



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC APPEAL NO. 1 OF 2014

JOSHUA CHARO KIRAGA.....1ST APPELLANT

KAWASI CHARO KIRAGA.....2ND APPELLANT

DHAHABU CHARO KIRAGA.....3RD APPELLANT

VERSUS

FRANCIS THAKI MURE.....1ST RESPONDENT

YUSUF ALI GONA.....2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the decision of the Bahari Divisional Land Disputes Tribunal delivered on 14th June, 2005 in respect of its Land Disputes Case No. 56 of 2004. By the said decision, the Tribunal as established under the now repealed Land Disputes Tribunal Act No. 18 of 1990 determined as follows: -

“Tribunal Award

1. Francis Thaki is declared the legal owner of the portion of land measuring 4 acres and the title deed should be issued to him.

2. Yusuf Ali Gona is hereby declared the owner of the 4 acres by inheritance and a title deed to be issued to him.

3. The Land Registrar is hereby directed to recall the title deed in the name of Dhahabu Charo Kiraga and re-issue a new title deed for the remaining 4 acres.

2. As required under Section 7(2) of the repealed Act, the determination was read to the parties and was endorsed as a Judgment of the court in Kilifi SRMCC No. 21 of 2005; Joshua Charo Kiraga & 2 others -vs- Francis Thaki & Another. The parties were then granted 30 days to Appeal the decision.

3. Aggrieved by the said decision, the Appellants herein – Joshua Charo Kiraga, Kawasi Charo Kiraga and Dhahabu Charo Kiraga filed an appeal against the two Respondents herein – Francis Thaki Mure and Yusuf Ali Gona before the Mombasa Provincial Land disputes Tribunal citing some 27 grounds in their Memorandum of Appeal. The Respondents also filed a lengthy Reply to the Appellants’ Grounds of Appeal.

4. Before the Provincial Land Appeal Tribunal could hear the matter however, the Environment and Land Court Act No. 19 of 2011 came into operation. Section 30 of the new Act repealed the Land Disputes Tribunal Act and directions were then given that all matters pending before those Tribunals be heard and determined by the Environment and Land Court.

5. At the trial herein, Mr. S.E. Odhiambo, Learned Counsel for the Appellants reduced the Appellants 27 grounds into two major grounds. The first ground is in regard to the Jurisdiction of the Tribunal. It was counsel’s submission that the Tribunal went beyond its jurisdiction in that it determined the issue of ownership of the parcel of land that was allegedly bought by the Respondents. It was the Appellants case that the Bahari Divisional Land Disputes Tribunal had no jurisdiction to determine ownership and issuance of title deeds as they had purported to do and the Appellants therefore urge this court to set aside the award of 14th June, 2005 in favour of the Respondents.

6. The second issue raised by the Appellants was that the sale was not done in accordance with the Land Control Act. It was the Appellants case that the land that was sold was agricultural land and that since the Respondents had failed to get the area Land Control Board Consent as required under Section 6 of the Land Control Act, the Respondents were only entitled to a refund of the purchase price and not the parcels of land as determined by the Tribunal.

7. In response, Mr. Obaga, Learned Counsel for the Respondent submitted that the tribunal rightly considered all the evidence from the parties together with their documents and rendered their Judgment in accordance with the overwhelming evidence placed before them by the Respondents.

8. In addition, it was the Respondent's case that this Appeal had been filed two years after the decision it sought to challenge was made and that having failed to seek the leave of the court for it to be filed out of time, the same was fatally defective, unmerited and one that ought to be struck out.

9. I have perused and considered the grounds of the Appeal herein and the response thereto. It was not clear to me from the record and the file before me when the appeal before the Provincial Appeals Tribunal was filed. From the documents on record, it would appear that the memorandum was filed sometime in the year 2005 which would be the same year when the Bahari Divisional Tribunal rendered its award. I was therefore unable on that score to find a basis for the Respondent's submission that the Appeal was filed two years after the determination and that it was therefore out of time.

10. The jurisdiction of the Land Disputes Tribunal Act was provided under Section 3(1) of the repealed Act as follows: -

“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.”

11. I have perused the record of the proceedings before the Tribunal. At page 31 of the Record, the Tribunal rendered itself as follows: -

“DECISION OF THE TRIBUNAL: The background of the facts in respect of the dispute before us is that the 1st and 2nd Claimants are sons of the late Charo Kiraga while the 3rd Claimant is the widow of Charo Kiraga. Their claim is that Nzai Kiraga sold a portion of land title Kilifi/Ngerenyi/1044 to the 1st Objector Francis Katana Thaki in 1994, according to the document No. 1 of 12th September, 1984. The document shows Nzai Kiraga's witness was Keneth Baya Kiricha. Nzai Kiraga now Claimants' witness number one admits to have sold the portion of 4 acres to the 1st Objector. He however says he sold it by mistake.

The Claimants want to repossess this portion from the 1st Objector because they were allegedly not involved in the transaction. They also want to repossess the portion of 4 acres sold to the 2nd Objector's late father by Charo Kiraga and refund the money paid for the two portions.

According to the documents produced in this case the 1st sale agreement was executed by Nzai Kiraga as the seller and Francis Katana Thaki as the buyer on 12th September, 1984. The other agreement was executed by Charo Kiraga as the seller and Ali Gona Abdalla as the buyer on 3rd October, 1986 witnessed by Benjamin Changa (DW1) for Charo Kiraga.

After hearing all the parties with their witnesses and the documents produced before us, we find the issues for consideration are: -

1. How old were the Claimants at the time the two portions were being sold?

2. Are the two sale agreements legally binding to date?”

12. The Tribunal then went ahead to determine on the first issue that the 1st and 2nd Claimants were too young during the sale and could not have been involved in the sale. As for the 3rd Claimant, the Tribunal stated that they did not find evidence that she resisted the sale by her late husband. On the second issue, the Tribunal found that the sale transaction was done by two sane persons voluntarily and that the two sale agreements were therefore binding. On that basis, they proceeded to grant the impugned award.

13. It was obvious to me that the Tribunal did not have the jurisdiction to hear such a case and to make such an award. The dispute between the Claimants and the Objectors was not a dispute envisaged under Section 3(1) of the Land Disputes Tribunal Act as replicated hereinabove. Further the Tribunal clearly went off-target when it ordered the Land Registrar to recall and cancel a title and issue a new one as it did in its determination.

14. What the Tribunal did was clearly 'ultra vires' its mandate. It proceeded to determine a dispute it had no jurisdiction to hear and

proceeded to issue orders which it had no power or authority to issue. The resultant award was therefore a nullity notwithstanding its adoption by the Kilifi Senior Resident Magistrates Court.

15. Accordingly I hereby set aside the award and orders of the Bahari Divisional Land Disputes Tribunal issued on 14th June, 2005. The parties are at liberty to pursue their interests in the disputed parcel of land in any other lawful manner.

16. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER, 2019.

J.O. OLOLA

JUDGE