



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL NO. 1 OF 2018

PETER ATAMBO MAGOYA APPELLANT

VERSUS

STELLA OSEBE RESPONDENT

J U D G M E N T

(Being an appeal from the Award of Mosocho Land Disputes Tribunal issued in Claim No. 32 of 2011 dated on 22nd June 2011)

1. This appeal arises from the decision/award by the Mosocho Land Disputes Tribunal No. 32 of 2011 where the Respondent was the claimant and the Appellant was the Objector/Respondent. The Mosocho Land Disputes Tribunal made a decision effectively ordering the cancellation of land title **West Kitutu/Bogusero/4641** then registered in the name of Peter Atambo Mugoya (the appellant) and the same to be reverted back to title **West Kitutu/Bogusero/4638**. The decision of the tribunal was adopted as the judgment of the Court vide Kisii Chief Magistrate's Court Misc. Application No. 73 of 2011 on 16th September 2011.

2. The Appellant being aggrieved and dissatisfied by the decision of the Tribunal lodged an Appeal to the Provincial Tribunal Appeals Committee at Kisumu vide a Memorandum of Appeal dated 1st September 2011. Appellant set out the following grounds of appeal in his Memorandum of Appeal:-

(a) THAT the Land Disputes Tribunal erred in law in hearing and determining a dispute concerning a claim to land in which it did not have jurisdiction under the Land Disputes Tribunal Act, No. 18 of 1990.

(b) The Land Disputes Tribunal erred in making a decision in effect cancelling the Appellant's title to land No. Kisii/West Kitutu/Bogusero/4641 which it did not have jurisdiction to do under the Land Disputes Tribunal Act No. 18 of 1990.

(c) The Land Disputes Tribunal erred in law in entertaining a claim by the Respondent against the Appellant whereas the said Respondent has n title to Land Parcel West Kitutu/Bogusero/4638 which land is in the name of Michael Mariaria Ochoi deceased and that if she alleges to have bought the land in issue the same did not and has to date not ever received the consent of the Local Control Board.

(d) THAT the Land Disputes Tribunal which heard and decided this case was not impartial as the Chairman of the said Land Disputes Tribunal at Mosocho was and is a close relative to the Respondent and Francisca Kemuma Mariaria her witness.

(e) THAT the Land Disputes Tribunal erred in not recording all the evidence that was adduced by the Appellant and falsely alleging that the Appellant did not produce and/or tender any documentary evidence as to the transaction between him and the late Michael Mariaria Ochoi deceased which eventually enabled him to acquire title to his land and further that as at the hearing the said Respondent was alleging that it is Francisca Kemuma Mariaria who sold the land in year 2009 to Stella Osebe and not Michael Mariaria Ocho deceased.

3. The record is not clear but it appears that the Provincial Land Disputes Appeals Committee, Kisumu did not hear and determine the appeal presumably because following the enactment of the Environment and Land Court Act, 2011 the Land Disputes Tribunal Act, No. 18 of 1990 pursuant to which the Provincial Appeals Committees were established was repealed. The Environment and Land Court Act, 2011 commenced on 30th August 2011 and effectively from that date the provisions of the Land Disputes Tribunal Act, 1990 ceased to have any operation. The transitional clause Section 30(1) of the Environment and Land Court Act provided as follows:-

30(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief

Registrar.

4. The subject appeal before the Provincial Appeals Committee, Kisumu was transferred to Kisumu Environment and Land Court where it was registered as Kisumu ELCA No. 190 of 2014 and was subsequently transferred to this Court vide an order of that Court dated 15th December 2017.

5. The appeal was argued by way of written submissions. The Appellant filed his submissions on 8th November 2018 and the Respondent filed her submissions on 20th March 2019. The Appellant in the appeal lodged before the Provincial Appeals Committee had contended that the Mosocho Land Disputes Tribunal lacked the jurisdiction to deal with the dispute lodged before them as the dispute fell outside the mandate they had under the Land Disputes Tribunal Act of 1990. The Respondent in the submissions filed on her behalf has contended that the appeal was filed out of time and hence the appeal was incompetent.

6. Whether or not the appeal lodged before the Provincial Appeals Committee was filed out of time is a preliminary issue that would require to be disposed of first. If it is found the appeal was filed out of time, the appeal would be incompetent and thus liable to be struck out. Equally, if the appeal is held to be competent, the issue whether or not the Tribunal had jurisdiction to entertain the dispute would be a preliminary issue to be determined. If it is found the Tribunal lacked jurisdiction, it would follow that their proceedings and decision were a nullity for want of jurisdiction.

7. The Respondent in the filed submissions has contended that the appeal was filed outside the time lines provided under the Land Disputes Tribunal Act particularly Section 8.

Section 8(1) of the Act provides:

8(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may within thirty days of the decision appeal to the Appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated.

8. The Respondent submitted no leave of the Court was sought to extend time or to be allowed to file the appeal out of time. It is noteworthy that the present appeal was not an appeal from the decision of the Provincial Appeals Committee but was rather an appeal made to the Provincial Appeals Committee. The Committee was rendered moribund following the enactment of the Environment and Land Court Act, 2011 which repealed the Land Disputes Tribunal Act. This Court of necessity inherited the appeals that were pending before the Provincial Appeals Committee and was duty bound to consider the appeals on their merits. This being not an appeal from the decision of the Appeals Committee, Section 9 of the Land Disputes Tribunals Act had no application.

9. On the issue whether or not the appeal before the Appeals Committee was filed out of time, I have carefully reviewed the record and regrettably the record is not definite as to whether or when the Tribunal's decision was read out to the parties. Time would have started to run from the date the award was read to the parties. Though it is evident the award/decision of the Tribunal was prepared after the parties and their witnesses were heard, it is not clear when the decision was communicated to the parties. The date of 22nd June 2011 indicated at the end of the award appears to have been super imposed on some other date. The award does not indicate it was read to the parties on that date.

10. The Appellant in submissions made to the Appeals Committee on 5th October 2011 after filing of the Memorandum of Appeal on 1st September 2011 under paragraph 4 states in part as follows:-

“4. The Land Disputes Tribunal did not invite me to the case (dispute) the verdict was not read to us either. But secretly was filed in court for the decree. But the Court returned it to Mosocho Land Disputes Tribunal. Reasons, I was not summoned to the Court and the verdict had not been read to the parties. But again it was returned to the Court for the decree without the verdict being read to the parties. It has never been read to the parties. But was taken to the Court in the 2nd round. The verdict was not read to me to enable me to appeal immediately within time...”

11. The proceedings taken before the Magistrates Court save the decree issued on 16th September 2011 are not included. Given the circumstances, I am not able to hold that the appeal before the Provincial Appeals Committee was filed out of time as it is not definite when the verdict was pronounced to the parties. By the time the Chief Magistrate's Court issued the decree on 16th September 2011 the appellant had already lodged the appeal and it would have been incumbent on the trial Magistrate to stay the issue of the decree until the appeal was disposed of. In the premises, I will accept the appeal before the Appeals Committee as having been filed within time and proceed to consider the same on merit.

12. Having held the appeal before the Appeals Committee was competent the other issue I have to determine as a preliminary issue is whether the Mosocho Land Disputes Tribunal had the jurisdiction to entertain the dispute under the provisions of Section 3(1) of the Land Disputes Tribunals Act. Section 3(1) of the Act provides:-

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.

13. Under the above provision, the Tribunal clearly did not have jurisdiction to entertain any dispute that touched on title to registered land. The Tribunal could only hear disputes relating to the division or determination of boundaries to land; claim to occupy or work on land and/or trespass to land. Any claim relating to ownership and/or title to land could only be handled by the High Court.

