is a court order, See, PExh.2. In the circumstances, it would be futile to declare the said non-existent decision as null and void. Such declaration will not have any effect as it will leave the judgment of the Resident Magistrate's Court and the order (decree) that emanated therefrom intact. A court of law will not make "an idle and ineffectual order" to borrow the words used in the book, **Snell's Equity, 29th Edition, at page 654**. The last relief sought by the plaintiff is a permanent injunction. No basis has been laid for such order to issue. The plaintiff has not established his interest in Plot No. 159 to warrant the issuance of the order.

16. Conclusion;

In conclusion it is my finding that the plaintiff's case against the defendant has not been proved. Consequently, the same is dismissed with costs to the defendant.

Delivered, Dated and Signed at Kisii this 17th day of July, 2015.

S.OKONG'O

JUDGE

In the presence of;

N/A for the plaintiff

N/A for the defendant

Milcent Maore Court Assistant

S.OKONG'O

JUDGE