



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL NO. 142 OF 2009

1. MATHEW WANYONYI

2. ROBERT WAFULA WERE

3. MATAYO WEKESA.....APPELLANTS

VERSUS

SHADDY KULOBA MANYASIRESPONDENT

J U D G M E N T

(Appeal arising from the Ruling and/or decision of HON. SOGOMO - SRM delivered on 9/3/2009 in BUNGOMA CMC LDT NO. 70 OF 2009).

The dispute between the parties herein relates to the land parcel **NO. E.BUKUSU/E. SANGALO/1562** (herein the suit land). **SHADDY KULOBA WAFULA MANYASI** (the Respondent herein) was the claimant and moved to the **KANDUYI LAND DISPUTES TRIBUNAL** on 23rd March 1999 against the three Appellants **MATHEW WANYONYI BULUMA** (1ST Appellant), **ROBERT WAFULA WERE** (2nd Appellant) and **MATAYO WEKESA BULUMA** (3rd Appellant) complaining that they had trespassed onto the suit land and constructed a home thereon.

The dispute was heard by the said Tribunal in accordance with the provisions of the law then applicable being the **Land Disputes Tribunal Act Chapter 303 A Laws of Kenya** (now repealed) and by its decision rendered on 4th June 1999, the Tribunal made an order that the Appellant should stop any development on the suit land. The Tribunal further ordered that the Land Registrar and Government Surveyor visit the suit land and determine the boundary.

It would appear from the record herein that the original Court file then disappeared. By then, however, the Tribunal award had, as was required under the **provisions of Section 7 of the repealed law**, been filed at the **BUNGOMA CHIEF MAGISTRATE'S COURT as LDT NO 70 OF 1999** and Judgment entered in favour of the Respondent in terms of the Tribunal's award on 6th March 2000. That is evident from the ruling dated 9th March 2009 and which is the subject of this appeal. No appeal was preferred against the Tribunal's award to the Appeals Committee as provided by **Section 8(1) of the repealed law** and certainly none could have been filed to the High Court under **Section 8(1) of the repealed law**. It follows therefore that thirty (30) days after 6th March 2000 when the Tribunal's award was adopted as a judgment of the Court, any claim that the Appellants may have had with regard to the suit land was extinguished and they were bound to abide by the said Judgment.

By an application dated 23rd December 2008, the Respondent moved to the subordinate Court seeking two (2) substantive orders i.e:-

(a) That a skeleton file be opened.

(b) Orders be granted for the eviction of the Appellants from the suit land.

In a ruling delivered on 9th March 2009, the trial magistrate (G. SOGOMO – RM) granted the prayers sought and subsequently through another ruling dated 4th May 2009, he granted the Appellants leave to appeal against that ruling delivered on 9th March 2009.

That paved way for the Appellants to file this appeal challenging the ruling dated 9th March 2009. The following six (6) grounds have been set forth in seeking to have the said ruling set aside:-

1. The learned trial magistrate erred in law and fact in being minded to order for the eviction of the Appellants when the

Tribunal had not so ordered.

- 2. The learned trial magistrate erred in law and fact in reaching a decision without the benefit of the original file.**
- 3. The learned trial magistrate erred both in law and in fact in ordering for eviction of the Appellants on an application when there had been no substantive suit heard and finalized.**
- 4. The learned trial magistrate did not properly address himself to the issues before him.**
- 5. The learned trial magistrate gave a decision which he had no jurisdiction to give.**
- 6. The finding is insupportable both in law and fact.**

The appeal having been admitted by **MUCHEMI J** on 15th April 2010, it was placed before me on 26th June 2018 when counsel for the Appellants sought time to prepare the record of appeal. By consent of the parties, it was agreed that the appeal be canvassed by way of written submissions.

I have considered the appeal and the submission as filed both by **MR. J. O. MAKALI** counsel for the Appellant and **MR. IKAPEL** counsel for the Respondent. As the 3rd Appellant is deceased, this appeal is only by the 1st and 2nd Appellants.

This dispute, as I have already indicated above, was heard by the **KANDUYI LAND DISPUTES TRIBUNAL** exercising its jurisdiction under the repealed law which was then applicable in 1999 before its repeal in August 2011 with the commencement of the Environment and Land Court Act. After the Tribunal filed its award in the subordinate Court, the Appellants had the right to file an appeal to the Appeals Committee as provided under **Section 8(1) of the repealed law**. No appeal was filed and the subordinate Court having entered Judgment in terms of the Tribunal's award as mandated by **Section 7(2) of the repealed law**, a decree issued and was enforceable in the manner provided for under the Civil Procedure Act. In order to execute the Tribunal's award the Respondent moved to the subordinate Court seeking the eviction of the Appellants from the suit land. Having failed to exercise their rights under **Section 8(1) of the repealed law** to appeal against the decision of the Tribunal within 30 days, it was not open to the Appellants to appeal against the ruling dated 9th March 2009 which was in respect to the execution process. It was the Tribunal's award and the adoption thereof by the subordinate Court as a Judgment that led to the execution process and therefore, the Appellants cannot mount any proper appeal against the ruling dated 9th March 2009 when the Judgment upon which it is predicated remains intact. I therefore agree with **MR IKAPEL** that this appeal is clearly incompetent. However, as the appeal was admitted by **MUCHEMI J** on 15th April 2010, I shall consider its merits.

I shall consider **grounds 1, 2, and 3** together which take issue with the trial magistrate for ordering the Appellant's eviction when the Tribunal had not ordered so and when no substantive suit had been heard and finalized and also in reaching a decision without the benefit of the original file.

As I have already indicated above, the original file disappeared after the Tribunal had filed its award in the subordinate Court which had proceeded to adopt it as a Judgment. However, by his application dated 23rd December 2008 and which gave rise to the impugned ruling, the Respondent sought orders for the reconstruction of the file and eviction of the appellants. In doing so, the Respondent annexed to his application copies of the pleadings and orders which were not objected to by the appellants. In his ruling, the trial magistrate made the following observation:-

“Though the file in which the Applicant seeks the Court (sic) is reconstructed under Section 3A of the Civil Procedure Act, I am inclined to presume the pleadings and orders annexed as being a true reflection of the original file. This is especially because the Respondents has (sic) not disputed them or provided copies of orders granted thereafter”.

What the trial magistrate was stating was that although the original file had disappeared, the Respondent herein (Appellant in the application for reconstruction of the file) had all the relevant pleadings and orders to enable him reconstruct the file. And since those pleadings and orders had not been disputed on the Appellants (Respondents in the application) he was entitled to presume that they were genuine to order him reconstruct the file and grant the orders sought. There was no error in law or fact committed by the trial magistrate in the approach that he took. The disappearance of the Court file does not mean that a party who can provide authentic copies of the previous pleadings and orders should be shut out from the seat of justice. That would be a serious precedent as it would allow parties who want to defeat justice to simply ensure that the Court file disappears from the registry once orders that are unfavourable to them are made. That would be a serious blow to the administration of justice. The Court of Appeal considered such a scenario in the case of a criminal trial in **PIUS MUKABE MULEWA & ANOTHER V. R. C.A CRIMINAL APPEAL NO. 103 OF 2001** and said:-

“Indeed, if it were to be known that as soon as the Court file and that of the police disappear, that would be the end of the matter, the Courts would expect many more disappearances and justice would be the loser”

In this case, however, the trial magistrate was able to reconstruct the file from documents made available by the Respondent and which were not disputed. That was clearly in order and is the most prudent direction to be taken by any Court given similar circumstances. There was absolutely nothing wrong with that both in law or in fact.

On the complaint that an order for eviction of the Appellants could not be made when there was no substantive suit heard and finalized, the dispute between the parties was filed at the **KANDUYI LAND DISPUTES TRIBUNAL** on 23rd March 1999 under the repealed law which was applicable then. **Section 3 of the repealed law** provided for the Tribunal's jurisdiction and empowered it to adjudicate over the dispute and reach a decision. **Section 3(2) of the repealed law** provided as follows:-

3(2) *“Every dispute referred to in subsection (1) shall be instituted by presenting a claim to the Tribunal for the area in which the land is situated, and shall contain, and contain only, a summary of the material facts on which the claimant intends to rely”.*

A suit is defined in the Civil Procedure Act as:-

“.....as all civil proceedings commenced in any manner prescribed”.

And in **BLACK’S LAW DICTIONARY 10TH EDITION**, the word suit is described in the following terms:-

“Any proceeding by a party or parties against another in a Court of Law”.

The Tribunal then proceeded to hear the dispute and file its award in Court which was subsequently adopted as a Judgment. It cannot therefore be correct to suggest, as the Appellants have done, that there was no suit heard and finalized. The Respondent filed a claim before the tribunal under the law as it was then, it was heard and determined. There was no appeal against the Judgment. It cannot therefore be correct to argue that there was no substantive suit heard and determined.

On the ground that the trial magistrate should not have ordered for the eviction of the Appellants when there was no such order by the Tribunal, it is clear from the Tribunal proceedings that the core of the dispute between the parties was trespass. The second order granted by the Tribunal in its award dated 4th June 1999 was as follows:-

“The Court to make orders to the effect that the three objectors not to do any development including working on the two parcels E.BUKUSU/E.SANGALO 1562 and 1563”.

The trial magistrate grappled with the issue on whether or not to grant eviction orders and resolved it as follows:-

“In order to give teeth to the orders already on record, it is imperative that I also grant the eviction orders sought notwithstanding that the same were not encompassed in the award”.

Therefore, while it is true that the Tribunal made no orders for the eviction of the Appellants from the suit land, the gist of their award was that the Appellants were trespassers on the suit land and in my view, In order to *“give teeth”* to those orders, as the trial magistrate stated, he was entitled to grant the eviction orders because Courts should not act in vain. Appellants’ Counsel **MR. MAKALI** has cited the case of **PETER MUIRURI KAMAU .V. LEE MBURU BORU HIGH COURT CIVIL APPEAL NO 498 OF 2002 NBI (2004 eKLR)** for the proposition that the trial Court had no jurisdiction to order eviction on the basis of a decision made by the Land Dispute Tribunal. I have looked at that decision by **P.J RANSLEY J** which is of course not binding on me. That decision can be distinguished from this case because in that case, **RANSLEY J** was dealing with an appeal from the Provincial Appeals Committee arising out of a decision by the Land Disputes Tribunal. **RANSLEY J** was therefore exercising his jurisdiction under **Section 8(9) of the repealed law**. In this case now before me, I am not determining an appeal from the Provincial Appeals Committee because none was filed against the decision of the **KANDUYI LAND DISPUTES TRIBUNAL** dated 4th June 1999 and therefore that decision binds the parties. What I am dealing with here is an appeal against the ruling of the trial magistrate arising out of the execution process of the Judgment of the Court following the Tribunal’s award.

Secondly, in the **PETER MUIRURI KAMAU** case (supra) **RANSLEY J** made the following observation:-

“In my view, the Tribunal rule (sic) made an order that a person has trespassed onto land but it has no power to order eviction or award compensation arising out of such findings. The proper forum for an order for eviction is in the Courts of law. However, where the Tribunal has found that there has been an act of trespass, this should be sufficient evidence to enable a Court of Law to make the appropriate orders”. Emphasis added.

What **RANSLEY J** was saying was that whereas a Tribunal can make an order that a person has trespassed onto another’s land, it cannot order for eviction nor award compensation. While I agree that a Tribunal exercising its jurisdiction **under Section 3(1) of the repealed law** cannot make any orders for compensation, I do not subscribe to the proposition that it cannot order for eviction. My view is that since the jurisdiction of the Tribunal under **Section 3(1) of the repealed law** is to determine a dispute relating to trespass to land, then it follows that it is quite proper for a Tribunal, having determined that there is a trespass, to make an order that the trespasser be evicted because that is the remedy that should ordinarily follow such a finding. However, since the Tribunal has no way of enforcing such an order, the only recourse is for the person in whose favour the order is made to move to Court have a decree drawn encompassing an order for eviction so that it can be executed in accordance with the Civil Procedure Rules as set out in **Section 7(2) of the repealed law**. This is because, the order for eviction must be contained in the decree and that can only be done if the Tribunal made such an order. The decree envisaged **under Section 7(2) of the repealed law** must therefore be in tandem with the award of the Tribunal. In that regard therefore, I do not agree with the proposition by **RANSLEY J** that a Tribunal has *“no power to order eviction”*. The trial magistrate was no doubt alive to the fact that unless he ordered for the eviction of the Appellants from the suit land, the Tribunal’s award would be ineffectual. That is why he made reference to the words *“In order to give teeth to the orders on record”* There was no error either in law or in fact for the magistrate to make an order for the eviction of the Appellants from the suit land because the Tribunal had already determined that they were trespassers. It is also clear from the **PETER MUIRURI KAMAU** case (supra), that **RANSLEY J** went on to add that once the Tribunal has found a party to be a trespasser, that is sufficient evidence upon which the Court can order an eviction. That is exactly what the trial magistrate did in this case when he relied on the findings of the Tribunal to order for the eviction of the Appellants from the suit land.

There is no merit in **grounds 1, 2, and 3** of the appeal.

Grounds 3, 5 and 6 can also be considered together. Counsel for the Appellants has submitted that the trial magistrate ought to have first

opened a skeleton file after which a separate application for eviction could be filed. That was not necessary. There was no error either in law or in fact for the two applications for reconstruction of the file and for the eviction of the Appellants being canvassed simultaneously. Judicial time must not be used extravagantly and no prejudice was caused to the Appellants in the manner in which the trial magistrate handled the application. Having been satisfied that the record placed before him was authentic, nothing stopped the trial magistrate from granting the orders of eviction.

On the issue that the trial magistrate had no jurisdiction to make the orders that he did, counsel has cited the locus classicus case of **OWNERS OF MOTOR VESSEL 'LILLIAN S' .V. CALTEX OIL (K) LTD 1989 KLR 1** and stated that since the Tribunal had no jurisdiction to issue orders of eviction, then the trial magistrate could not have been clothed with similar jurisdiction. As I have already stated above, the **KANDUYI LAND DISPUTES TRIBUNAL** did not specifically make an order for eviction of the Appellants in this case although in my view, nothing stopped it from doing so. Nonetheless, having made a finding that the Appellants were trespassers, the order for eviction was granted by the Court. A dispute touching on trespass was well within the jurisdiction of the Tribunal by virtue of **Section 3(1) of the repealed law** and the trial magistrate did not err in granting the order for eviction of the Appellants from the suit land. The trial magistrate properly addressed himself to the two issues before him which were whether he could reconstruct a skeleton file based on the evidence presented to him and which was not rebutted and also whether he could order the Appellant's eviction from the suit land. In my view and having considered his ruling, there can be no merit in the argument that he did not address the issues before him or that his findings are unsupported both in law and fact. I find that his findings were based on cogent evidence which was not rebutted. Those grounds are similarly dismissed.

The up shot of the above is that this appeal is wholly without any merit. It is hereby dismissed. The 1st and 2nd Appellants shall meet the Respondents costs of this appeal and in the Court below.

Boaz N. Olao.

JUDGE

27th March 2019.

Judgment dated, delivered and signed in open Court at Bungoma this 27th day of March 2019.

Mr. Murunga for Appellant present

Mr. Kweyu for Mr. Ikapel for respondent present

Right of Appeal explained.

Boaz N. Olao.

JUDGE

27th March 2019.