REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 78 OF 2017

ADRIANO M. ANDUKU...........................APPELLANT

VERSUS

CHARLES A. INGABO......................... RESPONDENT

JUDGEMENT

The appellants being aggrieved with the ruling and order of Mr. P.N. Areri The Learned Resident Magistrate delivered and issued on 5th February 2010, in the above mentioned case hereby appeal against the said ruling and order on the following grounds;-

1. That the learned trial magistrate erred in law and fact in failing to establish that the respondent's application dated 12th August, 2009, was premature as the Shinyalu Land Disputes Tribunals Award had not formerly been read to the parties.

2. That the learned trial magistrate erred in law and fact in failing to establish that the Shinyalu Land Disputes Tribunals Award could not be implemented as the said tribunal lacked jurisdiction to arbitrate over matters of title to land thereby occasioned a miscarriage of justice.

3. That the learned trial magistrate erred in law by taking into account extraneous matters that had no bearing on the case.

4. That the learned trial magistrate erred in law by failing to establish that there was no valid decision capable of being adopted as a judgment of the court.

The appellant prays that the appeal be allowed and the decision and order issued on 5th February 2010, be set aside and or be vacated and or varied.

In the application dated 12th August 2009 the respondent sought for orders by the trial court that the award of the tribunal be adopted as the final order of the court. The appellant opposed his application on the basis, inter alia, that the award had, infact, not been read to the parties before it would be adopted.

According to the trial court, the award had been read to the parties by the tribunal itself. The trial court based this finding on an alleged letter written by the tribunal dated 4th June 2009 and addressed to court stating that the award was read by the tribunal to the parties on 6th May 2009.

It is trite law that before the award would go for adoption the same has to be read to the parties. The tribunal only seems to have written a letter stating that the award was read to the parties on 6th May 2009. This cannot be communicated by way of a letter. Far from this, it has to be part of the proceedings. Obviously the proceedings do not reflect that the award was actually read.

Reading of the finding/award of the tribunal is critical in so far as it gives the parties a chance to explore other avenues in the event that a party is dissatisfied. This could be way of judicial review to the high court or an appeal to the provincial appeals committee. To the extent that the award was not read to the parties, and it is very clear that it was not read, the appellant lost his chances of challenging the decision of the tribunal. This is breach of the appellant's constitutional right and it is in this regard that this appeal ought to be allowed so that the appellant is not denied this fundamental constitutional right.

Next, this is a first appeal and this is a court of original jurisdiction. It is clear that the dispute under reference related to title to land. The tribunal quite obviously did not have jurisdiction to entertain this dispute in the first instance. They submit ultimately that this appeal has merit and the same would better be allowed with costs to the appellant. The respondent despite being served failed to attend court or file any submissions.

On ground 1 of the appeal that, the learned trial magistrate erred in law and fact in failing to establish that the respondent's application dated 12th August, 2009, was premature as the Shinyalu Land Disputes Tribunals Award had not formerly been read to the parties, I have perused the pleadings in great detail. I agree with the trial magistrate that the letter written by the tribunal dated 4th June 2009 and addressed to court stating that the award was read by the tribunal to the parties on 6th May 2009. I am satisfied that the award was indeed read to the parties and hence the award was properly adopted by the court.

On ground 2 to 4 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 Andriano Mbimwa Anduku. The tribunal ordered that the title be subdivided into two title numbers and transfer the latter to the claimant. The dispute between the parties before the Shinyalu Land Disputes Tribunal was essentially a claim to title over the land. The Shinyalu Land Disputes Tribunal held that;

"we therefore make the hereunder enumerated final and binding orders;

> *1. We order the objector herein one Andriano Mbimwa Anduku alias Andriano Bimwa Anduku who is the regestered proprietor of the parcel of land No.Isukha/ Shitoto/1639 being a resultant title number after the subdivison of the title No. Isukha/ Shitoto/776 among other title numbers to cause the immediate subdivison of the siad title number into two title numbersas per the local demarcation thereon and wholly transfer the latter titleto the claimant herein one Charles Andugu Ingaboforthwith.*
>
> *2. We order the removal of our restriction from the parcel of land No. Isukha/ Shitoto/1639."*

For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Sinyalu Land Disputes Tribunal. 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 these tribunals and the Shinyalu Tribunal was wrong to register and hear pass judgment and make orders on the respondents claim against him for the title to the suit land. I find that this appeal has merit on this groung and I allow the same. I quash the decision/verdict of the Shinyalu Land Disputes Tribunal with costs to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE