



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL APPEAL NO. 2 OF 2017

FRANCIS NZIOKA.....APPELLANT

-VERSUS-

JUSTUS MAKAU.....RESPONDENT

(Appeal from the decision of the Provincial Lands Appeal Tribunal Coast Province delivered

on 12th July, 2011 in being land Appeal No. Lnd/Ta/49 of 1999 – Francis Nzioka & 2 others =versus= Justus Makau)

JUDGEMENT

1. The appellant moved this Court being a 2nd appeal vide his memo of appeal that listed the following grounds:

- 1. The committee erred in law and fact in failing to hear the appellant on the appeal and only proceeded to deliver its decision.**
- 2. The committee erred in law and fact in failing to appreciate the fact that the Respondent was a member of the committee and there was a likelihood of a biased decision.**
- 3. The committee erred in law and fact in failing to appreciate the fact that the respondent did not purchase the alleged 7 acres of land from the appellant.**
- 4. The committee erred in law and fact in granting a decision that is incapable of being effect taking into account the acreage in question.**
- 5. The committee erred in law and fact in repossessing the appellant's land without due process.**
- 6. The committee erred in law and fact in ordering the cancellation of the appellant's valid title deed to his land.**
- 7. The committee erred in law and fact in failing to record the proceedings before it.**

2. The parties agreed to argue the appeal by filing of written submissions. The appellant on 1st October 2018 informed the Court that the record of appeal was incomplete. Leave was granted for filing supplementary record but none was filed. The Respondent has taken the incompleteness of the record in his submissions.

3. The appellant in his submissions dated 3rd August 2018 opened by stating that the appellant was abandoning ground 1 of the appeal. He therefore argued grounds 2 – 7 of the appeal. On ground 2, he submitted that the Respondent was a member of the Provincial Appeals Committee therefore likely to influence the outcome of the appeal. This Court notes the appellant did not point out from the evidence on record that showed the Respondent was a member of the Appeals Committee or that he influenced the impugned decision.

4. On ground 3, he submitted that the handwritten agreement presented by the Respondent did not state the plot number. That the appellant was not a party to the sale agreement. That it was wrong for the tribunal to arbitrate a matter by including the Appellant who was not party to the sale.

5. The appellant continued in his submissions that the tribunal had no power to interfere with his title. That the land in question was 21 acres yet the award gave totals to 25 acres. That the appeals committee granted a decision that was incapable of implementation.

6. The appellant cited the provisions of section 143 of the Registered Land Act (repealed) that provides only for Courts to make orders for rectification of title by cancellation or amendment. That the Appeals Committee was wrong in making such a decision. The appellant also submits that the parties did not obtain the consent of the Land Control Board for the purchase thus the sale was null & void. That the Appeals Committee cannot purport to enforce a contract of sale that is null & void. The appellant urged this Court to vacate the orders of 12th July 2011 and allow his appeal with costs.

7. The Respondent on his part submitted that the appeal herein is incompetent and bad in law for two reasons. First because of incompleteness of the record and secondly because there was no appeal capable being adjudicated upon by the Provincial Land Disputes Appeal Tribunal. He referred the Court to page 43 & 44 of the record. He also stated that the appeal before the Committee was accepted out of time (page 29) without leave sought to extend the time.

8. The Respondent submitted that the present appeal is not on points of law contrary to the provisions of section 8 of the Land Disputes Tribunal Act (repealed). The Respondent further submitted that this appeal is devoid of merit and should be rejected with costs.

9. I have considered the record of appeal filed and the submissions rendered. I frame the following questions for my determination:

(a) Whether this appeal lie to this Court under the provisions of section 8 of the Land Disputes Tribunal Act (repealed).

(b) Whether this appeal raises issues of law.

(c) Whether or not the Appeal has merit.

(d) Who bears the costs of the appeal?

10. The appeals to this Court under the Land Disputes Tribunal Act (repealed) would have their origin from the District Land Disputes Tribunal then to the Provincial Land Appeal Committee before finding their way here. There are timelines provided which parties must comply with. In this instance what the Court notes from the record is that this dispute was first heard by the Land Control Board of Kubo Division. At page 36, the document is referenced thus "*minutes of the Judgment of Land Dispute between:*"

11. The membership of the board given is 8 in number with Mr I. K Adan – D. O chairing the meeting. Under section 4 of the Land Disputes Tribunal, it provides that the membership of a tribunal is a chairman & 2 or four other members. That gives a maximum of number of 5. The Appellant took up this issue in his appeal to the province when at ground 1 & 2 in the memo of appeal dated 12th May 1999 he stated that the said tribunal had no mandate under section 4 of Land Disputes Tribunal Act to arbitrate the dispute.

12. The issue of whether or not that tribunal had mandate was also mentioned by the Provincial Land Disputes Appeal Committee on 24th July 2007 at page 43 of the record. They stated in their findings thus, "*The land in dispute was not heard by the District Land Dispute Tribunal but was before the Land Control Board. The case has been rejected as the case has not been channelled through the District Land Disputes Tribunal Kwale.*"

13. The appellant having been aware the tribunal was not properly constituted should have sought advice on the best way to deal with the decision of the Land board members. Otherwise the Land Control (Cap 302) Act does not provide for appeals to this Court in the manner presented. Consequently the appeal as filed does not lie and is thus incompetent.

14. The Respondent also stated that the Provincial Land Disputes Appeals Committee later admitted the appeal when they had no mandate to do so. The Respondent stated that the decision complained of was rendered on 25th November 1998 while the appeal was lodged on 13th May 1999 some 5 months out of time. Secondly that the appeal having been rejected on 24th July 2007 as not properly channelled there was no appeal capable of being heard in the year 2011.

15. The appellant did not address this Court on the aspect of time. Since it was submitted that the record is incomplete this Court was unable to find under what provisions of the law the Provincial Land Disputes Appeals Committee reversed their Order of 24.7.2007 to re-hear the appeal. Further the 1st appeal made on 13th May 1999 was made out of time. In the absence of contrary evidence, I find that the only order/decision that should have been appealed was the one of 24th July 2007. For the twin reasons of filing the initial appeal out of time without leave and the provincial Land Dispute Appeals Committee reviewing its order, I find the present appeal as incompetent and a candidate for striking out.

16. Does the appeal raise issues of law? I find that ground Nos 4, 5 & 6 raised issues of law. The only problem I find with the appellant's complaint on challenging the order as given is that a copy of the record of the title before subdivision was not included in the record for the Court to be able to ascertain on its own what was the initial acreage. The Committee in their finding stated that in the event the land is less than 25 acres then the figures provided were to be used as ratio for the subdivision as listed (page 4 of the record). The inference drawn is that the Committee's decision left for revision of the sizes guided by the ratios of the figures stated. For this, I find that the order was capable of implementation.

17. Did the Committee err in repossessing the appellant's land without due process? To give effect to the order the Appeals Committee ordered for revision of the previous sub-division of the parcel of land in dispute. The order on the face of it did not state that the Appellant's land was being repossessed.

18. Lastly on whether the Committee exceeded its powers in ordering the cancellation of the Appellant's title? On this I do agree with the appellant that the Appeals Committee did not have jurisdiction to make an order directed at the Registrar of titles to issue fresh titles.

Unfortunately this ground is not sufficient to make this Court reverse the said orders because of the incompetency of the appeal as already stated.

19. In conclusion, I find that this appeal is incompetent and lacking in merit. The result is to have it struck out which I hereby do with an order that each party meets their respective costs of the appeal.

Dated, signed & delivered at Mombasa this 21st March 2019

A. OMOLLO

JUDGE