



No. 200

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L CIVIL APPEAL NO. 71 OF 2008

WILSON DINDA OLILO.....APPELLANT

VERSUS

DALMAS AKECH NGIELA....RESPONDENT

JUDGMENT

(Appeal from original Judgment and decree of the Resident Magistrate's Court at Oyugis, Hon. C. L. Yalwala, RM. in Oyugis, SRMCC No.3 of 2008 dated 6th May, 2008)

Introduction:

1. The appellant was at all material times the registered proprietor of all that parcel of land known as **LR. No. West Kasipul/Kodera Karabach/34** (hereinafter referred to as “**the suit property**”). The suit property was registered in the name of the appellant on first registration on 10th May, 1979. Sometimes in the year 2005 or thereabouts, the respondent herein lodged a claim against the appellant at the local Land Disputes Tribunal (hereinafter referred to as “**the tribunal**”) seeking the nullification of the appellant’s title over the suit property and the transfer of the suit property to the respondent. The tribunal heard the respondent’s claim against the appellant and declared the respondent to be the rightful owner of the suit property. The tribunal’s decision was filed at the Senior Resident Magistrate’s court at Oyugis in SRM Misc. Appl. No. 1 of 2005 for adoption as a judgment of the court pursuant to the provisions of section 7 of the Land Disputes Tribunals Act, 1990(now repealed)(hereinafter referred to as “**the Act**”)and the same was accordingly adopted as a judgment of the court. It is not clear from the record whether the appellant appealed against the said decision of the tribunal or challenged the same in any way as by law provided. However, following the said judgment, the title of the appellant over the suit property was cancelled and the suit property was registered in the name of the respondent on 21st September, 2007. The respondent was thereafter issued with a title deed in respect of the suit property on 26th October, 2007. After obtaining title to the suit property, the respondent filed a suit against the appellant at the Senior Resident Magistrate’s court at Oyugis namely, **Oyugis SRMCC No. 3 of 2008, Dalmas Akech Ngiela vs. Wilson Dinda Olilo** (hereinafter referred to as “**the lower court**” or “**the lower court case**” where the context so admits). In this suit, the respondent claimed that he is the registered proprietor of the suit property and that the appellant had without any justifiable or reason cause trespassed on the suit property and put up a house thereon. The respondent contended that the suit property had been awarded to the respondent by the tribunal and that the appellant did not appeal against the said tribunal’s decision. The respondent sought an order for the eviction of the appellant from the suit property and an order restraining the appellant from interfering with the

suit property. In his statement of defence that was filed in response to the respondent's claim in the lower court, the appellant contended that he was at all material times the registered proprietor of the suit property on a first registration and that the transfer of the suit property into the name of the respondent pursuant to the court order made on 7th June, 2005 that adopted the tribunal's decision as a judgment of the court was null and void and as such could not confer upon the respondent a valid title. The defendant contended that the tribunal was not legally constituted and that no valid claim was laid before the tribunal in accordance with the rules of procedure set out under the Act. The appellant contended further that the proceedings before the tribunal were conducted ex parte without proper service having been effected on him and that the tribunal had no jurisdiction to determine the respondent's claim that concerned title to land. The respondent's suit in the lower was heard by C. L. Yalwala, R.M who in a judgment delivered on 6th May, 2008 allowed the respondent's claim against the appellant. He ordered the appellant to vacate and hand over vacant possession of the suit property to the respondent. He also issued a permanent injunction restraining the appellant from interfering in any manner with the suit property. The lower court found that the respondent had a valid title to the suit property which he acquired through a court order. The lower court dismissed the appellant's claim that the respondent had acquired title to the suit property through fraud arguing that a title acquired through a court order cannot be said to be fraudulent. The lower court found that the appellant's occupation of the suit property was recent and that it was carried out in defiance of an order of the court. The court held that the appellant had failed to establish any right over the suit property that would have entitled him to remain on the suit property hence the judgment in favour of the respondent in terms stated above.

2. **The appeal before this court;**

It is against the said judgment of the lower court, C. L. Yalwala R.M. delivered on 6th May, 2008 that this appeal has been preferred. The appellant has put forward four (4) grounds of appeal namely, that;

- i. **The learned trial magistrate erred in law and in fact in failing to hold that the appellant's title to the suit property was acquired through first registration and as such was not liable to be defeated except as provided under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed) ;**
- ii. **The decision of the learned trial magistrate was made without jurisdiction ;**
- iii. **The learned trial magistrate erred in law and in fact by failing to determine the real issues that were in controversy between the parties;**
- iv. **The learned trial magistrate erred in failing to take into account and fully consider the weight of evidence that was tendered before him.**

3. The appeal came up for hearing on 31st July, 2013 when Mr. Mutai, advocate appeared for the appellant while the respondent appeared in person. The parties made oral submissions in support of and in opposition to the appeal. The appellant's advocate argued grounds 1, 2 and 3 of appeal individually. He did not make any submissions with respect to ground 4 of appeal. On ground 1 of appeal, the appellant's advocate submitted that the appellant's title to the suit property was acquired on first registration and as such the same was impeachable in law. On ground 2 of appeal, the appellant's advocate submitted that the lower court had no jurisdiction to determine the respondent's claim. The appellant's advocate submitted that the respondent's title was acquired pursuant to an award by the tribunal which award was made without jurisdiction. Counsel submitted that the said award was illegal, null and void and likewise its adoption by the Magistrates' court as a judgment of the court. Counsel submitted that since the respondent's title was acquired through a null and void decision, the lower court had no jurisdiction to rely on the said decision as a basis for entering judgment in favour of the respondent as it did. In support of this submission counsel cited the cases of, **Republic vs. The Business Premises Rent Tribunal & 2 others, Nairobi, HC. CIVIL MISC. APPL. No. 562 of 2007(unreported)** and **Desai vs. Warsama [1967] E.A 351**. On ground 3 of appeal, the appellant's advocate submitted that it was clear from the certificate of search that was produced in evidence that the appellant was registered as the proprietor of the suit property before the same was transferred to the respondent. In the circumstances, counsel submitted that the lower court was wrong in holding that the appellant had

never been registered as the proprietor of the suit property. In reply to the appellant's submission, the respondent submitted that although the appellant was registered as the proprietor of the suit property on first registration, the property did not actually belong to him. He submitted that the suit property belonged to him (the respondent) and was only registered in the name of the appellant during the land adjudication because the respondent was a way in Molo at that time. He supported the lower court's judgment that ordered the eviction of the appellant from the suit property. The respondent submitted further that the appellant has a parcel of land elsewhere which is registered in the name of his brother. The respondent submitted that the suit property was his inheritance from his father and as such the dispute he had with the appellant was within the jurisdiction of the tribunal that awarded him the property. He urged the court to uphold the decision of the lower court. The respondent informed the court that due to the relationship that exists between him and the appellant, he would not mind allowing the appellant to retain a portion of the suit property where his homestead is situated. Otherwise, he prayed for the appellant's appeal to be dismissed.

4. I have considered the lower court's judgment, the appellant's grounds of appeal against the same and the respective submissions by the parties. In my view, there is only one issue to be determined in this appeal, namely, whether the lower court erred in entering judgment for the respondent against the appellant. As I have already stated above, the lower court's judgment has been attacked on three fronts. The first ground of attack was that the title of the appellant over the suit property arose out of a first registration under the Registered Land Act, Cap. 300, Laws of Kenya (now repealed)(hereinafter referred to as "**the RLA**") and as such the same could not be impeached by the lower court. I am in agreement with the appellant's argument that proprietary interest in land acquired on first registration under the RLA cannot be defeated even on account of fraud save as provided in the RLA. This argument was however inappropriate in the circumstances of this case. The appellant's title over the suit property that he acquired admittedly on first registration was not in dispute before the lower court. What was being asserted in the lower court was the respondent's title over the suit property that was acquired after the appellant's title to the suit property aforesaid had been determined by the decision of the tribunal that was thereafter adopted by the Magistrate's court as a judgment of the court. When the appellant was sued in the lower court, his title to the suit property had already been determined through a separate legal process. The sanctity of the appellant's title could not therefore be raised before the lower court because as at the date of the lower court's decision, the appellant's title over the suit property was not in existence as the suit property had been transferred to the respondent. Due to the foregoing the lower court cannot be faulted for failing to uphold the appellant's alleged impeachable title over the suit property. In my view the impeachability of the appellant's alleged title over the suit property should have been raised before the tribunal or used to challenge the tribunal's award that cancelled the appellant's title. The lower court's judgment has also been attacked on the ground that the court had no jurisdiction to determine the respondent's suit against the appellant. In his submission in support of this ground, the appellant's advocate argued that the tribunal's award and the judgment that was made by the Magistrate's court after its adoption on the basis of which the respondent acquired the suit property were null and void. Counsel's argument was that the lower court had no jurisdiction to put reliance on null and void decisions in its determination of the respondent's claim against the appellant. Again, I am in agreement with the appellant's general statement of the law. The dispute that the respondent had taken before the tribunal for determination concerned title to land. The tribunal's jurisdiction as was set out in section 3(1) of the Land Disputes Tribunals Act, 1990 (now repealed) ("**the Act**") did not extend to the determination of disputes over title and/or ownership of land. The tribunal's decision in respect of the dispute over the suit property between the appellant and the respondent in which the respondent was declared the owner of the suit property was therefore made without jurisdiction and as such the same was null and void. The adoption of the said decision by the Resident Magistrate's court as a judgment of the court was equally done without jurisdiction as the Magistrate's court had no jurisdiction to adopt a null and void decision as a judgment of the court. The cases that were cited by the appellant that I have mentioned above are clear that decisions made without jurisdiction are nothing but a nullity. I must say however that the validity or otherwise of the tribunals decision was not before the lower court for determination. The lower court had no jurisdiction to sit on appeal against the decision of the tribunal or the decision of the Magistrate's court that adopted the tribunal's decision. When the

respondent's case was presented before the lower court, the Magistrate's court order that adopted the tribunal's decision as a judgment of the court had not been varied or set aside and in fact the same had been executed by the cancellation of the appellant's title over the suit property and the registration of the property in the name of the respondent. The lower court had no jurisdiction or power to make a finding that the tribunal's decision and its adoption as a judgment of the court were made without jurisdiction and as such the title acquired by the respondent pursuant thereto was not valid. It is my finding that the lower court had jurisdiction to determine the respondent's claim against the appellant and to pass the judgment that he passed. If the appellant was aggrieved by the tribunal's decision, the forum for challenging the same was not the lower court but either through appeal to the Provincial Land Disputes Appeals Board or through judicial review in the High Court. The appellant took neither of these steps and as such the tribunal's decision remained in force and was accordingly executed. The lower court could not be expected not to uphold the rights that were acquired pursuant to such decision as it had no supervisory jurisdiction over the tribunal. I have said enough to lay the appellant's challenge to the lower court's decision on the ground of jurisdiction to rest. The last ground that was put forward by the appellant against the lower court's judgment was based on the lower court's finding that the appellant had never been registered as the proprietor of the suit property because "Dinda Olilo" who was indicated in the search certificate that was produced in evidence to have been registered as the proprietor of the suit property before the same was transferred to the respondent may not have been the same person as "Wilson Dinda Olilo", the appellant herein. I am in agreement that the lower court made an error in this conclusion. The issue as to whether Wilson Dinda Olilo and Dinda Olilo were one and the same person was not before the lower court for determination. Furthermore, it was not contested before the lower court that it was the appellant who was registered as the proprietor of the suit property during the land adjudication. The respondent's contention before the lower court and before this court was that the said registration was made in error as the suit property belonged to the respondent. This erroneous finding notwithstanding, the lower court reached the correct conclusion in its final decision. My analysis of the parties' respective arguments above has been on the basis that the appellant was registered as the proprietor of the suit property on first registration on 10th May, 1979. It follows therefore that even if the lower court had accepted the appellant's contention before it that he was registered as the proprietor of the suit property on 10th May, 1979 as aforesaid, that would not have changed the final outcome of the suit since the respondent was the registered proprietor of the suit property when the dispute came up for determination before the lower court the appellant's title having been extinguished by the earlier decision of the tribunal.

5. Conclusion;

Due to the foregoing, I find no merit in this appeal. The same is accordingly dismissed with costs to the respondent. The respondent had intimated to the court that he would not mind allowing the appellant to continue occupying the portion of the suit property on which his homestead is situated. Unless the respondent agrees to grant this indulgence, the appellant shall vacate and handover vacant possession of the suit property to the respondent within one hundred and twenty (120) days from the date hereof.

Delivered, dated and signed at KISII this 7th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Nyagwencha h/b for Bosire for the Appellant

N/A for the Respondent

Mobisa Court Clerk.

S. OKONG'O

JUDGE