



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 6 OF 2018

BENJAMIN MACHIO LUTOMIA

AGNETA W. MACHIO.....APPELLANTS

VERSUS

JOSEPH ISIMBISHIRA WANDAKO.....RESPONDENT

JUDGEMENT

Being dissatisfied with the decision of the Western Provincial Appeals Committee in appeal No. 106 of 1998 the appellant who was the appellant before the appeals Committee appealed to this court against the said decision on the following principal grounds:-

1. That the Appeals committee erred in law in not giving reasons for their verdict.
2. That the Appeals Committee erred in law in not properly evaluating the evidence before it.
3. That the Appeals Committee erred in law in not addressing the issue of the Limitations Act.
4. That the Appeals Committee erred in law in finding that the Mumias Land Disputes Tribunal had jurisdiction to entertain a claim based on a matter touching on ownership of land registered under the Registered Land Act Cap 300 Laws of Kenya.
5. That the Appeals Committee erred in law in proceeding to hear the appeal in an irregular manner.
6. That the Appeals Committee erred in law in making a decision that was at variance with the evidence on record.
7. That the Appeals Committee erred in law in upholding the decision of the Mumias Land disputes Tribunal when no fraud had been proved as against the appellant in respect to his registration as absolute proprietor thereof.

The appellant submitted that, by a plaint dated 20/3/1998 (page 1-2 of the record) the respondent sued the appellant Benjamin Machio Lutomia who was substituted by Agneta W. Machio in which he prayed for judgment against the said appellant for recovery of land parcel No. E. WANGA/ISONGO/364, costs of the suit and interest thereon. According to the plaint there are no particulars that the suit land was acquired fraudulently, illegally and or unprocedurally by the appellant. The defendant/appellant herein vide its defence dated 9/4/1998 denied allegations having acquired the said parcel of land fraudulently and stated that it is now over 27 years whilst in possession of the land in question and also in possession of the land title deed.

The respondent proceeded to court and prayed for a temporary order to restrain Mumias Sugar Company from re-ploughing and cultivating sugar cane on contract No. ISONGO PLOT NO. 364 A/C NO. 3831 until further orders of the court. Upon evaluation of the matter the court vide its ruling dismissed the application with costs and ordered that the appellant should continue using the land. The respondent aggrieved with the decision of the court abandoned the plaint he had filed at the Resident Magistrate's court in Mumias and decided to refer the matter to the Land Disputes Tribunal at Mumias.

At the tribunal the respondent claimed 6 acres of the entire land claiming that the appellant had acquired it fraudulently. The tribunal upon its verdict ordered that the parcel of land No. E. WANGA/ISONGO/364 be subdivided thereafter three acres be given to the respondent and the remaining 3 acres to the appellant. The appellant aggrieved with the decision of the Mumias Land Disputes Tribunal appealed to the Western Provincial Appeals Committee which decision was further upheld by the said committee. The appellant further appealed against the said decision to this court which gave rise to this instant appeal.

Further the appellant averred that the suit was time barred and that the Land Dispute Tribunal and the Western Provincial Appeals Committee lacked jurisdiction to handle matters related to ownership of land.

Whether the Mumias Land Disputes Tribunal had jurisdiction to entertain claims based on matters of ownership of land registered under Registration Land Act Cap 300 Laws of Kenya. The Land Disputes Tribunal derive their jurisdiction from the Land Disputes Tribunal Act (No. 18 of 1990) (now repealed) which provides for cases which may be heard and determined by the Tribunal. S3 (1) of the Act provides that these are cases of a civil nature involving a dispute as to

- (a) The division of or the determination of boundaries of land to including land held in common
- (b) A claim to occupy or work on land
- (c) Trespass to land.

Under the above provision the tribunal had no jurisdiction to deliberate on a dispute touching on interest in land. This off course includes matters of proprietorship of a registered land. The proceedings of the tribunal that was conducted on 29/6/1998 clearly show that one of documents presented to the panel was a copy of the land certificate (now referred to as title deed) for L.R. NO. EAST WANGA/ISONGO/364. The Land Certificate shows that as at 23/11/1971 the said parcel of land was registered in the name of the appellant Benjamin Machio Lutomia prior to the substitution. In total disregard of the restricted powers given to the tribunal, it went ahead and ordered for the subdivision of the said parcel of land as spelt out in its award. This was indeed in violation of the law. To buttress the above point let the appellant refer to a few decided cases.

In the case of Jidraph Nyoro Kang'ethe vs. Silas Kang'ethe as cited in Mgandi Dume Mgandi vs. Charo Kirao Randu Civil appeal No. 72 of 2004 the Court of Appeal held that the jurisdiction of the tribunal to deal with land registered under the Registered Land Act Cap 300 is found in Section 159 of that Act. The jurisdiction is limited by Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 which provides for cases which may be heard and determined by the tribunal.

In conclusion the appellant submitted that, the tribunal had no jurisdiction to hear and determine this matter as it concerned ownership of land. It thus acted ultra vires its jurisdiction half an acre, it is clear that the proceedings before the tribunal related to both titles to land and to beneficial interest in the suit land and such a dispute is not within the provisions of Section 3 (1) of the Land disputes Tribunal Act as such disputes can only be tried by the High Court or by the Resident Magistrates court in cases where such latter court has jurisdiction.

Notwithstanding the issue of jurisdiction it is their considered submission that the appellant did not acquire the parcel of land fraudulent, illegally or through a corrupt scheme. Although Article 159 of the Constitution enjoins the court to administer substantial justice without undue regard to procedural technicalities the same article does to allow parties to totally ignore the rules of evidence. The respondent made no attempts to give particulars of fraud, misrepresentation and or illegalities as required. As regards standard of proof the law is quite clear as was stated in the case of R.G. Patel N. Halji Makanji where the former Court of Appeal for Eastern Africa.

They further submitted that, it is clear from the proceedings before the tribunal at Mumias that the appellant and the respondent entered into an agreement in or about 1971 to sell the suit land known as E. WANGA/ISONGO/364 at a sum of Ksh. 3,100/=. Upon completion of the purchase price the appellant was registered as the owner of the land and put into possession in or about the same year. By the time the respondent filed the case at the tribunal in or about 1998, a period of over 27 years had lapsed. It is therefore their submission that since the appellant got registered as the owner of the parcel of land in 1971 or thereabouts he has remained in actual occupation and utilization of the same.

Section 7 of the limitation of Action Act (Rev 2012) Cap 22 laws of Kenya provides that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claim to that person”

They relied on the decision in the Court of Appeal civil appeal No. 73 of 1982 Public Trustees vs. Wanduru 1984 KLR pages 314-326 in which it was held inter alia that;

“..... Section 7 of the act provides an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person whom he claims to that person”

A purchaser in possession of land purchased after having paid the purchase price is a person in whose favour the period of limitation can run under section 10 (1) of English Limitation Act 1939 (closely akin with section 7) against the vendor. From the above provision the appellant has been registered as the owner and still is in occupation of the suit land since 1971 a period of over 12 years upto when the respondent filed his suit in court. They therefore pray that the suit herein be struck out and or dismissed with costs as it is statutory time bared, bad in law, incompetent and or does not disclose a reasonable cause of action.

It is also their considered submission that the Appeals Committee failed to make a determination of any of the issues before it. In its verdict the committee found that there existed land parcel No. E. WANGA/ISONGO/364 registered in the names of the appellant and he the appellant has even been in actual occupation and possession of the suit land for now more that 27 years and the committee went ahead and ordered for the sub division of the same a prayer that was not sought for By the respondent before the tribunal. The respondent's case before the tribunal was that he sold 3 acres of the land. The respondent after selling the said parcels of land did go to settle in Kitale and in or about 1998 he returns back and claims that the appellant transferred the remaining 3 acres to himself.

The respondent submitted that the Tribunal had jurisdiction and arrived at a fair decision as this was a claim to subdivide the land. They submit that the evidence on record clearly shows that the appellant fraudulently acquired the land from the respondent without going through due process. They never went through the Land Control Board.

This court has carefully considered the submissions herein. This appeal is premised upon the memorandum of appeal dated 7TH July 1999 which raises seven grounds, the preliminary issue in my view which is for determination is the jurisdiction of this tribunal. On ground 4 and 5 of the appeal, 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 tribunals in the present case dealt with title or ownership to property. The Western Provincial Appeals Committee signed on 23/9/1994. It read “IT IS HEREBY ORDERED AND DECREED”

1. That the verdict of the Mumias Land Disputes Tribunal is adopted as judgment of this court.
2. That the applicant is awarded 3 acres of land comprised in L.R. NO. E. WANGA/ISONGO/364.
3. That the executive officer of this honourable court to sign the necessary land forms to enable the 3 acres to be transferred to the applicant immediately.

The dispute between the parties before the Mumias Land Disputes Tribunal and Western Provincial Appeals Committee 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 Mumias Land Disputes Tribunal and Western Provincial Appeals Committee. 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 Mumias Land Disputes Tribunal and Western Provincial Appeals Committee were wrong to register, hear and pass judgment and make orders against the appellants 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 and Committee 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 Mumias Land Disputes Tribunal and Western Provincial Appeals Committee with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE