



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC APPEAL NO. 7 OF 2016

MOSES MAKOKHA OSANYA.....APPELLANT

VERSUS

ELEKIA MABOSIO MARENGA.....RESPONDENT

JUDGEMENT

Being dissatisfied with the decision and/or judgment of the Western Appeals Committee, the appellant who was the appellant at the said Provincial Appeals Committee hereby appeals to the honourable court against the said Award/Judgment and sets forth the following grounds of appeal:-

1. That the Appeals Committee erred in law by not addressing the issue whether or not the matter fell within the jurisdiction of the Land Disputes Tribunal.
2. That the Appeals Committee erred in law and facts in allowing the Land Disputes Tribunal's decision when the said tribunal had no jurisdiction to entertain that claim.
3. That the Appeals Committee erred in law and fact by relying wholly on the evidence of the respondent in total disregard of the evidence of the appellant who raised weighty issues that could not have been ever looked by the Appeals Committee.
4. That the decision of the Appeals Committee does not reflect what transpired during the hearing of the appellant's claim having been dated wrongly hence an endorsable.
5. That the Appeals Committee erred in law and fact by adopting the decision of the land disputes tribunal having admitted that the same had a one point proceeded ex parte thereby disregarding the cardinal precept that no party should be condemned unheard which principle forms the pillar of judicial system.

The appellant prays that the decision of the Appeals Committee upholding the decision of Lurambi Land Disputes Tribunal be set aside. The costs of this appeal and of the proceedings below be awarded to the appellant.

The appellant submitted that he is said to have entered into a sale agreement with the respondent over a sale of a portion of land parcel No. BUTSOTSO/INGOTSE/2065 measuring 1 acre for a consideration of Ksh. 120,000 sometimes in the year 2009. The appellant however had a change of mind in selling he said portion of land and it is that dispute that was taken to the tribunal at Lurambi to solve. The appellant was clear to the tribunal that he wanted to refund the respondent the consideration he had paid and have his land back. The tribunal sitting at Lurambi dismissed his objection and he filed an appeal to the Kakamega Provincial Land Disputes Appeals Tribunal, which appeal was also dismissed. The award was then confirmed by the magistrate's court as required by the law. He then therefore lodged this appeal on the grounds that:

1. The appeals committee failed to address the issue whether the matter fell within the jurisdiction of Land Disputes Tribunal.
2. The appeals committee relied wholly on the evidence of the respondent and disregarded the weighty issues and evidence of the appellant herein.
3. The decision of the committee does not reflect the events that transpired during the hearing of the matter.
4. The committee admitted to the matter before the tribunal proceeding ex-parte but still went ahead to adopt it.

He submitted that, the Land Disputes Tribunal is established under section 4 of the Land dispute Tribunals Act, 1990 (herein after referred to as “the Act”) (now repealed). The tribunal has its jurisdiction specified under section 3 (1) of the Act. The section provides 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.

It is the appellant’s submission that the Land Dispute Tribunal in Lurambi lacked the jurisdiction to solve the dispute herein. This is for the fact that the dispute was an agreement dispute. Being that, the tribunal was not clothed with the powers to determine the said disagreement. The powers of the tribunal were limited to the disputes mentioned under section 3 (1) and as such the tribunal could in no way purport to have powers to solve a disagreement over sale of land.

Where a tribunal acts in excess of its powers then the only remedy is to have the whole proceedings emanating therefrom be declared null and void. In **Joseph Karobia Gicheru vs. Michael Gachoki Gicheru [2013]eKLR** where the court stated:-

Where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ab initio. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate could confer upon such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end.

The tribunal as per section 3 (1) can only hear and determine cases of civil nature involving a dispute as to the division of or the determination of boundaries to land including land held in common, claim to occupy or work on land or trespass to land. The framers of the Act never intended the tribunals formed under the Act to sole sale of land agreements or enforce contracts. If in any way they intended so, nothing would have been easier than for the framers of the Act to state so.

This was a case where the appellant had sold land to the respondent but due to unforeseen issues he decides to return the money and retain his land. The tribunal in total disregard to the law and in its wisdom or lack of it thereof decides to enforce the sale agreement. This was not within its jurisdiction as mentioned above. In **Jane Wangari Kairu & Another vs. Jane Wachuka Kariuki [2008] eKLR** Justice Makhandia stated as follows on a similar issue:

In **Wamwea vs. Catholic Diocese of Murang’a Registered Trustees [2003] KLR 389** Justice Khamoni held at page 394 line 2 that:

“..... disputes over title to land are not within the jurisdiction of tribunal and Lands Disputes appeals Committee. It can also be said that disputes over contracts are not under that jurisdiction”

Although this is a decision of the High Court which is not hiding on me I am nonetheless in agreement with the reasoning. It would appear therefore that in compelling the appellants to transfer to the respondent an acre out of the suit premises, the tribunal was in effect enforcing a contract for the sale of land which jurisdiction it does not have. In so ordering therefore the tribunal acted ultra vires.

Secondly, the appeals committee by ordering the division of the land which was registered under the existing land laws then meant that the title which was owned by the appellant herein was to be cancelled and a new title issued. This too was not one of the powers granted to the appeals committee or even the tribunal by the Act. This is what the judges in Nyeri Court of Appeal in **M’Marete vs. Republic & 3 others [2004] eKLR** state in their judgment:

..... We have already set out at the commencement of this judgment the final decision of the tribunal. It was to the effect that the panel of elders awarded the parcels of land Nos. Nyaki/Mulathankari/1680 and 1681 to the claimant (Beatrice) who is the appellant before us. These pieces of land were registered under Registered Land Act (Cap 300 Laws of Kenya). Awarding land to the claimant meant she acquired an interest in it by virtue of that award. In order to put that ruling into effect, the appellant would have to effect it by rectifying or cancelling the titles. The issue is whether the tribunal had jurisdiction to do so.

.....

In our view, the dispute before the tribunal did not relate to boundaries, claim to occupy 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 Registered Land Act to the appellant. In our view, the tribunal acted in excess of its jurisdiction. In view of the foregoing, we are in agreement with the ruling of the learned judge to the effect that the tribunal went beyond its jurisdiction. It therefore follows that the superior court cannot be faulted for having allowed the application and granting the reliefs sought by that application.

Without doubt, jurisdiction is everything, it is sine qua non the court’s authority to adjudicate a legal dispute. It is a principle that was

elucidated on in a masterly fashion in the celebrated Court of Appeal case of Owners of the Motor Vessel "Lilians" vs. Caltex Oil (Kenya) Ltd. [1989] KLR by Justice Nyarangi and has become the sweetest canticle on jurisdiction, that:

.....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 downs in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

The appeals committee failed in its decision to find out if the tribunal had the powers to handle the case. The committee ought to have done that which if indeed it had done then it would have quashed the decision of the tribunal. If the tribunal lacked jurisdiction then the appeals committee too lacks jurisdiction and its decision ought to be declared null and void.

On the grounds of Appeal numbers 3, 4 and 5. While at the Appeals Committee the applicant asked it to find that the tribunal had at a various occasions proceeded in his absence and even failed to consider his evidence. They contend that the Appeals committee failed in this regard and had it considered that fact it would have reached a different decision. Being the first appellate place for an aggrieved party, all the appeals committee was needed to do was to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the tribunal are to stand or not and give reasons either way. The appeals committee seems to say from its decision on record that the appellant gave no enough evidence to support its appeal. In conclusion, they submit that from the foregoing the tribunal lacked jurisdiction to deal with this matter as it purported to enforce a contract which is not one of the powers given to it under section 3 (2) of the Act. In the same vein the appeals committee ought to have found out that way being that jurisdiction is a point of law. Further, from the records before this honourable court, the Appeals committee failed to evaluate afresh the proceedings before the tribunal and come to its own conclusion regarding the same matter. It totally chose to ignore the evidence tendered by the appellant herein and his submissions too and only relied on the evidence and submissions of the respondent. They pray that the decision of the appeals committee upholding the decision of Lurambi Land Disputes Tribunal be set aside and with costs to the appellant.

The respondent submitted that, they sued the appellant vide Lurambi Land Disputes Tribunal (Tribunal) Claim No. 133 of 2010 regarding ownership of 1 acre of land from L.R. No. Butso/Ingotse/2065 (Plot 2065). According to the evidence the respondent purchased the 1 acre from the appellant on the 4th day of May, 2009 for the sum of Ksh. 120,000/= part of which was to be utilized by the appellant in off-setting a loan he had obtained from Agricultural finance Corporation (AFC). The respondent was to obtain a title deed to the 1 acre once AFC released the parent title deed to plot 2065 to the appellant. This would enable the parties herein attend the relevant Land Control Board (LCB). Although the appellant did not dispute the veracity of the respondent's assertions, he testified that on the eve of the attendance before the LCB, namely, the 13th day of December, 2009, the respondent unlawfully uprooted his sugar cane with a tractor, surveyed the 1 acre and placed boundary markings around it.

The appellant was not happy at what the respondent had done and therefore decided to call off the agreement and refund the consideration of Ksh. 120,000/=. On the 13th day of August, 2010 the tribunal ruled that the respondent was entitled to the 1 acre and this decision was adopted as a judgment of the court vide Award No. 57 of 2010 before the Chief Magistrate's court at Kakamega. The appellant challenged the decision of the Tribunal before the Provincial Land dispute Appeals Committee (Appeals Committee) at Kakamega vide case no. 76 of 2010 but on the 2nd day of December, 2010 the appeals committee upheld the decision on the tribunal. It is dated the 24th day of May, 2011 and filed in court on the 27th day of May, 2011 listing 5 grounds impugning the decision of the appeals committee. Grounds 1 and 2 state that the appeals committee failed to consider the fact that the tribunal did not have the requisite jurisdiction to entertain the claim of the respondent. A perusal of the proceedings before the tribunal and appeals committee does not indicate that the appellant raised any such question concerning jurisdiction. He willingly participated in both proceedings and cannot at this stage raise issues of jurisdiction. The appellant under grounds 3 and 4 argues that the appeals committee disregarded weighty issues which he had raised and erred by wholly relying on the evidence of the respondent. It will be appreciated that the appellant admitted having disposed of 1 acre of his land to the respondent and only became annoyed when the respondent took it upon himself to erect boundary markings around the 1 acre. The tribunal and appeals committee alike after considering evidence by both the appellant and respondent over the 1 acre found in favour of the respondent.

Under ground 5 the appellant states that he was condemned unheard as the proceedings before the tribunal at some point in time was conducted without his participation. However, nothing on record supports this conclusion and these assertions must to this extent fail. Under the repealed Land Disputes Tribunal Act, Section 8 (9) provided that an appeal from the decision of an appeals committee to the High Court was to be presented inside 60 days of such decision. As pointed out above the appeals committee delivered its decision on the 2nd day of December, 2010 while this instant appeal was filed on the 27th day of May, 2011. As the same was clearly filed out of time this honourable court lacks the jurisdiction to consider the appeal. In support of this point the respondent places reliance on case law: "Nyeri Court of Appeal Civil Appeal (Application) No. 48 of 2014.

This court has carefully considered both the appellant's and the respondent's submissions herein. On the issue of jurisdiction, the respondent submitted that, under the repealed Land Disputes Tribunal Act, Section 8 (9) provided that an appeal from the decision of an appeals committee to the High Court was to be presented inside 60 days of such decision. As pointed out above the appeals committee delivered its decision on the 2nd day of December, 2010 while this instant appeal was filed on the 27th day of May, 2011. Be that as it may this appeal was admitted for hearing way back in 2011 by Justice Thurairaja Jaden using her discretion and I hence find that the appeal is properly placed before me.

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 I find that, 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. The respondent sued the appellant vide Lurambi Land Disputes Tribunal (Tribunal) Claim No. 133 of 2010 regarding ownership of 1 acre of land from L.R. No. Butso/Ingotse/2065 (Plot 2065). According to the evidence the respondent purchased the 1 acre from the appellant on the 4th day of May, 2009 for the sum of Ksh. 120,000/= part of which was to be utilized by the appellant in off-setting a loan he had obtained from Agricultural finance Corporation (AFC). The respondent was to obtain a title deed to the 1 acre once AFC released the parent title deed to plot 2065 to the appellant. This would enable the parties herein attend the relevant Land Control Board (LCB). Although the appellant did not dispute the veracity of the respondent’s assertions, he testified that on the eve of the attendance before the LCB, namely, the 13th day of December, 2009, the respondent unlawfully uprooted his sugar cane with a tractor, surveyed the 1 acre and placed boundary markings around it.

The appellant was not happy at what the respondent had done and therefore decided to call off the agreement and refund the consideration of Ksh. 120,000/=. On the 13th day of August, 2010 the tribunal ruled that the respondent was entitled to the 1 acre and this decision was adopted as a judgment of the court vide Award No. 57 of 2010 before the Chief Magistrate’s court at Kakamega. The appellant challenged the decision of the Tribunal before the Provincial Land Dispute Appeals Committee (Appeals Committee) at Kakamega vide case no. 76 of 2010 but on the 2nd day of December, 2010 the appeals committee upheld the decision on the tribunal. The dispute between the parties before the Lurambi Land Disputes Tribunal and Provincial Land Dispute Appeals Committee was essentially a claim to title over the land. The Provincial Land dispute Appeals Committee held that;

1. The appeal fails due to lack of evidence to back the grounds of appeal
2. The Lurambi Land Disputes Tribunal court ruling stands as ordered.
3. In the event of the appellant Moses Makhokha Osanya refusing to cooperate or honor the above order. The Executive Officer of the High Court shall sign all the necessary transfer documents.

For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Lurambi Land Disputes Tribunal and Provincial Land Dispute Appeals Committee. The proceedings prima facie violated the Land Disputes Tribunal Act (now repealed). In the case of **Masagu Ole Naumo v Principal Magistrate Kajjado Law Courts & another, Nairobi, High Court, JR 370 of 2013 [2014] eKLR**. In that case, Odunga J held as follows-

“In my view 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 Lurambi Tribunal and the Provincial Land Dispute Appeals Committee were wrong to register and hear pass judgment and make orders on the appellant’s claim against him for the title to the suit land. I find that this appeal has merit on these grounds and I allow the same. I quash the decision/verdict of the Lurambi Land Disputes Tribunal and Provincial Land Dispute Appeals Committee 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