



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO.10 OF 2013

FRANCIS OKULLU..... APPELLANT

VERSUS

JAMES OSINDI RODHO RESPONDENT

JUDGMENT

1. The Appellant herein is the son of one, **Isaiah Odago, deceased** (hereinafter referred to only as “**the deceased**”). The deceased died in the year 2005. The deceased is and was at all material times registered as the proprietor of all that parcel of land known as **LR. No. Kabondo/Kowidi/322**(hereinafter referred to as “**the suit property**”). Sometimes in the year 2010, the respondent herein lodged a claim with Rachuonyo District Land Disputes Tribunal (hereinafter referred to as “**the tribunal**”) against the appellant in relation to the suit property. In his claim before the tribunal, the respondent contended that the parcel of land comprised in the title of the suit property had been sub-divided during the land adjudication into two portions, one portion for the deceased and the other portion for the respondent. The respondent contended that soon after adjudication, he left the area where the suit property is situated at Kabondo Division, Rachuonyo District to look for employment in Mombasa.
2. While he was in Mombasa, the deceased caused the respondent’s portion of the parcel of land now comprised in the suit property to be consolidated with the deceased’s portion and a single title therefor to be issued in the name of the deceased for the consolidated portion. As a result of the foregoing, the deceased ended up having a title not only for his portion of land that he acquired during the land adjudication but also the portion that was adjudicated and demarcated in the name of the respondent. The respondent sought the assistance of the tribunal to compel the appellant to sub-divide the suit property into two equal portions and transfer one portion thereof to the respondent. The tribunal after hearing the respondent and the appellant together with their witnesses in an award delivered on or about the month of August, 2010 ordered the appellant to apply for a grant of letters of administration in respect to the estate of the deceased and thereafter to sub-divide the suit property and transfer a half portion thereof to the respondent. The tribunal’s decision was lodged with the Principal Magistrate’s Court at Oyugis in Oyugis PMC Misc. Suit No.10 of 2010 for adoption as a judgment of the court and the same was adopted as such pursuant to the provisions of section 7 of the Land Disputes Act No.18 of 1990 on 29th March, 2011. The appellant was aggrieved with the tribunal’s decision aforesaid and preferred appeal against the same to the Provincial Land Disputes Appeals Committee at Kisumu (hereinafter referred to as “**the Appeals Committee**”) on 8th April, 2011.
3. In his memorandum of appeal to the appeals committee, the appellant appealed against the entire award of the tribunal on the following grounds:
 - i. **That the tribunal erred in law and fact in entertaining a dispute over title to land in respect of which it had no jurisdiction.**

- ii. **That the tribunal with the full knowledge that the registered proprietor of the suit property, Isaiah Odago Mudho was deceased erred in making orders affecting his property before grant of letters of administration had been applied for and issued in respect of his estate.**
- iii. **That the tribunal erred in interfering with the title of the suit property that was registered on a first registration after adjudication that took place in 1963 and with respect to which no objection was raised by the respondent.**
- iv. **That the tribunal erred in failing to take note of the fact that when Isaiah Odago Mudho, deceased was alive the respondent never raised any claim with respect to the suit property and that the respondent's claim that was brought after seven (7) years of the death of the deceased was an afterthought and in bad taste.**
- v. **That the tribunal failed to visit the disputed land to have the views of the elders who could have given it the true position of the suit property.**
- vi. **That the tribunal erred in failing to appreciate the fact that according to Luo Customary Law the late Isaiah Odago Mudho could not have shared land with the respondent as the respondent was neither a brother nor a son to the late Isaiah Odago Mudho.**
- vii. **That the tribunal failed to consider his statement and the statements by his witnesses thereby making the case a one sided affair.**
- viii. **That the tribunal erred in failing to note that the witnesses who testified on behalf of the respondent were not from their clan and as such had little knowledge of the suit property.**

4. The tribunals and the appeals committees were dissolved following the repeal of the Land Disputes Tribunals Act, No. 18 of 190 by the Environment and Land Court, Act, 2011 which came to effect on 30th August, 2011. Following the directions given by the Chief Justice under section 30 of the Environment and Land Court Act, 2011, the appellant's appeal that had been lodged with the Land Disputes Appeals Committee as Appeal Case No. 034 of 2011 was transferred to this court 30th November, 2012 for hearing and disposal. On 16th July, 2013 when the appeal came up for directions, it was directed that the appeal be heard through oral submissions because the respondent was acting in person. The respondent later engaged the firm of Ogejo Olendo & Company Advocates to act for him. The said firm of advocates filed a Notice of Appointment of Advocates and Notice of Preliminary Objection to the appeal on 23rd May, 2014. The respondent's objection was brought on the grounds that:

- i. **The appeal has been instituted by a person with no locus standi the appellant having failed to obtain letters of administration in respect of the estate of the late Isaiah Odago Mudho and thus has no legal capacity to institute these proceedings.**
- ii. **The appeal is premature, misconceived and constitutes an abuse of the due process of the law and ought to be struck off with costs.**

5. When the appeal came up for hearing before me on 30th June, 2014, Miss Nekesa, advocate appeared for the respondent while Mr. Gembe advocate appeared for the appellant. Miss. Nekesa informed the court that the respondent wished to act in person. The appeal was adjourned to 23rd October, 2014 to give the respondent time to file a notice to act in person. When the hearing on the appeal resumed on 23rd October, 2014, Mr. Gembe appeared for the appellant while the respondent appeared in person. On that day, the respondent notified the court that he had withdrawn instructions from the firm of advocates that was on record on his behalf and wished to proceed with the appeal in person. The court allowed the respondent to act in person notwithstanding the fact that he had not filed a notice to act in person. Mr. Gembe learned counsel for the appellant submitted that the appeal was against the undated award by tribunal by which the tribunal ordered that the suit property be subdivided into two by the appellant after succession proceedings and that one of the portions be registered in the name of the respondent.

6. Mr. Gembe submitted that when the tribunal made the said award, the suit property was registered in the name of Isaiah Odago, deceased. He submitted that a copy of the title deed for the suit property had been produced in evidence before the tribunal together with a certificate of official search which showed that Isaiah Odago was registered as owner of the suit property on 25th January 1966. He submitted that in the circumstances, it was not in dispute that Isaiah Odago in

- whose name the suit property was registered was deceased when the tribunal was deliberating on the dispute over the said property.
7. Mr. Gembe submitted that the decision of the tribunal was arbitrary because the appellant had no legal interest in the suit property on account of which he could have been sued by the respondent before the tribunal. Mr. Gembe submitted that the appellant was not the legal representative of the estate of Isaiah Odago (deceased) and hence the tribunal should not have entertained the respondent's claim against him (the appellant). Counsel submitted further that the tribunal did not have jurisdiction to entertain the respondents claim and to make the award complained of. Counsel submitted that the jurisdiction of the tribunal was set out in section 3 (1) the Land Disputes Tribunal Act No. 18 of 1990 (now repealed).
 8. Counsel submitted that the tribunal had no jurisdiction under that section to arbitrate on succession disputes or to give directions on how estates of deceased persons should be administered. Counsel submitted that Isaiah Odago (deceased) was the first registered owner of the suit property and as such the tribunal had no power to order the rectification or alteration of his title to the suit property. Counsel submitted further that the respondent's claim before the tribunal was barred under section 13 (3) of the Land Disputes Tribunal Act, No.18 of 1990(now repealed)in that it was brought more than 12 years from the date of registration of the deceased as the owner of the suit property. Counsel submitted that the tribunal had no jurisdiction to entertain a claim that was filed out of time.
 9. Mr. Gembe submitted in conclusion that since the decision of the tribunal was made without jurisdiction, the same was null and void and of no legal consequence and the adoption thereof as a judgment of the court at the Principal Magistrates Court at Oyugis in Misc. Suit No. 10 of 2010 was likewise a nullity. The respondent in opposing the appeal submitted that he was given a portion of the suit property by his father in 1963 before the appellant was born. The respondent submitted that the appellant is ason to the deceased and that the deceased used to stay with his (the respondent) father in the same compound. The respondent submitted that the deceased put up his homestead on the suit property after the suit property had been given to him (the respondent) by his father one, Elkana Rodho Osindi. He submitted that the deceased moved to the suit property in the year 1964 and that the adjudication process took place in the area around the year 1965 while he was away from home.
 10. On coming back in the year 1975, he found when the deceased had already been registered as the proprietor of the suit property. He submitted that the deceased was his father's step brother. The respondent submitted that his father died in the year 2003 while the deceased died in the year 2005. The respondent submitted that he has no land registered in his name as it is the suit property that was reserved for him. The respondent submitted that the deceased had another parcel of land apart from the suit property. He submitted that he is at the moment occupying land that belongs to his deceased brother and that his brother's wife has threatened him with eviction. On the issue that the tribunal had no jurisdiction to entertain his claim against the appellant, he submitted that he did not know that the tribunal had no jurisdiction to deal with the matter as he did not know that the suit property was registered in the name of the deceased.
 11. I have considered the proceedings of the tribunal, the appellants' grounds of appeal, the respondent's Notice of Preliminary Objection and the submissions that were made before me by the appellant's advocate and the respondent in person. The respondent did not argue his Notice of Preliminary Objection and as such I will take the same as having been abandoned. The appellant's first ground of appeal is that the tribunal had no jurisdiction to entertain the respondent's claim and to make the decision challenged in this appeal. It has been said that jurisdiction is everything and without it, the court or tribunal before which a matter has been brought must lay down its tools. In the case of **Desai –vs- Warsama (1967) E. A 301**, it was held that no court can confer jurisdiction upon itself and proceed to hear and determine a matter not within its jurisdiction and that if a court proceeds in that manner, its determination would be a nullity. Jurisdiction of the tribunal was set out in the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) (hereinafter referred to as "the Act"). Section 3(1) of the said Act provided that the tribunal had jurisdiction to determine:-

“...all cases of civil nature involving a dispute as to:

- a. **The division of, or the determinations of boundaries of land, including land held in common;**
- b. **A claim to occupy or work land; or**
- c. **Trespass to land”.**

12. It is clear from the foregoing Rachuonyo Land Disputes Tribunal (the tribunal) did not have jurisdiction to determine the dispute between the appellant and the respondent herein that concerned ownership or title to the suit property. The suit property was registered under the Registered Land Act, Cap 300, Laws of Kenya (“the RLA”) (now repealed). When the respondent lodged his claim with the tribunal against the appellant, the jurisdiction to determine disputes concerning title to or possession of land registered under the RLA was conferred exclusively upon the High Court and the Resident Magistrate’s Courts in limited cases by section 159 of the said Act. The tribunal had no jurisdiction over such matters. In the Court of Appeal case of **Jotham Amunavi –vs- The Chairman Sabatia Divisional Land Disputes Tribunal & Another Court of Appeal, Civil Appeal No. 256 of 2002 (unreported)**, the court stated as follows regarding the powers of the Land Disputes Tribunals:-

“It is clear that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of section 3 (1) of the Land Disputes Tribunal Act. By section 159 of the Registered Land Act such a dispute can be tried by the High Court or by the resident magistrate’s court in cases where the latter has jurisdiction.”

13. The tribunal did not also have jurisdiction to determine disputes over the estates of deceased persons. The respondent claim against the appellant before the tribunal involved land (suit property) that was registered in the name of a deceased person. This fact was brought to the attention of the tribunal and it is apparent from the decision of the tribunal that the tribunal was aware of the same. The tribunal did not have power to order for the transfer of a portion of a property that was registered in the name of a deceased person whose estate had not been administered to the respondent. I am also in agreement with the submission by the appellant’s advocate that the tribunal had no jurisdiction to direct or order the appellant to take out letters of administration in respect of the estate of the deceased. Section 47 of the Law of Succession Act Cap 160, Laws of Kenya divested the tribunal of jurisdiction to deal with disputes relating to estates of deceased persons.

14. Due to the foregoing, I am fully in agreement with the submissions by the appellant’s advocate that the award by the tribunal which is the subject of this appeal was arrived at without jurisdiction. Having come to the conclusion that the tribunal did not have jurisdiction to entertain the respondent’s claim against the appellant, there is no need to consider the other grounds of appeal that were raised by the appellant in his grounds of appeal herein. This issue of jurisdiction alone is sufficient to dispose of the appeal. In conclusion, I hereby allow the appeal herein, and set aside the undated decision of Rachuonyo Land Disputes Tribunal and its adoption as a judgment of the court by the Principal Magistrates Court at Oyugis in Misc. Suit No. 10 of 2010. In view of the relationship between the parties, each party shall bear its own costs of the appeal.

Delivered, Dated and Signed at Kisii this 5th day of November, 2014

S.OKONG’O

JUDGE

In the presence of:

Mr. Gembe for the Appellant

N/A for the Respondent

S.OKONG’O

JUDGE