



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC APPEAL CASE NO. 8 OF 2018**

**ISAAC LISALITSA ALUMASA.....PLAINTIFF**

**VERSUS**

**PAUL LUTEYA LUVASIA.....DEFENDANT**

**JUDGEMENT**

The appellant herein being aggrieved by the decision/verdict of Hon. C. Kendagor RM in KAK MISC. AWARD NO. 26 of 2011 delivered in 14<sup>th</sup> June 2012 preferred this appeal and puts forth the following grounds:-

1. The learned trial magistrate erred in law and fact in adopting the award whose decision ought to have been better determined in a probate and administration court since the suit property in question related to a deceased person whose succession process was pending in court.
2. The learned trial magistrate erred in law and facts by in adopting the award without taking into account that there were two conflicting decisions emanating from the same tribunal on the Land Dispute.
3. The learned trial magistrate erred in law and facts in adopting the award whose decision was ultra vires as the Tribunal had no powers to order the cancellation of subdivision and reverting the land to the original owner.

The appellant submitted on the first ground of appeal that the trial magistrate erred in law and fact in adopting an award whose effect was dealing with land of a deceased person i.e. Kakamega/Shiswa/1481 in the names of Daudi Ben Alumasa (deceased). By so doing the court and the tribunal acted in excess of its powers in determining in a probate and administration cause but not the tribunal. The appellant having disclosed to the court that succession cause relating to the estate of the late Daudi Ben Alumasa was pending in court vide cause No. 355 of 1989 was pending in court, then the tribunal and the court ought to have made a finding that it had no jurisdiction to entertain the claim and refer the parties to the said succession cause.

On ground 2, they submit that the trial magistrate erred in law and fact without taking into account that there are two conflicting decisions emanating from the same land Dispute Tribunal as can be confirmed at pages 21 and 22 of the Record of appeal and the decision on pages 47 and 48 of the said record of appeal. This raises suspicion as to why a tribunal sitting at the same time could have two conflicting decisions. The trial magistrate ought to have rejected both decisions and refer them back for clarification.

On the 3<sup>rd</sup> ground, trial magistrate erred in law and fact in adopting a decision reached by the tribunal ultra vires. The tribunal had no powers to order for cancellation of any sub-division and ordering land to revert to its original number. By so doing the tribunal acted outside its jurisdiction. The powers of the land dispute tribunal are well set out in section 3 of the land dispute tribunal act (Repealed). Such powers were limited as determining boundary disputes, land held in common, claim to occupy or work on land or trespass to land. By the tribunal ordering cancellation a sub-division where title had been issued, it acted outside its jurisdiction.

In the decided case of Joseph Karobi Gicheru vs. Michael Gachoki Gicheru (2013) ECLR, the trial judge stated that “where a court or Tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of a legal life and are null and void abinitio.

In the circumstance, they pray that the appeal be allowed, the trial magistrate’s order adopting the award and the award itself be set aside with costs to the appellant.

The respondent submitted that under S7 and rule 20 of the Land Disputes Tribunal Act (No. 18 of 1990) once the chairman of the tribunal has filed the decision of the tribunal in court the magistrate has no option, but to adopt the decision by entering judgment in accordance with

the terms of the decision. The magistrate has no power to review, reject or remand the decision. He has no power to criticize the decision. The magistrate did what is required to be done by law.

S7 (1) of the Act runs thus, “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”.

S7 (2) of the Act runs thus, “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 enforceable in the manner provided for under the Civil Procedure Act.”

The court acted in accordance with the dictates of the law. Ground No. 1 of the appeal lacks merit and they urge the court to dismiss it. Mr. Wilson Muyonga (pg 57) the Chairman of the Tribunal identified the decision of the tribunal which was filed in court. He disowned the second decision which the appellant had introduced to contradict the authentic decision of the tribunal. The decision was by 2 members of the tribunal (pg 48). The decision which the chairman filed was by 3 members of the tribunal (pg. 22). The appellant did not call the 2 members of the tribunal who made the conflicting decision, nor did he produce it as exhibit during the viva voce hearing. Section 6 (b) of the Act (Land Disputes Tribunal Act No. 18 of 1990) provides that the decision of the tribunal was therefore that which was signed by 3 members of the tribunal as opposed to that which 2 members signed. The one signed by 2 members was therefore not a decision at all. The magistrate was not wrong in adopting the decision of the majority of the members of the tribunal. It is their submission that the second ground of appeal is devoid of merit and they would urge the court to dismiss it too.

As regards the excess of jurisdiction by the tribunal, the learned magistrate pointed out rightly that that was the preserve of the High Court to review decisions on account of excess in jurisdiction. The appeal lacks merit and they would urge the court to dismiss it with costs.

This court has carefully considered the submissions herein. This appeal is premised upon the memorandum of appeal dated 13<sup>th</sup> July 2012 which raises three grounds, the preliminary issue in my view which is for determination is the jurisdiction of the tribunal which is the basis of the decision being appealed against. On the issue of jurisdiction, the operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows-

*“3 (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 4.”*

In this case, the tribunal meandered beyond its boundaries. In *M’Marete v Republic & 3 others*, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR the court held-

*“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”*

The tribunal in the present case dealt with title or ownership to property. The ruling of the tribunal dated 20th April 2011 was that;

*“ Following the evidence adduced both orally and documentarily by the parties including the respondent’s brother and mother, we have established beyond reasonable doubt that the late Peter Shiakaba’s parcel of land did exist across the parcel of land appropriated by the late Marcko Alumasa and was retrieved before the land demarcation, adjudication and registration and that the late Marcko Alumasa capitalised on the absence of the late Peter Shiakaba and registered it in his name and that the portion lying across KAK/SHIWA/211 has been surrendered to the Shiakaba family and that succession and subdivision of the claimed portion on KAK/SHIWA/212 was done hurriedly without the knowledge and consent of the claimant herein, we therefore make the following orders;*

*1. That the late Peter Shiakaba’s portion across KAK/SHIWA/212 be reverted to its originality.*

*2. That the claimant Paul Luteya, files succession cause in respect of Daudi Ben Alumasa and the parcel number KAK/SHIWA/1481 be transferred in favour of the claimant herein Paul Luteya forthwith.”*

The dispute between the parties from the above ruling before the Shinyalu Land Disputes Tribunal which was adopted in court was essentially a claim to ownership over the land.

For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Shinyalu Land Disputes Tribunal. The proceedings prima facie violated the Land Disputes Tribunal Act (now repealed). In the case of *Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & Another*, Nairobi, High Court, JR 370 of 2013 [2014] eKLR. In that case, Odunga J held as follows-

*“In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.*

The provisions of section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 are very clear on what matters these tribunals had, jurisdiction over claims of title to registered land is not one of the matters that can or could be laid in this tribunal and the Shinyalu Land Disputes Tribunal was wrong to register, hear and pass judgment and make orders against the appellant on the title to the suit land. Having found this there will be no need to go into the merits or demerits of the proceedings in the Tribunal as they never had jurisdiction in the first place. I find that this appeal has merit and I allow the same. I quash the decision/verdict of the Shinyalu Land Disputes Tribunal and the award adopting it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**