



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC. APPEAL NO. 18 OF 2017

MELENIA OCHOLA ONAYA.....APPELLANT

VERSUS

SILVANUS ODHIAMBO OBWOLO.....1ST RESPONDENT

VINCENT WANDO OBWOLO.....2ND RESPONDENT

JUDGEMENT

Appeal arising from the Ruling of Honourable P.N. Areri Resident Magistrate in Kakamega CMCC Misc. Award No. 37 of 2010 delivered on the 12th November, 2010. The appellant being dissatisfied with the ruling of the Honourable P.N. Areri – Resident magistrate in respect of Kakamega CMCC Misc. Award No. 37 of 2009 on the following principal grounds:-

1. The learned trial magistrate erred in law in adopting a ruling as a judgement of the court.
2. The learned trial magistrate erred in law and fact in granting an eviction in a Miscellaneous Application file where no suit had been filed and evidence taken.
3. The learned trial magistrate erred in law and fact in granting eviction of the applicants when they had raised an issue of law in the replying affidavit.
4. The learned trial magistrate erred in law and fact in granting eviction of the appellants from the deceased's land parcel No. South Wanga/Bungasi/986 when there was no administrator of the said estate exposing the estate of misuse, exploitation and intermeddling.
5. The learned trial magistrate erred in changing the ruling quite contrary to the award of South Wanga Land Disputes Tribunal to suit the respondents' application.
6. The learned trial magistrate erred in contributing to miscarriage of justice.

The appellants pray that the appeal herein be allowed and the ruling of the Honourable Court made on 12th November, 2010 be set aside with costs to the appellants.

On the first ground, the learned trial magistrate erred in law in adopting an award that was an illegality. There was a Replying Affidavit to the application for adoption sworn on 2nd July, 2009 (page 11 of the Record of Appeal) where the appellant clearly stated that the land parcel in dispute was in the name of her late husband and as such challenged the powers of the tribunal in arbitration over the said land parcel. That being the case it was wrong for adoption of the award which led to miscarriage of justice.

Secondly, the court erred in granting eviction in a Miscellaneous Application without advising parties to file suit where evidence would be taken and substantive orders made.

The learned magistrate erred in ignoring the replying affidavit of the appellant sworn on the 2nd July, 2009 and filed on the same date which affidavit raised triable issues such as ownership of the disputed land parcel and legal representation thereof.

The fifth and most crucial is that the learned trial magistrate erred in changing the ruling of the tribunal and extracting an order which led to total miscarriage of justice. The order is on page 14 of the Record of Appeal. It orders nullification of the Certificates to land Parcel No.

South Wanga/Bungasi/986 and further orders registration of the said title in the Respondent's names (Order part 2(a)). That was not the Ruling of the Tribunal. The said Ruling is found on page 7 of the Record of Appeal which directs the nullification to be done by the High Court. The order as extracted orders nullification direct without reference to the High Court. If the High Court has to nullify the land certificate, then parties would file pleadings which evidence will be called and justice done. The omission of involvement of the High Court in the cancellation of the title document is so erroneous and contributed to grave miscarriage of justice. There was an application by the Appellant dated 25th November, 2010 for review of the said ruling which application was dismissed on the spot. They pray that the court allows this appeal, set aside the said order and award costs to the appellant.

The 2nd respondent submitted that the court has to satisfy itself first whether it has jurisdiction to entertain this appeal. They take up issue as preliminary as it is a point of law sufficient to dispose of this appeal. They submit that this Honourable Court has no jurisdiction to entertain this matter in its original and appellate jurisdiction.

The genesis of this appeal are proceedings in the land disputes tribunal. It is clear from the record of appeal filed herein on 21st June, 2012 dated 18th June, 2012 that the respondents who were the claimants instituted case no. 14 of 2007 in the Land Disputes Tribunal South Wanga Division in respect to land parcel No. South Wanga/Bungasi/740 measuring approximately 15.5 acres where they were claiming a portion of 4 acres. On 5th February, 2009 (pages 6-7 of the said record of appeal) the said tribunal passed a verdict in favour of the respondents. On 21st of October, 2009 the 1st Respondent herein filed an application of even date to be traced between pages 9-10 of the record of appeal, seeking for among other things the adoption of the verdict of the said tribunal.

From the proceedings made vide Kakamega CMC Miscellaneous Award No. 37 of 2009 erroneously instituted Criminal Case No. 37 of 2009 the above application was fixed for hearing on 12th of November, 2010 after recording the presence of both parties herein and their statements the court noted that the parties had admitted that the award had been re-read to them and that there was no replying affidavit or grounds of opposition to the application dated 21st October 2009 and proceeded to allow the application and adopted the award of the said tribunal dated 5th February 2009 to be the final judgement of the court (the record of appeal page 28). This is the ruling that the appellant is purporting to appeal against. The proceedings under the said tribunal and the court below were at all material times when the matters were being conducted governed by the Land Disputes Tribunal Act No. 19 of 1991 which Act was subsequently repealed when the Land and Environment Act came into force on 30th August, 2011.

The said Act had elaborate provisions regarding the steps to be taken by an aggrieved party against a decision of the Land Disputes Tribunal. The magistrate's court was only empowered to adopt a decision of the land tribunal in the first instance. There was no direct right of appeal to the High Court. The appellant herein should have first appealed to the Provincial Appeals Committee within 30 days of the decision of the said tribunal which was made on 5th of February, 2009 i.e. on or before 6th March, 2009 under S. 8(1) of the said Act and Appeal to the High Court within 60 days from the date of the decision of the appeals committee under S. 8(9) of the said Act. The appellant has not provided any evidence that he exercised the right to appeal to the Provincial Appeals Committee first before coming to this court.

The appeal appears to be challenging the jurisdiction of both the Tribunal in its original jurisdiction as then constituted and the court when it adopted the decision of the said tribunal. They submit that such an issue could not have been entertained by the magistrate's court whose powers it duly exercised as evidenced by the proceedings incorporated in the record of appeal filed herein.

The verdict of the said tribunal clearly refers the parties to the High Court the appellant has instead after a period of well over 2 years from the date of the ruling delivered on 12th of November, 2010 purported to file this appeal. The appellant should have filed a judicial review if he wanted to move the high court directly and not appeal. Even assuming that the order of the magistrate was automatically appealable then he should have lodged and appeal within 30 days of the decision made by the magistrate in his ruling on 12th of November, 2010. In light of the foregoing they submit that this court has no jurisdiction to entertain the appeal herein and that the same is an abuse of the due process of law and that this court should not be troubled to go through the motion of entertaining the appeal on merits.

On the issue of jurisdiction, as per 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 limited 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.

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 appeal is arising from a court ruling by Honourable P.N. Areri Resident Magistrate in Kakamega CMCC Misc. Award No. 37 of 2010 delivered on 12th November, 2010 and the Appellant being dissatisfied by the said Ruling appealed on the grounds set forth in the Memorandum of Appeal. I therefore find that this court has jurisdiction and will proceed to consider this appeal on its merit.

This court has considered the applicant's and the 2nd respondent's submissions in great detail. From the proceedings made vide Kakamega CMC Miscellaneous Award No. 37 of 2009 the application was fixed for hearing on 12th of November, 2010 after recording the presence of both parties herein and their statements the court noted that the parties had admitted that the award had been re-read to them and that there was no replying affidavit or grounds of opposition to the application dated 21st October 2009 and proceeded to allow the application and adopted the award of the said tribunal dated 5th February 2009 to be the final judgement of the court. The award of the tribunal read as follows;

a) Therefore the panel of elders sitting at South Wanga Division requests the High Court to nullify the land certificate

SW/Bugasi/986 and re register in the applicant's name.

b) Onala Wamayathe son to Wamaya Wando to vacate and join his family in parcel number SW/Bugasi/740 measuring 15.5 acres (fifteen point five acres)

c) Costs of the case to be met by both parties

The order is on page 14 of the Record of Appeal. It orders nullification of the Certificates to land Parcel No. South Wanga/Bungasi/986 and further orders registration of the said title in the Respondent's names (Order part 2(a)). That was not the Ruling of the Tribunal. The said Ruling is found on page 7 of the Record of Appeal which directs the nullification to be done by the High Court. The order as extracted orders nullification direct without reference to the High Court. If the High Court has to nullify the land certificate, then parties would file pleadings which evidence will be called and justice done. I concur with the respondent that the omission of involvement of the High Court in the cancellation of the title document is erroneous and contributed to grave miscarriage of justice.

Section 3 of the defunct Land Disputes Tribunal Act No. 18 of 1990 limited the powers of claims that tribunals could handle to:-

a. *The division or determination of boundaries.*

b. *A claim to occupy or work on land.*

c. *Trespass to land.*

It is the applicant's Submission that the case dealt with by the District Tribunal never belonged to any of the categories intended by Section 3 of the defunct Land Disputes Tribunals Act.

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 tribunal in the present case dealt with title to property and requested the high court to deal with the matter. The lower court from the order extracted did not suggest this but went ahead and gave final orders. I find that, the learned trial magistrate erred in law and fact in granting eviction of the appellants from the deceased's land parcel No. South Wanga/Bungasi/986. I also find that the learned trial magistrate erred in changing the ruling quite contrary to the award of South Wanga Land Disputes Tribunal. I find that this appeal has merit and I allow the same. The ruling of the lower Court made on 12th November, 2010 is set aside with costs to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE