



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 94 OF 2010

SAMUEL TAI (Suing as the personal representative

of the estate of TAI MOSANGWE, deceased) PLAINTIFF

VERSUS

JOYCE M. MASIRA 1ST
DEFENDANT

CHAIRMAN NYAMAIYA LAND DISPUTES TRIBUNAL 2ND
DEFENDANT

JUDGMENT

1. At all material times, the plaintiff's father, one, Tai Mosangwe, deceased (hereinafter referred to only as "the deceased") was the registered proprietor of all that parcel of land known as West Mugirango/Nyamaiya/ 779 (hereinafter referred to as "Plot No.779"). On the other hand, the 1st defendant's father in law, one, Stanley Masira Mokua, deceased, (hereinafter referred to only as "Mokua") was registered as the proprietor of all that parcel of land then known as West Mugirango/Nyamaiya/943 (hereinafter referred to as "Plot No. 943"). Plot No. 943 has since been sub-divided and the defendant's deceased husband, one, Samwel M. Masira (hereinafter referred to as "Masira") is now registered as the proprietor of a sub-division thereof known as West Mugirango/Nyamaiya/3901 (hereinafter referred to as "Plot No.3901"). Plot No.779 and Plot No. 943 shared a common boundary. Sometimes in the year 2003, a dispute arose between the deceased and the defendant's mother in law one, Monica Nyakambi Masira (hereinafter referred to as "Monica") over the boundary between Plot No. 779 and Plot No. 943. The dispute was referred to the land registrar for determination under section 21 of the Registered Land Act, Cap. 300, Laws of Kenya (now repealed). On or about 6th November 2003, Nyamira District land registrar visited the two parcels of land and fixed their boundary in the presence of the deceased and Monica. In the process of fixing the said boundary, the land registrar found that Monica had overshot the boundary of Plot No. 943 and encroached on Plot No.779 by a margin of 32 metres.
2. After the determination of the said dispute, all seems to have gone quiet until sometimes in the year 2005 when Masira lodged a claim against the plaintiff before Nyamaiya Land Disputes Tribunal (hereinafter referred to as "the tribunal" where the context so admits), the 2nd defendant herein in Claim No. 3 of 2005 regarding yet another boundary dispute. It is not clear from the material on record whether this dispute concerned the boundary between Plot No. 943 and Plot No. 779 or between Plot No. 3901 and Plot No. 779. I presume that the dispute must have been over the boundary between Plot No. 943 and Plot No.779 that had been determined earlier by the

- land registrar because, in the decision of the tribunal, there is a mention of the land registrar and surveyor having attempted unsuccessfully to resolve the dispute. Masira died before the claim was heard and was substituted with his wife Joyce M. Masira, the 1st defendant herein.
3. The tribunal heard the plaintiff and the defendant together with their witnesses and made its award on 3rd August, 2006. The tribunal found that the correct boundary between Plot No. 943 and Plot No. 779 was marked by a tree known as “Omotarankanga” and directed the land registrar and the survey office to amend their records to accord with that finding. The tribunal’s award was filed at the Principal Magistrate’s Court at Nyamira in Misc. Application No. 29 of 2006 for adoption as a judgment of the court and the same was adopted as such on 11th February 2010.
 4. The plaintiff was dissatisfied with the decision of the tribunal and its adoption as a judgment of the court as a foresaid and decided to bring this suit on 9th April, 2010 to challenge the same. In his plaint dated 7th April 2010, the plaintiff has sought the following prayers:-
 - a. A declaration that the award of 32metres out of the plaintiff’s deceased father’s land known as West Mugirango/Nyamaiya/779 to the 1st defendant by the 2nd defendant is null and void.
 - b. Costs of the suit.
 - c. Any other relief this honourable court may deem fit and just to grant.

The 1st and 2nd defendants were served with summons to enter appearance but failed to do so. This suit was therefore not defended. The suit was set down for formal proof on 22nd April 2013 when the plaintiff gave evidence and closed his case without calling any witness. The plaintiff told the court that he brought this suit on behalf of the estate of his father, Tai Mosangwe (“deceased”). The plaintiff adopted his witness statement dated 18th March, 2015 as his evidence in chief. In that statement, the plaintiff stated that the deceased is registered as the proprietor of Plot No.779 while Masira is registered as the proprietor of Plot No. 3901 which is a sub-division of Plot No. 943. The plaintiff stated that Plot No. 3901 shares a common boundary with Plot No. 779 and that the boundary between the two parcels of land was fixed by the Land Registrar, Nyamira District in November, 2003. The plaintiff stated further that in August, 2005, the 2nd defendant purported once again to fix the boundary of the two parcels of land at the instance of the 1st defendant a process which led to the award of a portion of Plot No.779 measuring 32metres to the 1st defendant. The plaintiff produced in evidence as exhibits among others, a copy of the Limited Grant of Letters of Administration dated 26th April, 2005 in respect of the estate of the deceased, a copy of the decision of the District Land Registrar, Nyamira District on the boundary dispute between the deceased and Monica dated 6th November, 2003, a copy of a sketch map showing the boundary between Plot No. 779 and Plot No. 643 and the extent to which the 1st defendant has encroached onto Plot No. 779 which has been put at 32metres and a copy of the decision of the tribunal dated 3rd August, 2006. On examination by the court, the plaintiff stated that he was a party to the case that was before the 2nd defendant.

5. I have considered the plaintiff’s case as pleaded and the evidence that was adduced by him in proof thereof. From my analysis of the pleadings and the evidence on record, the issues that arise for determination in this suit are as follows;
 - i. Whether the 2nd defendant erred in its decision that was made on 3rd August, 2006?
 - ii. Whether the plaintiff is entitled to the declaratory relief sought against the defendants?

The tribunal (2nd defendant) was established under the Land Disputes Tribunals Act No. 18 of 1990 (now repealed)(hereinafter referred to as “the Act”). Section 3(1) of the Act sets out the cases over which the tribunal had jurisdiction as follows; “.....**all cases of 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.”**

Section 7 of the Act, required the chairman of the tribunal to file its decision in a magistrates court for adoption as a judgment of the court. The magistrate’s court was supposed to enter judgment in accordance with the decision and issue a decree. Section 8 of the Act gave any party aggrieved by the decision of the tribunal a right of appeal to the Provincial Appeals Committee. The section provided also for a right to a second appeal to the High Court on points of law.

6. It is clear from the foregoing that the tribunal had jurisdiction to determine the boundary dispute that was taken before it by the 1st defendant. I don’t think that the mere fact that the land registrar had determined the same dispute under section 21 of the Registered Land Act, Cap.300, Laws of Kenya (now repealed) divested the tribunal of jurisdiction over the matter. Section 21(4) of the Registered Land Act aforesaid makes it clear that a court can entertain a boundary dispute after the boundary has been determined by the land registrar. The 1st defendant was therefore not precluded from lodging another boundary dispute for determination by the 2nd defendant. I am not seized of the complete proceedings of the tribunal. I believe however that the tribunal considered the land registrar’s decision while determining the 1st defendant’s claim. As I have mentioned above, the tribunal referred to the said decision in its award of 3rd August, 2006. It is clear from the award that the tribunal disagreed with the land registrar’s decision. In my view, it was within its power to do so. Whether the tribunal’s decision to depart from the earlier findings by the land registrar was right is another thing. The decision of the tribunal was filed in court and adopted as a judgment of the court on 11th February, 2010 according to paragraph 8 of the plaint. Once the said decision was adopted, it ceased to be a decision of the tribunal and became a judgment of the court.
7. As I have stated above, the plaintiff had a right to appeal to the Provincial Appeals Committee against the decision of the tribunal if he was aggrieved with the same. The plaintiff in my view could only challenge the said decision before this court on a second appeal from the decision of the Provincial Appeals Committee or by way of an application for judicial review. I don’t think that in the circumstances of this case, the plaintiff had a right to challenge the decision of the tribunal in this court by way of a declaratory suit. The plaintiff participated fully in the proceedings before the tribunal and was accorded statutory rights of appeal. The plaintiff having failed to partake of those rights cannot purport to challenge the decision of the tribunal which has already been adopted as a judgment of the court in these proceedings. The situation would have been different if the plaintiff had not participated in the proceedings before the tribunal and did not have notice of the tribunal’s decision until after the time limited for appeal had lapsed such that the only option left for him to get justice was to file a suit before this court.
8. In the case of, **Emily Jepkemei Ngeyoni & Another –vs- Nicholas Kipchumba Kogo & Anor (2006) eKLR**, my brother Dulu J. faced with similar facts stated that:
 - a. **“ After considering the plaintiff’s plaint on whether the Land Disputes Tribunal’s decision can be challenged in this court by way of suit, it is my view that that cannot be legally possible. The two options for challenging a land dispute tribunal’s award are through an appeal to the Provincial Appeals Committee, within 30 days before the award was adopted by the magistrate’s court. The other option was to file proceedings for judicial review in the High Court under Order LIII of the Civil Procedure Rules after the decision of the Tribunal was adopted by the magistrate’s court. Therefore, it is my view that the decision of the Land Disputes Tribunal cannot be challenged through a suit. As the decision of the Tribunal was registered in the subordinate court, filing a suit would in any event be fresh proceedings in a matter in which a decree of the subordinate court has already been issued. Filing multiplicity of cases in court on the same matter is not acceptable in law.’**
9. I am entirely in agreement with the said statement of the law. The decision that was made by the tribunal was a lawful decision as I have stated above. The merit of the decision could only be challenged through the appeal process that was provided for under the Act but not through fresh proceedings before this court. In view of the foregoing, I have to determine the two issues that I have framed earlier in this judgement in the negative. The plaintiff’s remedy lay in appealing the decision of the 2nd defendant or seeking the review of the same through an application for judicial

review. The declaration sought by the plaintiff herein is therefore not available to him.
10. In conclusion, it is my finding that the plaintiff has not proved his case against the defendants to the required standard. The plaintiff's suit is accordingly dismissed. Since the suit was not defended, there shall be no order as to costs.

Delivered, Dated and Signed at Kisii this 10th day of July 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Nyariki for the plaintiff

N/A for the defendant

Milcent Court assistant

S.OKONG'O

JUDGE