



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL APPEAL NO.18 OF 2010

WILSON MATHENGE GITAHI.....APPELLANT

VERSUS

MARY KIRIGO WACHIRA.....RESPONDENT

J U D G M E N T

Wilson Mathenge Gitahi, (*hereinafter referred to as the appellant*) lodged a claim against Mary Kirigo Wachira and Mary Wanjiku Ndegwa (*herein after referred to as the respondents*) at the Central Land Disputes Tribunal. The Tribunal sat and made a finding that the appellant had been owning the whole portion of **NANYUKI/SOUTH TIMAU BLOCK 1/361, 362 and 363** for more than twenty years and decided that title No.Nanyuki South Timau Block 1/361 & 362 owned by Geoffrey Githu Ndegwa and Nathan Njoroge Karigitho respectively be cancelled and issued to Wilson Mathenge Gitahi.

The appellant filed an application dated 28/11/2008 in the Senior Principal Magistrate's court at Nanyuki which was heard and determined. The gist of the application was an order seeking the court to adopt the award filed on 7/8/2008 as its judgment in accordance with the law.

The application was opposed by the respondent on grounds that the Land Disputes Tribunal conducted its proceedings unprocedurally and went against the rules of natural justice. Moreover, that the Land Disputes Tribunal lacked jurisdiction to make orders canceling a title hence the decision of the Tribunal was null and void.

Mr. Chweya for the applicant argued that the magistrate's power was limited to the adoption of the award as filed.

The learned magistrate after hearing the parties properly found that the courts powers are limited to the adoption of the award but went further to hold that certain things are outrageous and therefore misdirected himself by holding that the court cannot close its eyes and give effect to totally unlawful things. He went ahead to cite the illegalities in the matter. The second issue the learned magistrate took on is the fact that the parties in the suit were dead. Moreover, that the Tribunal dealt with the issue of adverse possession and yet they lacked jurisdiction to do so. For the above reasons the learned court dismissed the application for the adoption of the award.

The appellant was dissatisfied with the decision and therefore applied for review of the said decision. The learned magistrate considered the application for review but dismissed the same on grounds that the applicant had not demonstrated that there was discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the

time when the decree was made or passed or that there was some mistake or error apparent on the face of record or some sufficient reason to necessitate review.

The appellant has now appealed to this court on the following grounds namely that;

1. ***That the learned trial magistrate erred in law and fact in failing to appreciate that a review was most appropriate so as to correct an apparent miscarriage of justice.***
2. ***That the learned trial magistrate erred in law and fact in failing to withhold the principles governing review.***
3. ***That the learned trial magistrate erred in law and fact in failing to review/set aside a decree which was manifestly erroneous owing to the defects pointed out by the appellant hence occasioning miscarriage of justice.***
4. ***That the learned trial magistrate erred in law and fact in failing to uphold the wishes of natural justice by failing to allow the appellant to be heard on merit.***
5. ***That the learned trial magistrate erred in law and fact in failing to appreciate that the court cannot sit and supervise over a miscarriage of justice whereas it has powers to correct the same.***
6. ***That the learned trial magistrate erred in law and fact in failing to appreciate that the letter of the law must be given effect.***
7. ***That the learned trial magistrate erred in law and fact in failing to amicably resolve the dispute herein as the parties herein are left fighting over an issue the court could have arbitrated.***
8. ***That the learned trial magistrate erred in law and fact in failing to appreciate that the appellant's application dated 3/8/09 was merited and the appellant had a right to pray and be heard on the order sought.***

He prays that the appeal be allowed and that the order made on the 27/1/2010 in Nanyuki SRM Civil Suit No.22 of 2008 be set aside and the application dated 3/8/2009 be heard afresh.

The ***gravamen*** of the applicants submissions is that the learned magistrate misled herself in arriving at a decision that declared there was no error apparent on the face of record while it was her finding that by the time the decree sought to be reviewed was given some parts of the proceedings were missing from the record.

Moreover, the learned magistrate found that the widows of the deceased parties were allowed to obtain letters of administration for the estate of their husbands and still held that the decision of the Tribunal exceeded its mandate.

The appellant further argues that the learned magistrate arrived at the decision not to adopt the award without the correct facts hence the appellant was entitled to a review of the said decree arising out of her ruling.

Last but not least, the appellant argues that the learned magistrate overstepped her jurisdiction by sitting on appeal over the Tribunal's findings and award.

The respondent through Kiget and Company Advocates also filed their written submissions whose gist was that the reason for the decision by the Tribunal was not tendered as required by Natural Law, the Tribunal exceeded its jurisdiction, had no statutory express or implied jurisdiction to entertain such a matter or subject other than written law which is in this respect doesn't exist.

I have considered the record of appeal, the rival submissions and facts of this matter and on the offset,

do find that such are the matters that necessitated the repeal of the Land Disputes Tribunals Act No.18 of 1990. The Act was in operation for approximately 21 years but these were the dark years of land disputes when litigants appeared before elders who were not trained on their mandate, did not understand the law, did not understand the Act that gave them jurisdiction and yet purported to render justice to the people of Kenya, thanks to the Constitution of Kenya 2010 that necessitated the repeal of this law by the creation of the Environment and Land Court vide the Environment and Land Court Act No.19 of 2013. This court was created pursuant to the provisions of **Article 162 (2) b of the Constitution of Kenya 2010** that gave parliament the power to establish courts with the status of the High court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

Parliament enacted the the Environment and Land Court Act No.19 of 2013 pursuant to the provisions of the Constitution aforesaid. Section 13 of the Act gives original and appellate jurisdiction to the court to hear and determine all disputes in accordance with Article 162(2)b of the Constitution.

