



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 22 OF 2017

FREDRICK BULIMU MUSIMBA APPELLANT

VERSUS

TOROKASI ONGENGE EMBOLOGONYE RESPONDENT

JUDGEMENT

The appellant, being dissatisfied and aggrieved by the decision and orders of the Western Provincial Land Disputes Appeals Committee dated 5th July, 2007 and read to the parties on 6th September, 2007 in Appeal No. 39 of 2007 now appeals to this court against the said decision and orders on the principal grounds:-

1. THAT the Sabatia Land Disputes Tribunal had no jurisdiction to hear and or determine the matter as the issue concerned title to land and was outside their scope as envisaged in section 3 (1) of the Land Disputes Act 18 of 1990, and the PLDAC erred in law in allowing the tribunal's decision to stand.
2. THAT the Sabatia Land Disputes Tribunal's composition offended section 4 of the Act, that the proceedings and verdict were neither stamped nor dated and that the PLDAC erred in law in allowing them to stand.
3. THAT the PLDAC erred in law upholding the Tribunal's decision when the respondent's claim was clearly time barred and the issue had been rendered res judicata by reason of KAKAMEGA HC SUCCESSION CASE NO. 271 OF 1990 through which he obtained succession and title without objection from anyone.
4. THAT the PLDAC erred in law in accepting new documentary any evidence (a purported sale agreement) which he was denied the chance to query but which bore no signatures of the parties thereto and was palpably a false concoction.
5. THAT the PLDAC had no authority to make the orders they made and their decision and orders are illegal and oppressive.

The appellant prays that this appeal be allowed that the decisions and orders of both the Sabatia Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee be quashed and the respondent be condemned to pay the costs both here and in the Tribunal and the Appeals Committee and the Lower Court.

The appeal is against the verdict/decision/judgment and orders of Western Provincial Land Disputes

Appeal Committee dated July 5th, 2007 in the Appeal Case No. 39/07 in respect of land parcel KAKAMEGA/LOSENGELI/829. He had filed this appeal with the Western Province P.L.D Appeals committee against the verdict and orders of the Sabatia Land Disputes Tribunal in its case NO. SABATIA/WODANGA/12/97 in which one Embologonyi Masolia (the present respondents husband, now deceased) had claimed title to the suit land KAKAMEGA/LOSENGELI/829 which he had inherited from his father, Zedekiah Masimba, and had registered in his names following Kakamega High Court Succession Case No. 271 of 1990. The present respondent was substituted for her late husband who had died while the Tribunal case was pending before the Vihiga Senior Resident Magistrate's court, as it then was (Vihiga SRMC CIIR Misc. No. 75 of 1998.)

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 these tribunals and the Sabatia Tribunal was wrong to register and hear pass judgment and make orders on the respondents (Embologonyi Masolia's) claim against him for the title to the suit land. Equally, the Provincial Land Disputes Appeals Committee was wrong in upholding the tribunal's verdict as the tribunal had no jurisdiction to hear or pass judgment on a claim of title to land and the committee should have allowed his appeal and quashed the verdict and orders to the Sabatia Tribunal. The Sabatia Tribunal's proceedings and verdict were neither stamped nor were they dated as was required under section 4 of the Land disputes Tribunal Act. This omission rendered them null and void and the provincial Land Disputes Appeals committee was wrong to allow them to stand as being valid proceedings and verdict.

The evidence before the Tribunal clearly showed that the then plaintiff, Embologonyi Masolia claimed to have bought the suit land from his late father in 1975. The case before the Tribunal was filed in 1997, full twenty-two (22) years later. Clearly, the claim was time-barred under the limitation laws and this ground was included in his appeal to the committee and the committee was wrong to ignore it, the committee did not even address the issue (of the claim being time-barred.) The P.L.D.A. committee was also wrong in not addressing fully or at all the ground of jurisdiction which he raised in his appeal to it (pages 9-10 of the Record of appeal herein). The P.L.D.A. committee in its 'observations' (at pages 5 of the record of Appeal-observation No. 4) alleges that at the stage the present respondent produced "a sale agreement". This had never been produced (by Embologonyi Masolia) to the Sabatia Tribunal in fact in his evidence to the Tribunal, Embologonyi never said there was a written agreement. The P.L.D.A. committee was wrong in not attaching this purported sale agreement to its judgment. In fact, the committee was wrong to have accepted this piece of documentary evidence when it had not been referred to or produced before the Sabatia Tribunal (the tribunal's ruling at page 15 of the Record of Appeal).

For these reasons, the appellant pray that that the appeal be allowed with costs to him and that the decisions and orders of both the P.L.D.A. committee and the Sabatia Land Disputes Tribunal be quashed and be set aside.

The respondent submitted that the appellant's appeal is premised upon the memorandum of appeal dated 17th September, 2007 which raises five grounds prima facie the following issues arises from the appeal:-

1. Whether there is a competent appeal before the honourable court.
2. Whether the honourable court is seized of the requisite jurisdiction to grant the orders sought.

The opening paragraph of the memorandum of appeal indicates that the decision of the Western Provincial Land disputes Committee was dated 5th July, 2007. The said decision is filed at pages 4-6 of the record of appeal. Whereas the same opening paragraph of the memorandum of appeal indicates the decision was read to the parties on 6th September, 2007 there is nothing on the face of the said decision to show that it was read on 6th September, 2007 as stated or that reading of the decision was on a different date other than the date appearing that's 5th July, 2007. In fact the notice dated 21st June, 2007 filed by the appellant at page 8 of the record of appeal confirming that the determination of the appeal was scheduled for 5th July, 2007 which was the date of the decision.

The other notice dated 31st August, 2007 to the same appellant as that dated 21st June, 2007 shows alterations by phasing out word determination and determined as appears on the notice of 21st June 2007 and replacing with reading and read respectively. The impression being created through the appeal is that the decision went through two levels with the appellant present alone having been notified that's to say determination or determined of the decision 5th July 2007 and reading or read of the decision on 6th September 2007.

That could not have happened and if it happened the appellant ought to have filed evidence to show that after the committee determined the appeal on 5th July 2007, in the presence of the appellant, the same committee had a further session with the same appellant on 6th September 2007 when the decision was read. The irresistible conclusion from the foregoing confusion created by the appellant is that the decision of the tribunal was notified to him on 5th July 2007 and if there was any appeal to be filed at the High Court the same was to be within 60 days from the date of the decision by the section 8 (9) of the repealed Land Disputes Tribunal Act. The appeal period expired on 5th September, 2007 and the notice dated 6th September, 2007 appearing at page 7 of the record was only generated falsely to save the appeal which was not there. The appeal is being advanced to perpetrate a fraud.

That section did not provide that the appeal be filed within 60 days after the "reading" of the decision. The appellant should not benefit from an appellant fraud on his part.

The instant appeal arises under the right granted by section 8 (9) of the Land Disputes Tribunals Act (No. 18 of 1990) which was repealed by section 31 of the Environment and Land Court Act 2011 which commenced on 30th August, 2011. The appellant cannot purport to pursue enforcement of a right conferred by a repealed provision of the law. This was the statement of the Supreme Court in the case of **Michael Mungai vs. Housing finance Co. (K) Ltd. & Supreme Court of Kenya at Nairobi. Application No. 9 of 2015.**

It was held at paragraph 23 of the ruling as follows-

[23] In the case of Hermanus Philipus Steyn vs. Giovanni Gnnechi Ruscone Supreme Court. Application No. 4 of 2012. This court was categorical that a court has to be moved under a specific provisions of the law. The court stated that; it is trite law that a court of law has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is the constitution, the Supreme Court Act and the Supreme Court Rules, 2012 (as amended) hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not Supreme Court Act. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: None.

The transitional provisions contained in section 30 of the Act are not express that appeals pending before the High Court against the decision before the High Court against the decision of the provincial Lands Disputes Committee will be taken up by the Environment and Land Court after the court comes into operation. Subsection (2) of section 30 is specific that not all cases transited to the new court otherwise there would be no use for the provision which states –

“The Chief Justice may, after the court is established, refer part heard cases where appropriate, to the court”

They submit that in the absence of directions from the Chief Justice, the Honourable court is without jurisdiction in the matter.

The appellant prays the appeal be allowed and that the decisions and orders of both the Sabatia Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee be quashed. And indeed grounds 1 and 2 of the memorandum of appeal challenges the decision of the Sabatia Land disputes Tribunal for lack of jurisdiction and improper composition. Firstly there was no provision in the

repealed Act for appeal of the deceased of the appeal is misplaced and the orders sought do not avail.

Secondly if there lay such an appeal to the High Court that it could only be validly taken within 30 days of the decision. Grounds 1 and 2 fails for that reason as we submitted earlier that there is no valid appeal against the decision of the provincial committee. The same reason goes for Grounds 3, 4 and 5 with a further explanation that under the repealed Act, and appeal to the High court could only lie on matters of law and not fact. Ground 4 is purely founded on facts. Contrary to Ground 3, succession proceedings have never been treated as proceedings for purposes of the principle of res judicata.

Ground 5 is bare as there is no valid appeal against the decision of the provincial committee dated 5th July 2007. They pray the appeal be dismissed with costs.

This court has carefully considered both the appellant's and the respondent's submissions. This appeal is premised upon the memorandum of appeal dated 17th September, 2007 which raises five grounds, however the respondent raised prima facie the following issues arises from the appeal:-

3. Whether there is a competent appeal before the honourable court.

4. Whether the honourable court is seized of the requisite jurisdiction to grant the orders sought.

On the issue of the competency of the appeal the respondent submitted that, the appellant was notified on the decision of the tribunal on 5th July 2007 and if there was any appeal to be filed at the High Court the same was to be within 60 days from the date of the decision by the section 8 (9) of the repealed Land Disputes Tribunal Act. The appeal period expired on 5th September, 2007 and the notice dated 6th September, 2007 appearing at page 7 of the record was only generated falsely to save the appeal which was not there. I have perused the court file in great detail and the respondent filed an application wishing to strike out the appeal for the same reason on the 7th March 2012. This application was heard by the court and Justice Chitembwe delivered his ruling on the 23rd October 2013 and struck out the application stating that he found that the appeal had been properly filed and was not out of time. This issue is res judicata before me and the ruling stands.

The provisions of proving res judicata are clearly spelt out in section 7 of the Civil Procedure Act as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and subsequently decided by such court”.

In the case of **Njue Ngai vs. Ephantus Njiru Ngai & Another (2015) eKLR** where the court held that:-

“..... the principle of res-judicata is provided for in section 7 of the Civil Procedure Act. In terms of the provisions of that statute, for that principle to apply, the following must be established;

1. That the suit has been previously litigated upon by the same parties and a judgment was delivered therein.

*That the same **issue** is revived again to be litigated upon by the same parties and involving the same subject matter once it is established that the same issue is revived in the subsequent suit in which it has not been heard and finally determined by a court of competent jurisdiction, the matter cannot be litigated again*

The issue of the appeal being incompetent is therefore res judicata. On the issue whether the court is seized of the requisite jurisdiction to grant the orders sought, I wish to state as follows;

Article 162(2)(b) and 165(3)(a) of the Constitution of Kenya 2010 and section 13 of the Environment and Land Court Act, 2011 the jurisdiction of the Environment and Land Court is to determination of disputes relating to environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, evaluations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management, public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land. I wish to refer to the case of **John Kimani Njenga v Margaret Wanjiru Kanyiri & others ELC No. 345 Of 2014** where it was held that the ELC Court had jurisdiction to hear and determine disputes, actions and proceedings concerning land. The jurisdiction of the Environment of Land Court is set out in section 13 of Act No. 19 of 2011.

The court has original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the constitution and with the provisions of the Act or any other written law relating to environment and land.

The court has powers to deal with disputes relating to land administration and management. The court is also empowered to hear cases relating to private, public and community land and contracts, choses in action or other instruments granting enforceable interests in land. The court also exercises appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court. The court further exercises supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution of Kenya. This an appeal against the decisions and orders of both the Sabatia Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee hence this court has jurisdiction.

On ground 1 to 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 to property. It found that the claimant was entitled to the title of the land registered in the name of Fredrick Bulimo Masimba. The tribunal ordered that the title be revoked and registered in the name of the claimant. The dispute between the parties before the Sabatia Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee was essentially a claim to title over the land. The the Western Provincial Land Disputes Appeals (the Committee's ruling at page 5 of the Record of Appeal) in upholding the decision of the the Sabatia Land Disputes Tribunal held that;

“In view of the above observation we rule and order that;

1. The Sabatia Land Disputes Tribunal ruling stands

2. *The current land title No. KAKAMEGA/LOSENGELI/829 of 0.40.Hect registered in the name of the plaintiff Fredrick Bulimo Masimba is revoked.*

3. *The Land Registrar is directed to issue a new title for the same parcel of land in the names of Ongenge Embologeny as per the above ruling”.*

For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Sabatia Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee. The proceedings prima facie violated the Land Disputes Tribunal Act (now repealed) and the Law of Succession Act. 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 these tribunals and the Sabatia Tribunal was wrong to register and hear pass judgment and make orders on the respondents (Embologonyi Masolia’s) claim against him for the title to the suit land. Again, the Provincial Land Disputes Appeals Committee was wrong in upholding the tribunal’s verdict as the tribunal had no jurisdiction to hear or pass judgment on a claim of title to land. I find that this appeal has merit and I allow the same. I quash the decision/verdict of the Sabatia Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee with costs to the appellant.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 6TH DAY OF FEBRUARY 2018.

N.A. MATHEKA

JUDGE