



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 194 OF 2013

NDUNDA MIANO APPELLANT

VERSUS

MUGO RIAKATHARIRESPONDENT

(BEING AN APPEAL FROM JUDGMENT OF THE LEARNED RESIDENT MAGISTRATE HON. DUKE OCHARO DATED 2ND JULY, 2009 IN WANG'URU ARBITARATION CASE NO. 4 OF 2005)

JUDGMENT

This appeal is against the ruling of Honourable Mr. Duka Ocharo Resident Magistrate Court Arbitration Case No. 4 of 2005.

It is the appellant's case that the said ruling should be set aside and the memorandum of appeal raises the following grounds:-

1. ***That the learned magistrate erred in law and in fact in failing to establish that the subject matter being land reference No. MWEA/TEBERE/B 26 was a subject in High Court of Kenya being H.C.C No. 22 of 1977 Originating Summons at Nairobi which suit was fully heard and determined***
2. ***that the learned magistrate erred in law and in failing to establish whether the subject matter before him was res-judicata***
3. ***that the learned magistrate erred in law and in fact by finding that the Land Dispute Tribunal had legal mandate to deliberate on the issue of title as opposed to Section 3 of the Land Tribunal Act 1990***
4. ***that the learned magistrate erred in law and in fact by failing to determine the issues before him conclusively***
5. ***that the learned magistrate erred in law and in fact in entertaining a matter which was beyond his jurisdiction***

I have considered the submissions by counsels for the appellant and the respondent as well as the authorities cited for which I am grateful.

Notwithstanding those lengthy submissions, the issue in this appeal basically revolves around the mandate of a Court exercising its jurisdiction under **Section 7 of the now repealed Land Disputes Tribunal Act (Cap 303 A Laws of Kenya)**. The dispute herein was in respect of a parcel of land known as MWEA/TEBERE/B 26 which, as was the practice then, was heard by the Mwea Land Disputes Tribunal which made their decision dated 10th February 2005 ordering that the title deed in respect of the

land and which had been issued to the appellant herein be revoked and the land be given to the original owner who is the respondent herein. That award was filed at the Resident Magistrate's Court Wanguru and was read in the presence of both the appellant and respondent on 26th April 2005. Indeed the record of the proceedings on that day show that the award of the Tribunal was read and adopted as a judgment of the Court by Kimutai K.T. Resident Magistrate in the presence of Mr. Kahiga holding brief for Mr. Kibocho for the appellant herein who was the defendant in the Tribunal case. The magistrate explained to the parties that there was a right of appeal against the decision of the Tribunal. A decree followed thereafter and the appellant's application to stay execution of that decree was dismissed on 1st September 2005. On 2nd July 2009, Mr. D.A. Ocharo Resident Magistrate allowed an application by the respondent herein seeking orders, inter alia, that the Executive officer at the Wanguru Court signs transfer documents in relation to land parcel number MWEA/TEBERE/B 26 in place of the appellant herein in order to give effect to the Tribunal's decision. It is that ruling that has given rise to this appeal on the grounds that I set out at the beginning of this judgment.

Grounds 1, 2 and 3 of the memorandum of appeal can be dealt with together as they basically relate to the issue of sub-judice in that the magistrate failed to establish that there was another suit in Nairobi being H.C.C.C No. 22 of 1977 touching on the same subject matter and further, that the Land Disputes Tribunal had no jurisdiction over title to land. In his ruling which is the subject of this appeal, the learned magistrate observed, and rightly so in my view, that the appellant having not appealed against the decision of the Land Disputes Tribunal, the issue of whether or not that Tribunal had jurisdiction over the matter could not be raised in his Court. The learned magistrate also found that nothing was placed before him to suggest that the matter before the Tribunal was sub-judice there being a High Court case.

When the magistrate adopted the Tribunal's award on 26th April 2005, he was acting pursuant to the provisions of **Section 7 of the then Land Dispute Tribunal Act** which provides as follows in sub-section 1 and 2.

7 (1) "The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal"

7 (2) "The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforced in the manner provided for under the Civil Procedure Act" - emphasis added

And under **Section 8** of the same Act, it is provided for as follows in sub-section 1

8 (1) "Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated"

My understanding of **Section 7 (1) of the Land Disputes Tribunal Act** is that once the magistrate receives the award from the Tribunal, his duty is confined to entering judgment in accordance with the decision of the Tribunal. Indeed the use of the word SHALL demonstrates that the magistrate is under an obligation to enter judgment as per the decision of the Tribunal. Infact no hearing is contemplated at that stage because the magistrate's role is limited to adopting the decision of the Tribunal as a judgment of the Court and even if the Tribunal's decision was in excess of it's jurisdiction, as is the case herein, the Land Disputes Tribunal does not empower the magistrate to hear any application with regard to the decision. The only situation I can imagine where the magistrate can down his tools under **Section 7 (2) of the Land Disputes Tribunal Act** is if infact the Tribunal has not filed any decision with the Court. However, once a decision is filed, the magistrate is obliged to enter judgment in accordance with that decision. Nambuye J (as she then was) was of the same opinion in **MUTEMI MWASYA VS MUTUA KASUVA H.C CIVIL APPLICATION NO. 140 of 2011 (MACHAKOS)**. Kimaru J was also of the same view in **CHRISPUS GAKUI VS KARANJA WAINAINA 2006 e K.L.R.** I respectfully agree with the reasoning of both judges on that issue.

