



IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 31 OF 2011

JOSEPH OMBAIRE ISABOKE APPELLANT

VERSUS

PETER K. OKARA RESPONDENT

JUDGMENT

(Being an appeal from the decision of Nyanza Land Disputes Appeal Committee made on 18th January, 2011 in Case No. 75 of 2010)

1. At all material times the appellant was the registered proprietor of all that parcel of land known as **LR No. Nyamira/Central Kitutu/Bogetaorio/2274** (hereinafter referred to as the “**suit property**”). On the other hand, the respondent was occupying and residing on all that parcel of land known as **LR No. Nyamira/Central Kitutu/Bogetaorio/2273** (hereinafter referred to only as “**Plot No. 2273**”). The suit property and Plot No. 2273 shared a common boundary. Sometimes in the year 2010, the respondent lodged a complaint against the appellant at Manga Land Disputes Tribunal (hereinafter referred to only as “the tribunal”) claiming that the appellant had destroyed the common boundary between the suit property and Plot No. 2273. The respondent also claimed that the appellant had obtained the title for the suit property irregularly as the suit property was part of a parcel of land that was previously registered in the name of the respondent’s deceased father and that the appellant had acquired the same after the death of the respondent’s parents in unclear circumstances.
2. The respondent urged the tribunal to make an order for the boundary between the suit property and Plot No. 2273 that had allegedly been destroyed by the appellant to be reinstated and for the appellant’s title to the suit property to be revoked. The tribunal heard the respondent and the appellant together with their witnesses and in a ruling that was delivered on 14th September, 2010, the tribunal ordered the title of the suit property held by the appellant to be revoked having found that the same had been acquired through forgery. The tribunal also ordered the appellant to pay to the respondent the costs of the complaint before the tribunal. The tribunal was of the view that since the boundary dispute between the respondent and the appellant was brought about by the appellant’s acquisition of the title to the suit property which acquisition it found to be illegal, the same would be resolved by the revocation of the appellant’s title. The tribunal’s decision was filed before the Senior Principal Magistrate’s court at Nyamira for adoption as a judgment of court pursuant to provisions of section 7 of the Land Disputes Tribunal’s Act No. 18 of 1990 (now repealed) and the same was adopted as a judgment of court by the said court on 2nd December 2010.
3. The appellant was aggrieved by the said decision of the tribunal and pursuant to the provisions of section 8 of the Land Disputes Tribunal Act No. 18 of 1990 aforesaid; the appellant lodged an appeal with the Nyanza Provincial Land Disputes Appeals Committee at Kisumu (hereinafter referred to only as “**the Appeals Committee**”) on or about 4th October 2010. In his appeal to the Appeals Committee, the appellant contended among others that the tribunal had erred by failing to

appreciate the fact that the appellant was the registered proprietor of the suit property which was registered under the Registered Land Act Cap 300 Laws of Kenya. The appellant contended further that the tribunal had no jurisdiction to order the revocation of the appellant's title to the suit property as that is a jurisdiction which is solely reserved for the court. The appellant urged the Appeals Committee to overturn the tribunal's decision and dismiss the respondent's complaint. The appellant's appeal to the Appeals Committee was heard on 18th January 2010 and in a ruling that was delivered on the same day, the Appeals Committee upheld the decision of the tribunal and dismissed the appellant's appeal with costs to the respondent. The Appeals Committee agreed with the tribunal that the appellant had acquired the title to the suit property irregularly and as such the tribunal was right in revoking the appellant's said title.

4. The appellant was dissatisfied with the decision of the Appeals Committee and decided to prefer a second appeal against the same to this court pursuant to the provisions of section 8(9) of the Land Disputes Tribunals Act No. 18 of 1990(now repealed). This is the appeal which is the subject of this judgment. The appellant's appeal to this court was filed on 17th February 2011. In his memorandum of appeal, the appellant raised three grounds of appeal against the Appeals Committee's decision. The appellant in his first ground of appeal contended that the Appeals Committee erred in upholding the decision of the tribunal while the tribunal had no jurisdiction to revoke the appellant's title to the suit property. In his second ground of appeal, the appellant contended that the Appeals Committee erred in upholding the decision of the tribunal while the tribunal had determined an issue that was not placed before it for determination. In his last ground of appeal, the appellant contended that the Appeals Committee erred in condemning the appellant to pay the cost of the appeal while it had no jurisdiction to award costs. The appellant urged this court to set aside the decisions of the Appeals Committee and the tribunal with costs to the appellant. On 30th April 2013, the parties agreed to argue this appeal by way of written submissions. The appellant filed his submissions on 25th June 2013 and the respondent filed his submissions in reply on 27th September 2013.
5. I have considered the proceedings of the tribunal and its decision that was made on 14th September 2010. I have also considered the proceedings of the Appeals Committee and its decision that was rendered on 18th January 2011. Finally, I have considered the appellant's grounds of appeal to this court and the parties' respective written submissions. The issues that arise for determination in this appeal are three fold, namely;
 - i. Whether the tribunal had jurisdiction to revoke the appellant's title.
 - ii. Whether the tribunal made a determination on an issue that was not placed before it.
 - iii. Whether the tribunal had jurisdiction to award costs.

6. Issue No. 1:

The tribunal was a creature of a statute namely, the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) (hereinafter referred to only as "**the Act**"). As a creature of the Act, the powers of the tribunal were expressly set out in the Act. The tribunal could not therefore exercise any power that was not conferred upon it by the Act. According to section 3(1) of the Act, the tribunal was conferred with jurisdiction to determine 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.**

It is clear from the foregoing that the tribunal was not conferred with jurisdiction to revoke or cancel titles to land. I am in agreement with the submission by the appellant's advocate that the decision that was made by the tribunal on 14th September 2010 in which it purported to revoke the appellant's title was *ultra vires* the powers conferred upon the tribunal under the Act and as such was illegal, null and void. The appellant had raised this issue of jurisdiction before the Appeals

Committee whose decision is the subject of this appeal. In its decision made on 18th January 2010, the Appeals Committee did not make any determination on the issue. I am in agreement with the appellant's contention that the Appeals Committee fell into error by upholding the decision of the tribunal that was arrived at without jurisdiction. I am not persuaded by the respondent's argument that the tribunal having reached a finding that the appellant had acquired the suit property fraudulently it could not close its eyes on the appellant's fraud and as such it was justified in revoking the appellant's title. It has been said and I will repeat it here that, jurisdiction is everything and without it a court or a tribunal must lay down its tools. It was not the business of the tribunal to determine whether the appellant acquired the title to the suit property lawfully or not. It had no jurisdiction to enter into that inquiry which is a preserve of the court. The appellant's ground one of appeal therefore succeeds.

7. Issue No. 2:

The appellant had contended that the tribunal determined an issue that was not before it for determination, namely the revocation of the appellant's title. The appellant had contended that what was before the tribunal was a boundary dispute and not the issue of ownership of the suit property and that instead of determining the boundary dispute, the tribunal proceeded to determine the issue of the ownership of the suit property and ended up revoking the appellant's title to the suit property. I find no merit in this ground of appeal. It is very clear from the proceedings of the tribunal that the respondent did urge the tribunal to revoke the appellant's title on the ground that the appellant had obtained the same irregularly. The issue having been raised before the tribunal, the tribunal had to make a determination on it. The tribunal cannot therefore be said to have determined an issue that was not raised before it for determination. This ground of appeal therefore lacks in merit and is accordingly rejected.

8. Issue No. 3:

The appellant had contended that the Appeals Committee had erred in condemning him to pay the cost of the appeal while it had no jurisdiction to make such order. The appellant contended that the Act does not give the Appeals Committee the power to award costs and as such the cost awarded to the respondent herein was awarded without jurisdiction. The appellant argued that if it was the intention of the legislature to confer upon the Appeals Committee the power to award costs they would have said so expressly in the Act. The respondents' advocate did not respond to the appellant's submission on this ground of appeal. Both parties did not also furnish the court with any authority on the issue. On my part I must say that I am not persuaded by the arguments by the appellant's advocate that the Appeals Committee did not have jurisdiction to award costs. Section 10 of the Act conferred power upon the Minister for Land to make rules prescribing the procedure of the tribunals. Pursuant to that provision of the Act, the Minister for Lands made the Land Disputes Tribunals (Form and Procedure Rules), 1993 which were published as Legal Notice No. 13 of 1993. Rule 21 of the said rules gave the tribunal the power to award costs. I am of the opinion that the Appeals Committee had powers to make any order that the tribunal could have made and this includes awarding of costs. The appellant's third ground of appeal therefore lacks merit and is accordingly rejected.

9. The upshot of the foregoing is that the appellant's appeal herein succeeds on ground one of appeal alone. It is my finding that the Appeals Committee erred in upholding the decision of the tribunal that was arrived at without jurisdiction. If the respondent was aggrieved that the appellant had acquired the suit property fraudulently, the respondent should have gone to the proper forum for redress. I believe that all is not lost for the respondent. The respondent can still challenge the appellant's title in the right forum at which he can raise the issues of fraud and forgery that it had raised before the tribunal. Due to the foregoing, the appellant's appeal is allowed. The decision of Nyanza Land Disputes Appeals Committee dated 18th January 2011 is hereby set aside. There shall be a further order setting aside the decision of Manga Land Disputes Tribunal dated 14th September 2010 and dismissing the respondent's complaint that was lodged before that tribunal. The appellant shall have half (1/2) of the costs of this appeal.

Delivered, dated and signed at Kisii this 4th day of July 2014.

S.OKONG'O

JUDGE

In the presence of

N/A for the Appellant

Present in person for the Respondent

Mr. Mobisa Court Clerk

S.OKONG'O

JUDGE