



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 452 OF 2016

(FORMERLY HCC NO. 104 OF 2011)

KENNEDY OKARI OROGO.....PLAINTIFF

VERSUS

JOHN MARTIN BONGWE.....1ST DEFENDANT

JOSEPH NYABARO NYATOGE.....2ND DEFENDANT

J U D G M E N T

1. The plaintiff brought the instant suit vide a plaint dated 27th May 2011. The plaintiff averred he was the registered proprietor of land parcel number **Wanjare/Bomorenda/3512** and claimed that the defendant had interfered with and damaged the common boundary between land parcel **Wanjare/Bomorenda/244** and **3512**. The plaintiff further claimed that the defendant had filed a land dispute case before the Suneka Land Disputes Tribunal who purported to make an award touching on the ownership of the plaintiff's land in Suneka Land Dispute Case No. 75 of 2010 without jurisdiction. The plaintiff sought orders in the suit thus:

i. **An order compelling the District Surveyor Kisii Central to ascertain and mark the boundary between land parcels No. Wanjare/ Bomorenda/3512 and Wanjare/Bomorenda/244.**

ii. **A declaration that the proceedings of Suneka Land Dispute Tribunal Case No. 75 of 2010 is null and void.**

iii. **Costs of the suit.**

2. The defendant by his initial statement of defence dated 14th June 2011 pleaded that the instant suit is res judicata Kisii CM Misc. App. No. 5 of 2011 and that the court lacked the jurisdiction to deal with the suit. The defendant further denied interfering with the boundary between land **Nos. Wanjare/Bomorenda/244** and **3512** or that he was in trespass onto the plaintiff's parcel of land. Further the defendant pleaded that the issue in dispute in the instant suit was conclusively and finally adjudicated upon by the Suneka Land Dispute.

3. The defendant vide an application dated 18th November 2011 sought leave and was granted leave to amend his defence to plead a counter claim since the plaintiff had allegedly since the making of the award

by the Suneka Land Disputes Tribunal subdivided the suit land to create parcels 3512 and 3513 and had caused the latter parcel to be transferred to a third party who the defendant sought to join as a defendant in the counterclaim. The defendant by way of counterclaim averred that the plaintiff by subdividing the suit land and transferring parcel **3513** to the 2nd defendant in the counterclaim deprived the defendant/plaintiff in the counterclaim the fruits of his litigation in Kisii CM Misc. App. No. 5 of 2011. The defendant/ plaintiff in the counterclaim sought the subdivision and transfer of the suit property by the plaintiff to be declared a nullity and to be cancelled.

4. The suit was fixed for hearing before me on 23rd May 2017. The hearing date having been taken by the defendant's counsel ex parte the plaintiff's advocates M/s Bwondika & Co. Advocates were served with a hearing notice and the 2nd defendant to the counterclaim was equally served with a hearing notice as per the filed affidavit of service sworn by one, Isaac Miruka. Neither the plaintiff nor his advocate attended court. The 2nd defendant to the counterclaim also did not attend court. The court having satisfied itself service on the plaintiff had been effected and there being no explanation for the plaintiff's absence ordered the plaintiff's suit to be dismissed with costs to the defendant and allowed the defendant to proceed with the hearing of the counterclaim ex parte.

5. The defendant in support of the counterclaim testified that he had purchased from the plaintiff a portion of land measuring 216feet by 51feet out of land parcel **Wanjare/Bomorenda/3416** but the plaintiff had not effected transfer to him. The defendant/counterclaimant further testified that before the plaintiff instituted these proceedings, the defendant had instituted proceedings before the Suneka Land Disputes Tribunal who made a finding that the defendant had bought a portion of land measuring 216feet by 51feet out of land parcel **3416** then owned by the plaintiff. The proceedings before the Tribunal were produced as "**PEX1**". The defendant further stated that the plaintiff instead of giving him the land that he was awarded by the Tribunal proceeded to sell the same to the 2nd defendant in the counterclaim. The plaintiff subdivided land parcel **3416** to create land parcels **3512** and **3513** and transferred land parcel **3513** to the 2nd defendant in the counterclaim. The defendant/counterclaimant stated that land parcel **3513** was the portion that he had purchased from the plaintiff. The defendant produced copies of certificates of official search for land parcels **3512** and **3513** ("**PEX.3**" and **PEX.4**") which show the plaintiff and the 2nd defendant in the counterclaim are the registered owners respectively.

6. The defendant stated that the plaintiff by subdividing and transferring the portion that the defendant had purchased to the 2nd defendant in the counterclaim was deliberately circumventing the order of the tribunal that had awarded him the land and consequently sought an order of the court annulling the transaction in favour of the 2nd defendant in the counterclaim. The defendant further stated he was utilizing the portion that he had purchased from the plaintiff but stopped using the same when it was transferred to the 2nd defendant. He stated that the 2nd defendant was presently using the plot for cultivation and grows food crops like maize thereon.

7. The defendant's counsel filed written submissions in support of the counterclaim whereby he reiterated the evidence tendered by the defendant. The defendant submitted that the plaintiff acted fraudulently in causing the subdivision and the transfer of the portion of land that the defendant had purchased from him to the 2nd defendant in the counterclaim. The defendant argued this was done with the object of defeating and/or frustrating the award that the Suneka Land Disputes Tribunal had made awarding him the portion of land. The defendant further submitted that the actions of the plaintiff and the 2nd defendant to the counterclaim deprived him the fruits of his litigation and should be declared illegal, irregular and improper and should be cancelled to pave room for the defendant's decree obtained in Kisii CM Misc. App. No. 5 of 2011 which flowed from the award of the tribunal to be implemented.

8. Having reviewed the evidence tendered by the defendant in support of the counterclaim and the submissions made in support thereof, the issues for determination are as follows:-

i. Whether the award of Suneka Land Disputes Tribunal and the resulting decree vide Kisii CM Misc. App. No. 5 of 2011 are capable of enforcement by this court.

ii. Whether the subdivision of land parcel Wanjare/Bomorenda/ 3416 to create land parcels 3512 and 3513 was irregular and illegal and should be cancelled.

9. It is not in dispute that the defendant initiated proceedings before the Suneka Land Disputes Tribunal who made an award in favour of the defendant. The tribunal proceedings (“**DEx.1**”) is unclear as to what the award was as the verdict does not state with any specificity what was awarded to the defendant. The extracted decree, however, resulting from the award made in Kisii CM’s Court Misc. App. No. 5 of 2011 inter alia was in the following terms:-

1. That the decision of Kisii Couth Land Disputes Tribunal Case No. 75 of 2010 be and is hereby adopted as a judgment of this court.

2. That the applicant is a lawful purchaser of a portion measuring 216 feet long by 51 feet in the middle and 53 feet at the end in land parcel Wanjare/Bomorenda/3416.

10. It is not disputed that land parcel **Wanjare/Bomorenda/3416** was registered in the name of the plaintiff at the time the proceedings before the tribunal took place. Thus the issue does arise whether or not the tribunal had jurisdiction to entertain the claim by the defendant. The jurisdiction of the tribunal was as conferred under Section 3(1) of the **Land Disputes Tribunals Act No. 18 of 1990 (now repealed)**. Section 3(1) of the Act provided 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.

11. The tribunal had no jurisdiction to hear and determine disputes relating to title to registered land. The dispute referred to the tribunal by the defendant related to a contract relating to purchase of land by the defendant from the plaintiff which the defendant was contending the plaintiff had failed to honour. Under Section 3(1) of the Land Disputes Tribunal Act, the Tribunals did not have jurisdiction to hear and determine disputes arising out of contracts. It is evident that the tribunal entertained a dispute relating to contract when they held that the defendant bought the piece of land from the plaintiff and that the plaintiff had signed the agreement. The decision of the tribunal was therefore made in excess of its jurisdiction and the award it made was a nullity and of no legal effect.

12. This court has supervisory powers over Tribunals and courts subordinate to it and cannot sanctify an illegality. To uphold the award by the Tribunal would amount to legalizing the award when the law is clear that the Tribunal had no power to make such an award.

13. Although the issue was not raised by either the plaintiff or the defendant/ counterclaimant, the land the subject matter of the suit constituted agricultural land within the meaning of the **Land Control Act**, Cap 302 of the Laws of Kenya and therefore any transactions relating to the sale of and/or subdivision of the same would have required the consent of the Land Control Board pursuant to the provisions of the Act. Before the Tribunal, the defendant was claiming he had purchased a portion of the plaintiff’s original land parcel 3416. Such transaction under Section **6 (1) (a)** of the **Land Control Act** would have required the consent of the Land Control Board to have been sought and obtained as provided under Section 8(1) of the Act.

14. Section 6(1)(a) of the Land Control Act provides:-

6(1) Each of the following transactions:-

a. **the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situate within a land control area;**

b.

c.

Is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect to that transaction in accordance with this Act.

Section 8(1) provides:-

8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.

15. There is no demonstration that the transaction of sale between the plaintiff and the defendant complied with the foregoing provisions of the **Land Control Act**. To the extent that the defendant was relying on a contract of sale before the Tribunal it was mandatory for the defendant to have complied with the provisions of the **Land Control Act**. The Land Disputes Tribunal even if it had jurisdiction to handle the matter could not override the express provisions of the statute. The alleged agreement of sale between the defendant and the plaintiff became void for all purposes after six months elapsed without the consent of the Land control Board being obtained.

16. Having held that the Land Disputes Tribunal lacked the jurisdiction to deal with the matter it follows that the award it made was a nullity and this court cannot sanitize the award and the consequent decree that flowed from it.

17. The net effect is that I find the defendant's counterclaim to be lacking in merit and it is my holding and finding that the defendant has not proved his counterclaim on a balance of probability and I accordingly dismiss the same with no order as to costs.

Judgment dated, signed and delivered at Kisii this 28th day of July, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Soire for the plaintiff

N/A for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE