



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AN LAND COURT AT BUSIA**

**CIVIL APPEAL NO. 28 OF 2012**

**BRIAN MUBWEKA NDEDA ..... 1<sup>ST</sup> APPELLANT**

**MARY STELLA AWINO NDEDA ..... 2<sup>ND</sup> APPELLANT**

**= VERSUS =**

**CRISPINUS NDEDA ..... 1<sup>ST</sup> RESPONDENT**

**BONELLA NDEDA ..... 2<sup>ND</sup> RESPONDENT**

**EUGINE NDEDA ..... 3<sup>RD</sup> RESPONDENT**

**J U D G E M E N T**

1. The Appellants had sued the three Respondents before the Land Disputes Tribunal at Land Case No. 1 of 2008 claiming a stake in Bukhayo/Bugengi/2182. Their complaint as summarised by the Land Disputes Tribunal was that they were demanding for a share of the father's family land comprised in LR No. Bukhayo/Bugengi/2182.

2. The Tribunal after hearing evidence from both parties gave their award which was subsequently adopted as an order of court in Busia CMCC No.26 of 2012. The award/order read as follows:

**(i) The complainants' claim is allowed.**

**(ii) Both the complainants – Brian Ndeda and Marystella Ndeda are awarded the portion of land parcel No. Bukhayo/Bugengi/5053 (through succession process) which the late Michael Ndeda had preserved for himself before his death.**

**(iii) Both parties to share the costs of the case.**

3. In spite of the award being in their favour, the Appellants appealed that decision. They challenged it on the following grounds of appeal:

*1) That the Divisional Land Disputes Tribunal erred in law and fact by deliberating on a dispute involving L.R No Bukhayo/Bugengi/2182 which land is registered in the names of dead person.*

*2) That the Divisional Land Disputes Tribunal erred in law and fact by dealing in a land registered in deceased persons thereby ordering for subdivision thus overstepping their powers.*

*3) That the Divisional 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 Divisional Land Disputes Tribunal erred in law and fact by making a vague ruling incapable of being implemented.*

*5) That the Divisional Land Disputes Tribunal erred in law and fact by making a finding that the respondents had proved ownership when indeed no such ownership especially of L.R No. Bukhayo/Bugengi/2182 was ever proved.*

4. During the hearing of this appeal, the Appellant stated that he relies on the record. He added that at page 23 of the record, the Tribunal referred to a ghost mutation dated 27/1/2003 since it was not found anywhere in the record. Secondly that the total land given in the resultant titles mentioned in the proceedings was 6.1ha while L.R No. 2182 had a total land of 7.7ha leaving some balance out. He also stated that he

is relying on the document at page 59 and 63 to have the judgement quashed. (*which is document is a P&A form No. 5 listing the assets and beneficiaries of the Michael Ndeda – deceased in NBI H.C. Suc cause no 60 of 2001*).

5. The Respondents filed their submissions late on 30/10/2020 challenging the appeal. They submitted that the Appellants cannot say the Land Disputes Tribunal had no jurisdiction while it is them who filed the complaint before the Tribunal. The respondents denied that the Tribunal deliberated on land registered in name of a deceased person since L.R No 2182 had been sub-divided by the registered owner on 31/7/1996 before he died on 15<sup>th</sup> November 1997. Further the Respondents submitted that the Tribunal did not order for any sub-division.

6. The Respondents submitted that the Appellants did not raise any evidence on customary law which the Tribunal could be accused of not following therefore the Appellants cannot fault the Tribunal. The Respondents further submitted that the ruling of the Tribunal was not vague. That the 1<sup>st</sup> Respondent has filed Suc. Cause No. 60 of 2001 where Bukhayo/Bugengi/5053 is listed as one of the deceased properties. Lastly that the Tribunal did not make a finding that the Respondents had proved ownership of land parcel No. Bukhayo/Bugengi/2182. That the Appellants are looking for a remedy which cannot be granted by this court since no judicial review proceedings had been commenced.

7. I have read the proceedings before the Tribunal as well as the documents filed on record. The Appellant blamed the Tribunal for deliberating on the land L.R No. 2182 which was registered in the name of a deceased. The certificate of official search at page 36 of the record for Bukhayo/Bugengi/2182 indicates on its face that the title deed was closed on sub-division to new numbers 5049-5053. At page 13-14 (which were proceedings before the Tribunal), the 1<sup>st</sup> Respondent stated that before their father died, he assembled his brothers to witness the sub-division of the suit land. That the sub-division was done and the resultant numbers allocated to different persons (sons) leaving out parcel No. 5053 in the name of Michael Ndeda. The inference drawn is that by 2008 when this case was filed before the Tribunal, land title L.R No. 2182 no longer existed and it was not in the name of a deceased person.

8. The certificate of searches produced at page 40 – 48 also show the new numbers create from L.R No. 2182 were indeed registered. For instance, title no. Bukhayo/Bugengi/5052 was registered in the name of the 1<sup>st</sup> Respondent as at 30/10/1996; L.R No. 5051 was registered in name of Eugene Ndeda Orodi on 1/11/1996. This evidence which forms part of the Appellants record does not thus support ground 1 & 2 of the appeal.

9. The Appellant stated that the Tribunal failed to follow customary law and history in determining the dispute before it. The issue before the Tribunal was that the Appellants had been left out in the sharing of L.R No. Bukhayo/Bugengi/2182. The Tribunal's jurisdiction was set out at section 3(1) of the Land Disputes Tribunal Act thus;

**“(1) 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”.**

10. First the Tribunal could only deal with matters that were placed before him. The customary law issue before the Tribunal was whether or not the Appellants had a share in the suitland by virtue of their birth and marriage respectively. The evidence as put in paragraph 8 above demonstrates that the deceased Michael Ndeda had shared the suit land to his children during his lifetime. From the jurisdiction of the Tribunal paraphrased above, the Tribunal could not challenge the division already undertaken as they had no power to do so. In any event, the Appellants had not sued Michael Ndeda so the Tribunal could not follow customs used by the deceased in sharing his land.

11. Be that as it may, the Tribunal still went ahead to take care of the interests of the Appellants when in their award they decided that the parcel number Bukhayo/Bugengi/5053 which remained in Michael Ndeda's name be allocated to the Appellants. The Appellants did not in their evidence state the mode the land ought to have been distributed which was ignored. Consequently, the Tribunal could not open an issue not in dispute to deliberate whether or not the sharing was equitable.

12. At paragraph 4 of the Memo of Appeal, the Appellant pleaded that the Tribunal made a ruling incapable of being implemented. The Respondents have that the first Respondent already commenced the succession process to have the L.R Bukhayo/Bugengi/5053 transferred to the Appellants. The award was adopted as an order of the court. Once it became a decree, the Appellant was at liberty to execute. The Appellants did not elaborate why they were unable to execute decree.

13. The Appellants continued that the Tribunal made a finding that the Respondents proved ownership of L.R No. Bukhayo/Bugengi/2182. The following were some of the findings reached by the Tribunal;

*a) According to the statements given, the sharing out of the above portions of land was done by Michael Ndeda himself before he died.*

*b) Most if not all the resultant parcels of land from Bukhayo/Bugengi/2182 have title deeds issued from District Land Office – Busia.*

*c) If at all it is true that the late Michael Ndeda himself allocated the above portion of land to his family members and left out the two complainants (Brian and Marystella) and also left out a portion of land Bukhayo/Bugengi/5053 for himself, then it means that he had left this parcel for the two complainants who were not given any share.*

14. The finding number (b) was merely re-stating the existing facts i.e. that the resultant titles from sub-division of 2182 were issued to the various people as shown in the searches at pages 40-48. It was therefore not a finding of the Tribunal that the Respondents had proved ownership of land parcel No. Bukhayo/Bugengi/2182. In any case, the Tribunal lacked jurisdiction to cancel the resulting subdivision titles from L.R No 2182.

15. The Appellants had urged the court to find merit in their appeal and grant the following orders;

**a) That, the ruling/award of Matayos Land Dispute Tribunal in its Divisional Land Case No. 26/2012 as read and adopted by the subordinate court on 16/5/2012 be quashed.**

**b) That, an order be given by the Honourable Court directing the Land Registrar to cancel and revert all Land Parcel numbers Bukhayo/Bugengi/5049-5053 back to Bukhayo/Bugengi/2182.**

**c) That, this honourable court be pleased to make such order as it deems fit and justifiable in the circumstances as to the way forward.**

**d) That, costs of this appeal be borne by the respondents.**

16. However, in view of the foregoing analysis, I conclude that the Appellants have not proved any of the grounds listed in their appeal and therefore not entitled to be granted the orders sought. The result is that the appeal be and is hereby dismissed for want of merit with costs to the Respondents.

**Dated, signed & delivered at BUSIA this 3<sup>rd</sup> day of Dec., 2020.**

**A. OMOLLO**

**JUDGE**