As stated earlier, the Tribunal's award was read in the presence of both the appellant and the respondent and the right of appeal was explained to them. That right of appeal is found in **Section 8 (1) of the Land Disputes Tribunal Act** and grants an aggrieved party a right of appeal to the Appeals Committee within thirty days of the decision. Counsel for the appellant has made a forceful submission that the magistrate's role should not be simply to adopt the Tribunal's decision without establishing its legality and therefore the magistrate acted ultra vires. That argument may sound persuasive but the magistrate acting under **Section 7 of the Land Disputes Tribunal Act** is mandated to do only one thing and that is to enter judgment in accordance with the decision of the Tribunal. Thereafter, he must draw a decree to be enforced as provided for under the Civil Procedure Act. That is all that the magistrate is mandated to do by the law and while it is true that the Tribunal went beyond its jurisdiction in dealing with title to registered land, the appellant's recourse, which he did not take yet he was aware about the Tribunal's decision, was to appeal against that decision.

On grounds 3 and 4 of the memorandum of appeal, it cannot be said that the magistrate failed to determine the issues before him conclusively or that he erred in law and in fact by entertaining a matter beyond his jurisdiction. The issues that were raised before the magistrate and which were the basis of his ruling dated 2nd July 2009 included that the suit was res-judicata and that the Tribunal acted in excess of its jurisdiction under **Section 3 of the Land Disputes Tribunal Act**. Those issues were considered by the magistrate who rendered himself as follows:-

“ I agree with counsel for the appellant that any complaint on the powers of the Land Disputes Tribunal under Section 3 of the Land Dispute Tribunal Act (No 18 of 1990) are not matters for this Court but rather the subject of appeal. If the respondent felt that the Tribunal did not have jurisdiction to deal with a parcel of land with a title deed under Cap 300, he should have appealed on that ground either to the Provincial Appeals Tribunal or the High Court. He did not do that and the decree still stands under Section 7 of Act No. 18 of 1990, the jurisdiction of this Court is merely to receive the award and adopt it. This Court does not have jurisdiction to question an award made by the Land Disputes Tribunal”

In my view, the magistrate clearly determined the issues before him and made a finding. The Tribunal's award was that the land in dispute do revert to that original owner who is the respondent herein and that meant a transfer of the land to the respondent and that was the application that the magistrate was considering in his ruling subject of the appeal. That application was for purposes of actualizing the decree that followed the adoption of the Tribunal's award on 26th April 2005 from which there was no appeal. In so doing, the magistrate cannot be said to have acted beyond his jurisdiction. **Section 7 (2) of the Land Dispute Tribunal Act** empowered the magistrate to enter a decree in terms of the Tribunal's decision and enforce it in the manner provided by law and that is what was being asked of him when the respondent herein filed the application dated 29th October 2005 seeking the execution of the Tribunal's decision and which the magistrate allowed in his ruling subject of this appeal.

The appellant's counsel has submitted that since the Tribunal's award was the basis of the proceedings before the magistrate, this Court has the jurisdiction to interrogate it. Counsel also urges me to invoke the provisions of **Article 159 of the Constitution** and protect the appellant's right to own land. That is an attractive argument but I am un-able to find support for it in the law. What is before me is an appeal against the magistrate's ruling dated 2nd July 2009 and as I have already found, the magistrate really had no discretion in the matter once the Tribunal's decision was filed before him. He was under a statutory obligation to adopt and enforce it unless there was an appeal against the decision. It must be noted that under **Section 8 (1) of the Land Disputes Tribunal Act**, what is appealable is the “ **decision of the Tribunal**” and the appellant herein did not exercise that option. That cannot be a mere technicality that can entitle the appellant herein to seek refuge in **Article 159 of the Constitution**. That provision was not meant to oust the obligation of litigants to comply with the law even as they seek justice from the Courts – see **RAILA VS I.E.B.C & OTHERS 2013 e K.L.R (Supreme Court)**. It was the responsibility of the appellant to invoke the provisions of the Land Disputes Tribunal Act and appeal against the Tribunal's decision and having not done so, the trial magistrate was well within his jurisdiction to enforce that decision. He cannot be faulted for doing what the law required of him.

The up-shot of the above is that this appeal is dismissed with costs.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2013

4/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Muyodi for Mr. Ogutu for Appellant – present

No appearance for Respondent

COURT: Judgment delivered this 4th day of November 2013 in open Court.

Mr. Muyodi for Mr. Ogutu for appellant present

Mr. Momanyi for respondent absent

Right of appeal explained.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2013