



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 128 OF 2013

SELLA NYAKOA ETENYL.....PLAINTIFF

VERSUS

1. ANDREW KIPROP TANUL.....1ST DEFENDANT

2. CONSEFTA NASIMIYU TANUL.....2ND DEFENDANT

JUDGMENT

1. The plaintiff's claim is contained in the plaint dated 7/10/2013 which was filed in court on the same date. In that plaint, the plaintiff seeks the following reliefs against the defendant:-

(a) declaration and/or order that the Kwanza Divisional Land Disputes Tribunal Proceedings and Ruling read and adopted as judgment of the court on 13/12/2011 and decree arising therefrom in Kitale Chief Magistrate's Court Land Case No. 51 of 2011 is null and void ab initio and same ought to be set aside.

(c) Costs of this suit.

(d) Any other or/relief this court may deem fit to ward in the circumstances of this case.

2. The plaintiff's case is that she is the surviving widow of the late **Pius Kiprop Tanui** while the 1st defendant is a son to the said Tanui; that the 2nd defendant is a "stranger"; that the deceased settled the plaintiff on **12 acres** in plot 315 Meteitei Farm before his demise and another co-wife with her children on **38 acres** at His Talau Farm in West Pokot; that the defendants lodged a claim before the Kwanza Land Disputes Tribunal against the plaintiff claiming 6 acres in favour of the 1st defendant in **Plot No 315 Meteitei Farm** which claim the Tribunal, which the plaintiff now claims was without jurisdiction for the reason that the owner was deceased, allowed and which decision the Magistrate's Court adopted on **13/2/2011 in Kitale CMCC Land Case No 51 of 2011**; that no succession proceedings have been taken out in respect of the deceased's estate yet he died intestate. The plaintiff avers that the defendants had no *locus standi* to institute the claim before the Tribunal as they did not have Letters of Administration. Further the plaintiff claims that the **Land Disputes Tribunals Act No 18 of 1990** was repealed on 30/8/2011 yet the proceedings before it were conducted on 20/9/2011 and that the land was awarded to persons who were not parties to the proceedings.

3. The defendants never filed any memorandum of appearance or defence despite being served with summons and plaint and other documents on **15/10/2013** as evidenced by the affidavit of service sworn by one **Peter Orwaro** filed on **21/3/2014**.

4. The plaintiff testified on **15/11/2018** when this suit came up for formal proof. She reiterated the contents of his plaint and written statement dated **7/10/2013** filed in court on the same day, and produced documentary evidence in support of her case.

5. The facts that emerge from the pleadings and the evidence are that the deceased's estate was not made the subject of any succession proceedings. The deceased had already met his demise by the time at the proceedings were conducted by the Tribunal. He is said to have died intestate.

6. The defendants did not appear before this court to establish whether they had obtained Letters of Administration to the deceased's estate prior to lodging the claim before the Tribunal.

7. However even if it is assumed they did not have Letters of Administration while urging their case at the tribunal, I do not find this to be fatal to their claim before the tribunal for the reason that their claim was against the plaintiff as a co-wife to the 2nd defendant herein on their own behalf and not on behalf of the deceased's estate.

8. The proceedings before the Tribunal should not be annulled on the basis of the claimant's want of a grant of Letters of Administration to the deceased's estate.

9. However, while still on this point I find that under **Section 47** of the **Law of Succession Act** only the High Court has jurisdiction to hear and determine succession disputes. Without prejudice to what I will state later herein about the existence of the Tribunal, I find that even if the Tribunal had been in existence, the decision of the Tribunal in the claim before it regarding the suit land could not stand. The "panel" seemed to recognize this when they stated as follows in their award:

"That the Tribunal orders the matter be referred to succession through the entire family."

10. In view of the tribunal's observation above, it would therefore be apt for all the family members to be involved in a succession cause before the High Court at which each and every member's share will be determined.

11. I must also find that the proceedings took place before the Tribunal irregularly on **20/9/2011** because the **Land Disputes Tribunal Act No 18 of 1990** had been earlier repealed on **30/8/2011** by the Environment and Land Court Act which came into effect on that date. The panel of elders did not exist at least in the eyes of the law by **20/9/2011**.

12. The plaintiff produced a copy of a circular issued by the then Commissioner of Lands bringing to the attention of all District Land Officers the fact of repeal of the Act and the consequent cessation of existence of the Land Disputes Tribunals with effect from **30/11/2011**.

13. The Tribunal having sat on 20/9/2011, this circular which was issued on 31/10/2011 was therefore ineffective to communicate to the relevant panel members the fact of that repeal before they sat.

14. Ignorance being not a defence in law, this court must nevertheless hold the proper position to be that notwithstanding such lack of awareness, the "panel's" proceedings and award were illegal.

15. The evidence of the plaintiff was not controverted. The case went unopposed. I find that the plaintiff has established his claim on a balance of probabilities against the defendants and I therefore enter judgement in her favour against the defendants jointly and severally and issue the following orders:

(a) The Kwanza Divisional Land Disputes Tribunal Proceedings and Ruling read and adopted as judgment of the court on 13/12/2011 and the decree arising therefrom in Kitale Chief Magistrate's Court Land Case No. 51 of 2011 are null and void *ab initio* and same are hereby set aside.

(b) As the parties are admittedly members of the same family each party shall bear their own costs of this suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 29th day of **January, 2019**.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019