14. The Respondent argues that the Tribunal did not in its decision make any order for cancellation of title and submitted that the Tribunal merely recommended the carrying out of proper survey in regard to the two parcels of land. The Respondent submitted the issue was whether the Appellant had trespassed onto the Respondent's land. The Respondent further submitted the Appellant never raised any issue of jurisdiction of the Tribunal during the hearing and that he willingly submitted to the jurisdiction of the Tribunal to adjudicate the matter and that the appellant cannot properly raise the issue of jurisdiction at the appeal stage.

15. The Courts have repeatedly reiterated that jurisdiction is everything and that anything done without jurisdiction by a court of law or tribunal is null and void and ineffectual. In the leading case on jurisdiction **Owners of the Motor Vessel "Lilian S" -vs- Caltex Oil (Kenya) Ltd [1989] KLR 1** the Court of Appeal as per Nyarangi JA stated as follows:-

"...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

16. In the case of **Republic -vs- Chairman Siaya District Land Tribunal & Another Ex parte Augustine Ogola Odeny [2009] eKLR** referred to the court by the Respondent, Karanja, J. cited with approval the case of **Jotham Amunavi -vs- Chairman Sabatia Division Land Disputes Tribunal & Another - CA No. 256 of 2002 at Kisumu** where the Court of Appeal observed thus:-

"...if the implementation of the decision of the tribunal entails, the subdivision of the suit land into two parcels opening a register in respect of each subdivision and thereafter the transfer of the subdivision of half acre its clear that the proceedings before the tribunal related to both title 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 dispute can only be tried by the High Court, or by the Resident Magistrates Court where such latter court has jurisdiction."

17. In the present matter, the Tribunal in their determination inter alia stated thus:-

"The evidence adduced before the Tribunal is clear that the Objector has hived a piece of land on the lower part of the claimant Stella Osebe and wrongly registered it included into his land West Kitutu/Bogusero/4641. This was done when the claimant had not registered her land."

The Tribunal went on to hold and determine as follows:-

"The Tribunal is therefore unanimously satisfied that the objector Peter Atambo has trespassed into the claimant's piece of land which does not belong to him. The claimant is right to claim the piece of land in question West Kitutu/Bogusero/4641 back to his title deed no. West Kitutu/Bogusero/4638. The Tribunal therefore recommended that the piece of land in question to be transferred back to the claimant (Stella Osebe).

The land registry is therefore requested to amend the records of the two pieces of land as they run parallel."

18. The net effect of the Tribunal's decision was to require the Appellant to surrender his title **West Kitutu/Bogusero/4641** so that it is cancelled and given back to the Respondent to be included in title **West Kitutu/Bogusero/4638**. The decision without doubt entailed a determination that affected registered title belonging to the Appellant. The Tribunal under Section 3(1) of the Land disputes Tribunal Act did not have jurisdiction to make such a determination.

19. In the case of **Sir Alibin Salim -vs- Shariff Mohamed Shary [1938] KLR9** the Court stated as follows:-

"If a court has no jurisdiction over a subject matter of the litigation, its judgment and orders, however preciously certain and technically correct are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction."

(See also, **Republic -vs- Chairman Land Disputes Tribunal Kirinyanga District & Another Ex parte Kariuki [2005] 2KLR**).

20. In the present matter, the Tribunal as I have held lacked jurisdiction to adjudicate the dispute before them as it touched on title to registered land. The proceedings before them and the decision they made were null and void abinitio. The consequent adoption of the decision of the Tribunal as judgment of the court by the Magistrate's Court was of no effect. The Magistrates Court could not give effect to something that was already a nullity.

21. The net result is that the appeal preferred by the Appellant before the Provincial Tribunal Appeals Committee was meritorious. I allow the Appeal set aside the award/decision of the Mosocho Land Disputes Tribunal dated 22nd June 2011. The adoption of the award/decision

by the Kisii Chief Magistrate's Court in Misc. App. No. 73 of 2011 on 14th September 2011 is set aside.

22. Each party will bear their own costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE