



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 3 OF 2014

MAURICE LUBEMBE SHITIAVAYI.....APPELLANT

VERSUS

MAURICE ACHESA ANDOLE.....RESPONDENT

JUDGEMENT

The appellant herein, being dissatisfied with the ruling and orders of 8th July, 2014 by C. Kendagor – Ag. SRM in Kakamega CM Misc. Award No. 7 of 2011 hereby appeals and sets forth the following grounds of appeal.

1. The learned magistrate erred in law and in fact in failing to appreciate the known principles of law regarding appeals arising from the Land Disputes Tribunal.
2. The learned magistrate erred in law and in fact in failing to note that the repeal of Land Disputes Tribunal Act and the consequent disbandment of all tribunals.
3. The trial magistrate erred in law in prematurely allowing the execution to proceed.
4. The trial magistrate erred in law and in fact in failing to consider and take into account the weighty legal issues raised by the appellant in his replying affidavit sworn on 6th May, 2014.
5. The trial magistrate erred in law in condemning the appellant unheard.

The appellant prays that this appeal be allowed and the ruling and orders of the lower court be set aside. The appellant submitted that, this appeal arises from the ruling of Hon. Kendagor Ag SRM issued on 8/7/2014, in Misc. Award No. 7 of 2011. The Appellant was sued by the Respondent at Ileho Division Land Disputes Tribunal vide Claim No. 1 of 2011 whereby the tribunal entered judgment against him. Being dissatisfied with the said ruling, he launched an Appeal at Western Provincial Appeals Committee but before the appeal could be heard, the Land Dispute Tribunals were disbanded. Vide the Application dated 2/3/2011, the Respondent herein sought for adoption of the award of the Ileho Land Disputes Tribunal which had ordered for sub-division of the subject suit that would have seen the Appellants title cancelled. On the 7/3/2011 the appellant herein filed an application seeking for stay of proceedings pending hearing and determination of the appeal at the Western Provincial Land Disputes Appeals Committee. The two applications were heard on 2/6/2011 whereby the award was adopted but execution of the same was stayed. The Respondent herein then filed another application seeking for an order that the order issued on 16/6/2011 be varied and or set aside and execution do proceed. The application was allowed leading to the appeal herein.

The jurisdiction of the land disputes tribunal is clearly spelt out in section 3 of the repealed Land Disputes Tribunal Act. Cancellation of title was obviously beyond its mandate. By cancelling the Appellant's title and ordering that the land be sub-divided into five equal portions and be given to listed parties in the award, the tribunal obviously went out of its mandate and acted without jurisdiction. Based on this, the Appellant appealed at the Western Provincial Appeals Committee. Unfortunately, before the appeal could be heard, the Land Disputes Tribunal Act was repealed disbanding the tribunals. Despite the fact that the Land Disputes Tribunal Act had been repealed, the learned Magistrate proceeded to adopt the award and despite the fact that the said award was null and void ab initio and despite the pendency of the appeal.

The court in Eunice Muthoni Gatugi Vs Lusalia Wamweru and Others (2018) eKLR while agreeing with the observation in Alice Mweru Ngai Vs K.P & L.C LTD (2005) eKLR stated that;

“Where the law has granted jurisdiction to other organs of the government to handle specific grievances, the court must respect and uphold the law and allow the said remedies to be exhausted”.

The Court went ahead to state that

“It is in interest of proper, orderly and efficient administration of Justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that organs mandated to arbitrate over such disputes be respected and allowed to perform their statutory responsibilities”

The learned Magistrate by allowing execution to go on simply defeated the appellant’s appeal thus denying him to go through and exhaust all the procedures in quest to access justice. Thus, by allowing the execution to proceed before determination of the appeal, the magistrate condemned the appellant unheard thus violating the rules of natural justice.

The respondent submitted that, the Appellant herein alleges that he Land Disputes Tribunals were disbanded which is true, but the Appellant herein has not informed the court if indeed he took the step of having his appeal heard by this Honorable court and or High Court. The Appellant herein has not shown and or demonstrated to the court which number his appeal No. 19 of 2011 was adopted in the High Court and which case number his appeal was given in the Environment and Land court.

In summary the Appellant herein has no appeal against the decision of the Ileho Division Land Disputes Tribunal pending in any court of law as if there was any then the Appellant herein would not have been shy to point out the case number of the said appeal. The appeal in is not merited and should there be dismissed with costs and the decision of the Ileho Division Land Disputes Tribunal delivered on 09/02/2011 and adopted as the judgment of the lower court on 16/04/2011. Should this court want and or wish to exercise jurisdiction and look at the case herein afresh they submit that the case before the Ileho Land Disputes Tribunal was purely between beneficiaries to their maternal grandfather’s land. The said maternal grandfather had five daughters.

The clan decided that the family land be divided equally between the five daughters of the said Paul Achesa. The decision to subdivide the said land equally among the five daughters was very equitable and therefore the Appellant herein has no good reason why he should want to hold single handedly on to the whole land when he has first cousins including the Respondent who are equally entitled to the same. The actions of the Appellant herein clearly shows that he is greedy person who wants to single handedly benefit from his late maternal grandfather's land to the exclusion of the others. They urge the court to find in favor of the Respondent herein and dismiss the case herein 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 16th July, 2014 which raises five grounds, the preliminary issue in my view which is for determination is the jurisdiction of the tribunal. 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 tribunal in the present case dealt with title or ownership to property. The Ileho Land Disputes Tribunal ordered the subdivision of the subject suit that would have seen the Appellant’s title cancelled. The dispute between the parties before the Ileho Land Disputes Tribunal was essentially a claim to ownership over the land.

For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Ileho 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 Kajado 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 Ileho Land Disputes Tribunal was wrong to register and hear pass judgment and make orders on the respondent’s claim to the title to the suit land. Having found this there will be no need to go into the merits or demerits of the other grounds of appeal. I find that this appeal has merit and I allow the same. I quash the decision/verdict of the Ileho Land Disputes Tribunal and the ruling of the lower Court made on 8th July 2014 is set aside with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE