



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT APPEAL NO. 1 OF 2012.

PAUL OCHAWACHI OUMA..... 1ST APPELLANT

NICHOLAS BULUMA OUMA.....2ND APPELLANT

=VERSUS=

AGUNDA SAKHALI.....1ST RESPONDENT

OONGO OCHAYE NALUO.....2ND RESPONDENT

JACKSON SHIDA KHAOTA.....3RD RESPONDENT

J U D G M E N T.

PAUL OCHWACHI OUMA and **NICHOLAS BULUMA OUMA** hereinafter referred to as 1st and 2nd Appellant, through M/S. Maloba & company Advocates, filed this appeal against **AGUNDA SAKHALI, OONGO OCHAYE NALUO** and **JACKSON SHIDA KHAOLA**, hereinafter referred to as 1st, 2nd and 3rd Respondents respectively. Their appeal is against the ruling of Western Provincial Land Disputes Tribunal case No. 72 of 2011 relating to Bunyala/Bukoma/647 and 656 and adopted in Busia PMC Land case No. 79 of 2011. The appeal is based on six grounds as set out hereinbelow:

1. "That the Provincial Land Disputes Tribunal erred in Law and fact by deliberating on a dispute involving L.R. No. Bunyala/Bukoma/647 which land is registered in the names of dead people namely, Ochai Oduori and Ogunda Were.
2. That the Provincial Land disputes Tribunal erred in Law and fact by dealing in land registered in deceased persons in the absence of none of the parties having taken out letters of Administration intestate as by law required.
3. That the Provincial Land Disputes Tribunal erred in law and fact by failing to follow customary law and history in determining the dispute before it.
4. That the Provincial Land Disputes Tribunal erred in law and fact by making a vague ruling in capable of being implemented.
5. That the Provincial Land Disputes Tribunal erred in law and fact by making a finding that the Respondent had proved ownership when indeed no such ownership especially of L.R. No. Bunyala/Bukoma/647 was ever proved.
6. That the Provincial Land Disputes Tribunal erred in law and fact by dealing with a matter that was entirely required to be dealt with by way of succession under the Law of Succession Act."

The Appellants pray for the Western Provincial Land Disputes Tribunal ruling in case number 72 of

2011 as adopted in Busia PMCC No. 79 of 2011 on 29th December, 2011 be quashed, the Budalangi Land Disputes Tribunal award be reinstated and costs be paid by the Respondents.

The Respondent's opposed the appeal through the replying affidavit by Jackson Shida Khaota (the 3rd Respondent) sworn on 12th March, 2013 and filed through M/S. Ario and Company advocates. In the said affidavit deponed on his own behalf and on behalf of the other two Respondents, Jackson Shida Khaota aver to the following among others;

1. That the registered owners of the land parcel Bunyala/Bukoma/647 died in the years 1985 and 2003.
2. That by the time the Appellants filed their claim over the land in Budalangi Land Disputes Tribunal case No. 4 of 2011, they knew the registered owners had died several years before and that none of the Respondents had obtained grant in respect of the registered owners estates.
3. That to grant the prayers in the appeal especially prayer (b) would amount to an injustice.

When Mr. Makokha and M/S. Maloba for Respondents appeared before the court for hearing on 22nd May, 2013, they consented to proceed by way of written submissions. Both counsel filed their written submissions on the same day, the 22nd May, 2013.

I have carefully considered the six grounds of the appeal, the record of appeal and contents of the replying affidavit and find the following issues deserves to be determined:

1. This being a second appeal, would issues of fact be raised?
2. Did the Budalangi and Western province Land Disputes Tribunal have capacity to deal with the matter taken before them by parties herein.
3. Did the Appellants, when first initiating the matter before Budalangi Land Disputes Tribunal, sue the correct parties?

On the issue of what matters would in law be brought for determination before this court on a second appeal, it is important to see the provision of Section 8 (8) of Land Disputes Tribunal Act (now repealed) which states:

“The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.”

In view of this clear provision of the law, the court will only address issues of law in the appeal.

On the capacity or rather jurisdiction of both the Budalangi Land Disputes Tribunal and Western Province Land Disputes Tribunal, it was as limited under Section 3 (1) of the Land Disputes Tribunal Act (now repealed) which states;

“ Subject to this Act, 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,**

Shall be heard and determined by a Tribunal established under section 4.”

The case filed by the Appellants before Budalangi Land Disputes Tribunal though indicated as a trespass claim on page 1 of the proceedings, resulted to orders that were beyond the powers of the Tribunal. This made the Respondents to file an appeal before the Appeals Tribunal which was successful. The Appeals Tribunal allowed the appeal and revoked the Budalangi Land Disputes Tribunal ruling among others, This is what prompted the Appellants to file the current appeal as they want to have the Budalangi land Disputes Tribunal award reinstated. The court has already found that the decision of the

Budalangi Land Disputes Tribunal was in excess of their jurisdiction. As the Western Province Land Disputes Tribunal decision of 9th November, 2011 in Appeal No. 72 of 2011, had the effect of revoking the decision of Budalangi Land Disputes Tribunal award of 1st July, 2011 in case No. 79 of 2011, I find the appeal is without merit. The court cannot reinstate an Order or award issued by a tribunal outside its powers as such an award is nullity ab initio.

As properly submitted by counsel for the Appellant the Respondents herein had no capacity to be sued on behalf of estates of the owners of the land subject matter of this case. This is because they have not obtained grant to represent the said estates and this made the Tribunal to be without jurisdiction to deal with the case as it involved properties in the names of deceased persons. In the case of **Republic –vs- Chairman Matungu Land Disputes Tribunal Exparte Electina Wang’ona (2012)eKLR**, the

Court held as follows:

“.....The presence of proper parties before the Tribunal is a matter of jurisdictional significance. The absence of proper parties does not make the case feeble, rather, it goes to the jurisdiction of the Tribunal with the result that the Tribunal had no jurisdiction.”

The Appellants cannot be allowed to find fault on the Appeals Tribunal’s decision on the basis that the Respondents had no capacity, while asking the court to retain the decision of the Budalangi Land Disputes Tribunal, where they had sued persons who had not obtained grant in respect of the deceased person estate.

The court notes that the parties herein, now have counsel representing them and have no doubt they will be advised on the legal procedure to follow in respect of the claims, if any, that they may have over the properties in question.

For the reasons set out above the court issues the following orders;

- a. That Budalangi Land Disputes Tribunal award of 1st July, 2011 and adopted in Busia PMC. Land case No. 79 of 2011 on 4th August, 2011 was in excess of the Tribunal’s jurisdiction and hence a nullity and void ab initio.
- b. That to the extent that the Western Province Land Disputes Tribunal’s decision dated 9th November, 2011 in case No. 72 of 200 and adopted in Busia CMC Land case No. 79 of 2011 on 29th December, 2011 revoked the Budalangi Land Disputes Tribunal award of 1st July, 2011, the appeal is dismissed.
- c. That the Appellants will pay the Respondents the costs of the appeal.

It is so ordered.

S. M. KIBUNJA,

JUDGE.

Delivered on 10th day of July, 2013.