



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT CIVIL APPEAL NO. 3 OF 2010.

DENNIS OKWARAAPPELLANT

VERSUS

JOHN MABONGA MUPALIA.....RESPONDENT

J U D G M E N T.

The Appellant , **DENNIS OKWARA**, through M/S. Bogonko, Otanga & company Advocate, filed this appeal on 22.02.2010 against John Mabonga Mubalia, the Respondent, over the decision of Western Provincial Land Disputes Appeals Committee in Case No. 22 of 2005 adopted in Busia Principal Magistrate's Court Land case Number 26 of 2004 on 04.02.2010. The Appellant has set out three grounds in the memorandum of Appeal summarized as follows:-

1. That the Appeals Committee erred in law in affirming the decision of Nambale Land Dispute Tribunal which had issued specific performance orders in respect of an agreement made in 1987 as no consent had been obtained as required under section 6 of Land Control Board Act, Chapter 302 of Laws of Kenya.
2. That the Appeals Committee erred in law in upholding the specific performance orders of the 1987 agreement by the Nambale Land Dispute Tribunal as the Tribunal lacked jurisdiction in view of the section 3 (1) of the Land Disputes Tribunal Act (Now repealed).
3. That the Appeals Committee erred in law in upholding the decision of the Nambale Land Disputes Tribunal over a claim to recover land after 17 years from the date the cause of action arose.

The Respondent's counsel, Ouma Okutta & Associates filed notice of appointment of advocates on 9.05.2013. On 7.10.2013 both counsel consented to proceed with the appeal by filing written submissions. The Appellant's submissions were filed on 29.10.2013 while that of the Respondent were filed on 5.11.2013.

THE CASE BACKGROUND:

1. In 1987 the Appellant entered into a Land Sale agreement with the Respondent in which the Appellant was to sell the Respondent Bukhayo/Busibwabo/792 measuring six acres at Kshs.25,000/=.
2. The Respondent paid a deposit of Kshs.8,000/= to the Appellant.
3. In 2004, the Respondent filed Land case No. 18 of 2004 against the Appellant at the Nambale Land Disputes Tribunal claiming the land subject matter of the 1987 agreement. During the hearing before the

Tribunal, the Respondent claimed to have paid Kshs.17,000/= being the balance of the purchase price to Peter Kundu, a brother-in-law to the Appellant, but the Appellant denied having received the balance.

4. The Tribunal after considering the evidence availed before it ruled that the Respondent pays the balance of Kshs.17,000/= to the Appellant after which the latter do transfer Bukhayo/Busibwabo/792 to the former.

5. The Appellant was not satisfied and filed appeal case No. 22 of 2005 with Western Provincial Land Dispute Appeals Committee raising five grounds of jurisdiction, claim being statute barred, failure to make full payment, absence of Land Control Board consent and failure to provide for interest on the outstanding balance.

6. The record from the Appeals Tribunal shows the appeal did not take off on the first two days fixed due to absence of the Appellant. On the third hearing date, the committee proceeded with the hearing of the appeal in the absence of the Appellant who though served, had not attended.

7. During the hearing before the Appeals Committee the respondent disclosed that following the sale agreement of 1987, he made the payment of the purchase price in installments completing in 1988. That he lived on that land he bought from 1987 to 1997. That following the Nambale Land Disputes Tribunal award in 2004 he deposited the Kshs.17,000/=, being the balance due to the Appellant, with Busia Law Courts. The Respondent finally asked the Appeals Committee to assist him get his land and dismiss the appeal with costs.

8. The Appeals Committee after considering the Nambale Land Disputes Tribunal findings and the Respondent's submission made the following verdict.;

“1.) The appeal is dismissed with costs.

2) The Land parcel No. Bukhayo/Busibwabo/792 of 1.8 Ha is awarded to John Mabonga Mupalia.

3) The Land title deed fro parcel Bukhayo/Busibwabo/792 registered under the Appellant, Dennis Okwara Ekesa, be cancelled by the Land Registrar and a new title for the same land parcel be issued in the names of John Mabonga Mupalia.

4) The Appellant, Dennis Okwara should collect his 17,000/= shillings as awarded by the Nambale Land Disputes Tribunal Court which objector confirmed was deposited with the Busia law Court for his collection.

5.) The parties to keep peace.”

The Appeals Committee award was read and adopted by the Lower Court on 04.02.2010 in Busia PMC. Land Case No. 26 of 2004.

This being a second appeal, this court is only concerned with issues of law.

APPELLANT'S SUBMISSIONS.

1. That the 1987 Land Sale agreement between Appellant and Respondent had become null and void as no consent from land Control Board was obtained within six months of the agreement or at all. Refer to section 6 and 8 of Land Control Act, Chapter 302 of Laws of Kenya. That enforcement on Land Sale agreement is outside the powers of Land Disputes Tribunals whose jurisdiction was limited under section 3 (1) of the Land Disputes Tribunal Act (Now repealed). The Appellant's counsel referred the court to the following two Court of Appeal decisions:

a) KISUMU C.A.C. A NO. 157 of 2001. **Asman Maloba, Wepukhulu & Anor -v- Francis**

Wakwabubi Biket where the court upheld the High court decision quashing an award by Misikhu Land Disputes Tribunal for acting illegally in determining issues relating to land which was outside their jurisdiction.

b) **Nyeri C.A.C.A. NO. 133 of 1987. Nelson Githinji & Anor –vs- Munene Irangi** in which the court of Appeal set aside the High court order dismissing the application to set aside an arbitral award of specific performance where consent from the Land Control Board had not been obtained.

2. That the Respondent could have filed a suit against Appellant on specific performance within six years from 1987 subject to having obtained Land Control Board Consent. That the Respondent's claim was filed after 17 years and was therefore statutory barred.

3. The Appellant prays for the appeal to be allowed and set aside Nambale Land Disputes Tribunal decision in case number 18 of 2004, affirmed by the Western Province Land Disputes Appeals Committee in case number 22 of 2005 and adopted in Busia PMC. Land Case number 26 of 2004 with costs.

RESPONDENT'S SUBMISSIONS.

1. That the Appellant's appeal before the Western Province Appeals Committee was dismissed for want of prosecution after Appellant failed to appeal before the tribunal. That the Appellant ought to have applied for a reinstatement of his appeal before the Appeals Committee and it was only after a decision on merit is made that he could have come to this court on matters of law.

2. That the Appellant's appeal is improperly before this court and an abuse of due process.

3. That the court lacks jurisdiction to entertain this appeal and should award costs to the Respondent.

QUESTIONS OF LAW FOR DETERMINATION.

1. Whether the parties land sale agreement of 1987 was a controlled transaction and if so whether consent was obtained as required under section 8 of land Control Act Chapter 302 of Laws of Kenya.

2. Whether the Respondent's claim was statutory time barred by the time he filed it before Nambale Land Disputes Tribunal.

3. Whether the Nambale Land Disputes Tribunal had jurisdiction to entertain the Respondent's claim in view of the provision of Section 3 (1) of Land Disputes Tribunal Act (Now repealed).

4. Whether this appeal is properly before this court in view of the fact that the Appellant did not appear before the Appeals Committee to prosecute his appeal.

5. Whether this court has jurisdiction to determine this appeal.

FINDINGS.

1. The parties' Land Sale agreement of 1987 was over agricultural land (Bukhayo/Busibwabo/792) and therefore subject to Land Control Board Consent being obtained in terms of section 6 and 8 of the Land Control Act, Cap 302 of L.O.K. That no evidence was tendered before the Tribunal or the Appeals Committee of the Land Control Board consent to the transaction having been obtained within the six months from the date of the sale agreement or at all. The failure to have obtained the Land Control Board Consent made the sale agreement void and specific performance orders could not issue to

enforce the agreement. However the purchase price paid would be recoverable in terms of section 7 of the Land Control Act, Chapter 302 of L.O.K. The Appellant succeeds on this ground.

2. The sale agreement was entered into in 1987 and any court action seeking to enforce it needed to be filed within six years in terms of section 4 (1) (a) of the Limitation of Actions Act Cap 22 of L.O.K. The Respondent made the reference to the Nambale Land Disputes Tribunal in the year, 2004 which is about 17 years from the year of the contract. No leave to file the matter out of time had been obtained prior to the filing of the matter. The matter was therefore clearly statutory time barred by the time the Respondent filed Nambale Land Dispute Tribunal case No.18 of 2004. This fact was overlooked or not considered by the Western Province Land Disputes Appeals Committee when they rendered their decision in case No. 22 of 2005. On this ground also , the appeal succeeds on this grounds.

3. The claim the Respondent took before the Nambale land Disputes Tribunal in case No. 18 of 2004 was summarized in the heading of the proceedings as ‘ ‘ a claim to occupy’’ land. The evidence he gave to the Tribunal shows clearly that his claim was the six acres of Land Bukhayo/Busibwabo/792 bought from the Appellant at Kshs.25,000/= in 1987. The Tribunal’s order was that Respondent pays Kshs.17,000/= outstanding to Appellant, after which the Appellant was to transfer the land to him. Even though the claim in the heading had shown Respondent was after a right to occupy Land, the evidence adduced and the tribunal order had nothing to do with a claim to occupy the land. The evidence and the order shows the claim was one for ownership of land arising from a sale agreement. This was a claim that was clearly outside the powers granted to the Tribunal under section 3 (1) of the then Land Disputes Tribunal Act. The Court of Appeal decision in **Asman Maloba Wepukhulu & Anor –V- Francis Wakwabi Biketi, Kisumu C.A. No. 157 of 2001** is relevant. The Appellant had raised the issue of the Tribunal’s jurisdiction in his memorandum to the Appeals Committee in grounds 1, 2 and 4 and the Appeals Committee was obliged to make a finding when making their decision after hearing the Respondent *exparte*. The record of Appeals Committee do not contain any finding on grounds 1, 2, and 4 of the Memorandum of appeal. This was a serious omission as those grounds raised issues of law that needed the Appeals Committee to make a finding on. This ground is also proved.

4. On the issue of jurisdiction, section 8 (9) of the Land Disputes Tribunal Act (Now repealed), clearly shows that appeals to this court, being second appeals, are only on issues of Law. The Appellant had filed the first appeal before the Western Province Land Disputes Appeals Committee in case Number 22 of 2005. The copy of the proceedings annexed to the appeal record shows the Appellant did not attend the hearing of the appeal. However the appeal was not dismissed for want of prosecution as the Respondent was heard by the Appeals Committee. The Appeals Committee considered what Appellant had presented before them when filing the appeal, the tribunal’s proceedings and the Respondent’s submissions in coming up with the orders subject matter of this appeal.

In any case, even if the Appeals Committee had only ordered that the appeal to be dismissed for want of prosecution, the Appellant would still have had to come to this court after the repeal of the Land Disputes Tribunal Act which sounded the death of the Land Disputes Tribunals and **Appeals Committees**. The matters pending before the tribunals and Appeals Committee were to be handed by the appropriate courts in accordance with Chief Justice practice direction and therefore this court has jurisdiction to hear and determine this appeal.

RULING.

For reasons shown above, the appeal has merit and is hereby allowed in terms of prayers (a) to (c).

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 12th DAY OF March, 2014

IN THE PRESENCE OF; - Applicant, Mr. Otanga for Appellant and Mr. Okuta for respndent.

JUDGE.