In addition to the matter referred to in subsection 1 and 2 of the Act, the court has appellate jurisdiction over decision of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

Having set out the provision of Section 13 of the Act I do believe that it might have been the wish of many Kenyans to abolish the Land Disputes Tribunals and establish a court that would have jurisdiction to deal with the past injustices caused by the Land Disputes Tribunal, but I cannot see any section that gives me special power to quash or set aside an illegal decision of the Land Disputes Tribunal *ex debito justitiae*. This court has to observe the Provision the Law Reform Act and the procedures set out in order 53 of the Civil Procedure Act and Civil Procedure Rules 2010 .

What is before me is an appeal arising out of the order of Honourable Ndungu H.N Miss, the Senior Principal Magistrate Nanyuki delivered on 27/1/2010 in Nanyuki SRM court land case No.22 of 2008.

This court observes that many irregular decisions were made in this matter beginning with the decision of the Central Province Land Disputes Tribunal canceling a title in the names of a deceased persons and issuing the same to the appellant. This decision was basically an affront to rules of natural justice because the title holders were dead and that there was no evidence that succession had been done and the refore the proper parties were not heard.

The decision was ***substantively ultra vires*** as the Tribunal did not stick to their mandate as spelt out by Section 3(1) of the Land Disputes Tribunal Act No.18 of 1990.

When the matter came before the learned magistrate she totally misled herself that she had the power to reject the application for adoption. At page 2 of the ruling she correctly finds that her powers are only limited to reading and adopting the award as the courts judgment, but she was outraged by certain things hence dismissed the application putting the litigants in an awkward position hence a predicament because the decision of the Land Disputes Tribunal is hanging in limbo with the refusal of the court to adopt the same.

In Zedekiah M. Mwale -vs- Bikeke Farm Directors & Another Kitale HCCA No.25 of 1998. The court held which holding I associate myself with that a magistrate has no jurisdiction to alter, amend, set aside review or in any manner whatsoever interfere with a Land Dispute Tribunal's Award filed in court as section 7(2) only compels the magistrate to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.

In Peter Ouma Mitai -VS- John Nyarara in Kisii HCCA No.297 of 2005 Hon. J. Musinga as he then was followed the decision of Zedekiah M. Mwale VS Bikeke Farm Directors and Another by holding that the powers of law does not leave room for a magistrate to review alter or amend the decision of the Tribunal. If any party is aggrieved, he can appeal to the appeals committee or apply for judicial review in the High Court pursuant to the provisions of the Law Reform Act Cap 26 Laws of Kenya and order 53 of the Civil Procedure Rules.

The appellant also did not act smartly because instead of applying for Judicial Review Order of *Certorari* to quash the decision of the magistrate as being ultra vires, his powers he chose to apply for review under Section 80 of Civil Procedure Act and order 45 of the Civil Procedure Rules.

The issue before this court is whether the learned trial magistrate exercised her discretion properly in dismissing the application for review. The appellants grounds for review were as per the Notice of Motion dated 3/8/2009 that;-

- a. ***That this matter was heard and determined by the Central Division Land Dispute Tribunal which accordingly filed its award in court on 6th August 2008.***
- b. ***That on the face of it the proceedings are incomplete.***
- c. ***That there is an omission on either the part of Tribunal or the court which is a sufficient reason for review of the court's decree issued on 17th July, 2009.***
- d. ***That the omission is self evident which does not require elaborate argument to be established.***
- e. ***That there is an error apparent on the face of the record which need to be rectified.***

The learned trial magistrate found that there was no discovery of new and important matter or evidence which after the exercise of due diligence was not with the appellants knowledge or could not be produced by him at the time when the decree was made or passed. This court observes that at the time of the making of the decision of the court the whole record of the proceedings of the tribunal were not before the magistrate. The said proceedings were availed by the parties to the court after the courts decision had been made. This court finds that though this was a new matter, the same could have been availed by the appellant to the court before the decision was made with exercise of due deligence and the same was obviously within the knowledge of the appellant having participated in the proceedings.

However, this court finds that failure by the chairman of the land Disputes tribunal to file the proceedings and other documents or deposits was an error apparent on the face of the record and was in breach of Section 7 of the Land Disputes Tribunal Act Cap 303(A)(repealed). The omission by the chair to act as required by law is an issue of fact that was not complied with hence the learned magistrate should have considered the said omission and reviewed the ruling made on the 17/7/2009.

The upshot of the above is that the appeal is allowed and the order made on the 27/1/2010 in Nanyuki SRM Civil suit No.22 of 2008 is set aside with costs to the appellant and the application dated 3/8/2009 be heard afresh.

Orders accordingly.

Dated, signed and delivered at Nyeri this 10th day of October 2014.

A. OMBWAYO

JUDGE