



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC APPEAL NO. 17 OF 2017

(FORMELY Kisii Elcc No. 66 of 2014)

MOSES OMOLO ATIENO

GRADUS ATIENO OTHIM.....APPELLANTS

Versus

JOHN NJONG ONSINGO.....RESPONDENT

JUDGMENT

1. The appellants, Moses Omollo Otieno (the 1st appellant) and Gradus Atieno Othim (the 2nd appellant) are aggrieved by the decision and decree dated 29th September 2011 of Hon Z.J Nyakundi (Senior Resident Magistrate as he then was) in Rongo Senior Resident Magistrate's Court Miscellaneous Civil Application No. 19 of 2011 whereby the trial court adopted as judgement an award read to the parties on 5th July 2011 and filed in court on 19th July 2011 by the defunct Land Dispute Tribunal, Awendo (hereinafter referred to as the tribunal). The trial court decreed inter alia, that the 1st appellant was a trespasser and should be evicted from the suit land, LR NO. KAMAGAMBO/KAMWANGO/195 thus provoking the instant appeal.

2. The appellants were the objectors/respondents before the tribunal and the trial court. In this appeal they were formerly represented by Minda and company advocates and currently by S.M Sagwe and company advocates.

3. The respondent was the claimant/applicant before the tribunal and the trial court. He is represented by the firm of Oguttu, Ochwangi, Ochwal and company advocates herein.

4. This being the first appeal from the trial court, I am entitled to consider and evaluate the evidence on record afresh to determine whether the conclusion originally reached upon that evidence should stand. However, it must be remembered that this court neither saw nor heard witnesses in the dispute; see **Muthuita v Wande & 2 others (2008) IKLR (G&F) 1024**.

5. The respondent's claim before the tribunal was that he was the owner of the suit land. That the 1st appellant trespassed into the suit land and erected his home thereon. He called Lucia Ngere (1st witness) and Elkana Ngoje (2nd witness) in support of his claim. At the tribunal, the respondent testified inter alia:-

“ I have accused Gradus Atieno and his son Moses Omollo Atieno for trespassing in my parcel of land by making Moses Omollo build a home in the parcel. This I realized when I woke up on the morning of 13th February 2011.”

6. The appellants replied to the respondent's claim before the tribunal that they were entitled to the suit land which belonged to Othim Njong (Deceased), who was grandfather of the 1st appellant and father to the 2nd appellant. That the 1st appellant moved to the land on 3rd February 2011 and had the right to build thereon as the 2nd appellant had been using the suit land even when the deceased was alive. The appellants called two witnesses, namely Loice Ajwang Atieno and Kennedy Ochieng Atieno.

7. The tribunal's findings were that the 1st appellant was a trespasser on the suit land and should be evicted from the same. The tribunal held that:-

“Having listened to the case, statement from witnesses, and also making visitation to the site, the tribunal came to a clear conclusion that Moses is a trespasser and should therefore be evicted from parcel no. 195 Kamagambo Kamwango immediately and leave the parcel 195 to John Njong Osingo who is the next of kin to Othim Njong. Moses should go back to the parcel where his father Gradus Otieno Othim stays.”

8. On 26th September 2011, the learned trial magistrate adopted the award as judgment of that court in the matter. The trial magistrate's duty was merely to adopt the award and enter judgement accordingly as provided for under section 7(2) of the Land Disputes Tribunals Act cap 303A (the repealed Act) and as recognized in **Zedekiah Mwale case** (infra).

9. The instant appeal is anchored on four (4) grounds set out in the memorandum dated 4th June 2014 forming part of record of appeal dated 26th September 2018. The appellants contend that the tribunal and or the court did not have jurisdiction to determine any dispute over it and that the trial magistrate erred in law and in fact in adopting the decision of the tribunal which was void. Counsel urged this court to set aside the trial court's decree and allow this appeal with costs.

10. Learned counsel for the appellants filed submissions dated 3rd October 2018 wherein reference is made to the impugned award judgment and decree. Counsel submitted that the tribunal and or the trial court had no jurisdiction to entertain and determine the dispute which related to the title (ownership) of land of a deceased person (Othim Njong) and that the award was defective and bad in law as it was not signed by the chairman and secretary of the tribunal. That the award was void.

11. Counsel further submitted that judgment was rendered in favor of the appellants in Rongo Senior Resident Magistrate's Court criminal case No. 12 of 2013 where the 1st appellant was charged with forcible entry contrary to section 90 of the Penal Code (Cap 63). He relied on section 3(1) of the Repealed Act, section 45 of the Law of Succession Act (Cap 160), the case of **Zedekiah M Mwale v Bikeke Farm Directors and Samwel S Chemei Kitale HCC Appeal No. 250 of 1998** as well as the Court of Appeal decision in **Roy Shipping S.A** and all other persons interested in the ship "**Mama Otan**" v **Dodoma Fishing Company Ltd Civil Appeal No. 238 of 1997**, in support of the submissions.

12. By submissions dated 9th February 2019, learned counsel for the respondent gave the background of the dispute, identified or framed two (2) issues for determination namely whether the instant appeal has merit and whether the appellants are entitled to the orders sought. Counsel analysed the two issues to the effect that the purported appeal filed after over three (3) years from the date of issuance of the decree was an afterthought incompetent and an abuse of the court's process as this court is divested with the requisite jurisdiction to entertain the matter.

13. Counsel also cited section 8(3) and (8) of the Repealed Act, section 79G of the Civil Procedure Act(Cap 21) and the case of **Masagu Ole Koitelet Waumo v Principal Magistrate Kajjado Law Courts and another (2014)eKLR**. Counsel urged that this appeal be dismissed with costs to the respondent for want of merit.

14. I have examined with care the entire record of appeal and submissions of counsels for the respective parties in the instant appeal. I approve the issues for determination in the respondent's submissions in the determination of the appeal.

15. Ground number 1 of the appeal is that the tribunal and or the trial court did not have jurisdiction to entertain and determine any dispute over it. The issue of jurisdiction is very paramount because once it is resolved herein, it would determine the other three (3) grounds of appeal herein.

16. It must be pointed out that jurisdiction is everything as without it, a court has no power to make one more step; see the decision by Nyarangi J.A in **The Owners Of Motor Vessel Lilian "S" V Caltex Oil (Kenya) Ltd (1989)KLR I**.

17. According to the tribunal's award the 1st appellant interfered with original boundaries of the suit land hence declared the 1st appellant a trespasser thereon. Under section 3(1)(c) of the Repealed Act, the tribunal had the jurisdiction to hear and determine all cases of a civil nature involving a dispute as to trespass to land.

18. The decision of the tribunal was filed in the trial court on 19th July 2011 and the trial court entered judgment in accordance with the decision as dictated under section 7(1) and (2) of the Repealed Act. The tribunal explained to the parties that right of appeal within thirty days of the decision to the Appeals Committee as provided for under section 8 of the Repealed Act.

19. Interestingly, the instant appeal was filed on 4th June 2014. It was close to three years after decision of the tribunal and adoption of the same on the trial court. The appellants have not given reasons for the delay as per the decision by the Supreme Court of Kenya in the **Chairman Kenya National Union Of Teachers & Another V Henry Inyangila & 2 Others (2018) eKLR**.

20. Moreover, the appellants did not follow and exhaust the procedure and procedure laid down under section 8(1) to (9) of the Repealed Act. A party therefore aggrieved by the tribunal's decision could only challenge such determination by way of an appeal to the then Appeals Committee and further appeal to the High Court (read this court) on a print of law within sixty days from the date of the decision explained under section **8(9) of the Repealed Act**.

21. A party can also challenge the decision of the then Appeals Committee by way of judicial review and not otherwise if he considers the Appeals Committee acted wrongly or exceeded its jurisdiction. The appellants did not do so. Equity under **Article 10(2)(b) of the Constitution of Kenya, 2010** may not aid them in view of their extreme indolence and unexplained inordinate delay in mounting this appeal.

22. In the case of **Zedekiah Mwale** (supra), Wanjira Karanja Ag J (as he then was) took a position which I fully endorse as being relevant hereto and she held thus:-

"The appellants only option was to go on appeal as provided for under section 8(1) of the Land Disputes Tribunal Act or to come to the superior court by way of Judicial Review if he thought that the decision of the tribunal was illegal or arrived at in excess of jurisdiction on the part of the Panel of Elders. Having failed to pursue any of those options that were open to him, the

appellant cannot now come to this court and ask that a third avenue be created for him where none exists.” (Emphasis added)

23. In the premises, it is my considered view that the instant appeal lacks merit. Accordingly, I dismiss the appeal with costs to the respondent.

Orders accordingly.

DELIVERED, DATED and SIGNED AT MIGORI THIS 8th DAY OF APRIL 2019.

G.M. A. ONGONDO

JUDGE

In presence of :-

Mr. D. Adawo learned counsel instructed by M/S Oguttu, Ochwangi, Ochwal & Company Advocates for the respondent.

Tom Maurice – Court Assistant