



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**APPEAL NO. 72 OF 2016**

**STEPHEN OCHARO BIKONDO ..... APPELLANT**

**VERSUS**

**ISABELLA KWAMBOKA .....RESPONDENT**

**J U D G M E N T**

**(Being an appeal from the Decision of the Nyanza Provincial Land Dispute Appeal Committee dated on 10<sup>th</sup> July, 2011)**

1. The appellant, Stephen Ocharo Bikundo, has preferred the instant appeal to this court against the decision of the Nyanza Provincial Land Dispute Appeals Committee made on 10<sup>th</sup> July 2011 dismissing his appeal to the Committee. The appeal to the Nyanza Provincial Land Dispute Appeals Committee arose from the decision of the Nyamira Land Disputes Tribunal in Claim No. 13 of 2008 where the appellant was the Respondent and Isabella Kwamboka Arita, the respondent in the present Appeal, was the claimant. By the decision of the Nyamira Land Disputes Tribunal dated 28<sup>th</sup> January 2009 the tribunal interalia held that:-

**(i) The claimant's late husband had purchased the disputed portion of land from the respondent some 18 years earlier.**

**(ii) The claimant was entitled to the disputed portion measuring 50feet by 100feet as the legal widow of the purchaser, the late Samuel Arita Nyatuka, which should be excised from land parcel number West Mugirango/ Bonyamatuta/1568.**

**(iii) The claimant should pay the sum of kshs. 20,000/= being unpaid balance of the purchase price.**

**(iv) The respondent to assist the claimant Isabella Kwamboka Arita to acquire title to the disputed land.**

**(v) The claimant was awarded the costs of the case.**

2. Though the record is not explicit on when the appellant lodged the appeal before the Nyanza Provincial Land Dispute Appeals Committee, the appeal before the Committee was recorded as Appeal No. 053 of 2009. The Nyamira Land Disputes Tribunal's decision was filed in the Nyamira Senior Magistrate's Court on 29<sup>th</sup> April 2009 and was on 16<sup>th</sup> July 2009 adopted by the court as judgment.

3. The appellant's appeal before the Nyanza Provincial Land Disputes Committee was dismissed on 10<sup>th</sup>

July, 2011 on the ground that the appellant failed to attend before the committee to prosecute the same in spite of having been notified of the date of the hearing. In the Memorandum of Appeal before this court filed on 25<sup>th</sup> August 2011 the appellant raises two main grounds of appeal. Firstly, that there was no proper service for the appellant to attend before the appeals committee for the hearing of his appeal and therefore the Committee erred in proceeding to hear the appeal in his absence.

4. Secondly, the appellant avers that the appeals committee erred in law in upholding the decision of the Nyamira Land Disputes, Tribunal and cited the following grounds:-

**(a) That the Nyamira Land Disputes Tribunal erred in law in addressing issues of ownership of registered land which was clearly outside their mandate as the Land Dispute Tribunal as envisaged under Section 3 of the Land Disputes Tribunal Act.**

**(b) That to the extent that the subject parcel of land was agricultural land subject to the Land Control Act (Cap 302) the Tribunal erred in law in addressing the issue of ownership in blind disregard to the provisions of Section 6 of the Land Control Act and the provisions of Section 8 of the Land Control Act which gives a peremptory 6 months period for the obtaining of the consent from the Land control Board whereas the subject agreement was made 18 years ago and consent not obtained hence the same was a nullity.**

**(c) That the Nyamira Land Disputes Tribunal erred in law in addressing succession issues, to wit, the issue of the legal wife of the deceased purported purchaser of the subject parcel of land, the late Samuel Arita Nyatuka, and also proceeding to administer, allocate and distribute the estate of the Samuel Arita Nyatuka (deceased) when administration of the estate of a deceased person falls under the province of the High Court as provided in the Succession Act, Cap 160 Laws of Kenya.**

**(d) That the learned magistrate erred in law in addressing the issue of title deed which is not within its purview.**

5. The appellant has sought orders that:-

**(i) That the appeal herein be allowed with costs.**

**(ii) That the decision of the Nyamira Land Disputes Tribunal dated 28<sup>th</sup> of January 2009 and all consequential orders emanating therefrom and subsequent decision of the Nyanza Provincial Appeals Committee dated the 10<sup>th</sup> July 2011 and all consequential orders emanating therefrom be set aside and be quashed and/or dismissed in their entirety with costs to the appellants.**

**(iii) The costs herein be awarded to the appellant.**

6. Although this appeal was filed in Kisii High Court on 25<sup>th</sup> August 2011 as HCCA No. 136 of 2011 the file was following establishment of the High Court at Nyamira transferred to Nyamira High Court where it was renumbered as Nyamira HCCA No. 79 of 2015. On 29<sup>th</sup> June 2016 both the appellant and the respondent agreed before Hon. Justice Nagillah to argue the appeal by way of written submissions. The appellant filed his submissions on 17<sup>th</sup> August 2016 while the respondent filed her submissions on 5<sup>th</sup> September 2016.

7. Although Hon. Justice Nagillah had on 6<sup>th</sup> September 2016 reserved judgment for delivery on 14<sup>th</sup> October 2016 he on 28<sup>th</sup> September 2016 *suo moto* ruled he did not have any jurisdiction to handle the matter as it related to land. He ordered the appeal to be transferred to Kisii Environment and Land Court for hearing and determination. The file was transferred to Kisii Environment and Land Court and renumbered as Environment and Land Court Appeal No. 72 of 2016.

8. The appeal preferred by the appellant before the Nyanza Provincial Appeals Committee shows that the dispute before the Nyamira Land Disputes Tribunal related to contract of sale of land between the appellant and the respondent's deceased husband. The appeal also touched on the competency and/or capacity of the respondent to bring the case before the Tribunal without having obtained grant of letters of administration to represent the estate of her deceased husband.

9. Section 8 of the Land Disputes Tribunal Act, Cap 303A (repealed) provided for appeals to the Appeals Committee and the High Court. Section 8 (1) provides as follows:-

**8(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision appeal to the Appeals Committee for the province in which the land which is the subject matter of the dispute is situated.**

Section 8(8) of the Act provides:

**8(8)The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.**

**(9) Either party to the appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:-**

**Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.**

10. The instant appeal was admitted for hearing by Hon. Okong'o, J. on 30<sup>th</sup> April 2014. Having reviewed the Memorandum of Appeal I am satisfied the appeal does raise an issue or law relating to whether or not the Nyamira Land Disputes Tribunal had the jurisdiction to deal with the matter and further whether the respondent had the *locus standi* and/or capacity to bring the proceedings before the Tribunal without obtaining grant of letters of administration to her late husband's estate.

11. Under Section 3(1) of the Land Disputes Tribunals Act, the Tribunals established under the Act only had jurisdiction to handle the limited matters set out under the provision thereof 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.**

12. The Tribunals were conferred with jurisdiction to hear and determine disputes relating to title to land and conversely could not entertain a dispute where their decision would result to an order affecting title to registered land. The High Court under Section 159 of the Registered Land Act, Cap 300 Laws of Kenya (repealed) was the entity conferred with jurisdiction to hear and determine disputes relating to title to land. Section 159 of the Registered Land Act provides as follows:

**159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident magistrate's Court, or, where the dispute comes within the provisions of Section 3(1) of the**

## **Land Disputes Tribunals Act in accordance with that Act.**

13. The Nyamira Land Disputes Tribunal clearly had no jurisdiction to hear and determine an issue that related to registered land. The net effect of their decision when they ordered a portion of 50ft by 100ft to be hived out of land parcel **West Mugirango/Bonyamatuta/1568** was to order for the cancellation of the appellant's title and the subdivision thereof. This was in excess of their mandate under Section 3(1) of the Land Disputes Tribunal Act and their decision was *ultra vires* and was null and *void abinitio* for want of jurisdiction.

14. Still on the jurisdiction of the Land Disputes Tribunal, my view is that they also lacked jurisdiction to hear and determine a contractual dispute. In arriving at their decision they determined the respondent's husband had bought the portion of land some 18 years earlier and had not paid the appellant a balance of kshs.20,000/= which they ordered the widow to pay. Under Section 3(1) of the Land Disputes, Act, determination of issues relating to contract was not vested on the Tribunal to determine and they thereof acted outside the scope of their mandate in entertaining the dispute and making a determination.

15. On the issue whether the respondent had capacity to institute proceedings before the Tribunal on behalf of her deceased husband the answer must be in the negative. Before the Tribunal, although it was clear that the respondent was pursuing a claim on behalf of her late deceased husband there was no evidence that she had taken out letters of administration to act on behalf of the deceased estate. Under the Law of Succession Act, a deceased claim can only be initiated by a person who has been given authority to act for and represent the estate. Such a person must be a legal representative who has been issued a grant by the court to represent the deceased estate. Section 82 of the Law of Succession Act, Cap 160 Laws of Kenya provides for the power of personal representatives in regard to the estates of deceased persons.

16. Section 82(a) provides:

**82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-**

**(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;**

Section 80(2) provides:-

**80(2) A grant of letters of administration, with or without a will annexed, shall take effect only as from the date of the grant.**

17. There is no evidence that the respondent as at the time she lodged the complaint/dispute before the Nyamira Land Disputes Tribunal, she had obtained a grant of letters of administration to her late husband's estate. She lacked the legal capacity to represent her late husband in the absence of grant of letters of administrators. To the extent that she did not have any letters of administration authorizing her to represent the deceased estate before the Tribunal, the proceedings she had before the Tribunal were null and *void abinitio*.

18. The respondent has in her submissions argued that the appellant ought to have challenged the Tribunal's award by way of Judicial Review rather than by way of appeal. The appellant however had the option to challenge the decision of the Tribunal as provided in the Land Disputes Tribunal Act as he did. Once the issue of jurisdiction of the Tribunal and capacity were raised in the appeal before this court, the court had a duty to consider the issues as they went to the substratum of the dispute that was initiated before the Nyamira Land Disputes Tribunal. The expectation was that the Tribunal would have only dealt with matters it had mandate to handle. The appellant lodged his appeal before the Nyanza Provincial Appeals Committee who dismissed the same on 10<sup>th</sup> July 2011. The appeal before the High Court was filed on 25<sup>th</sup> August, 2011 and was not filed out of time as submitted by the respondent. The appeal was filed within the period of sixty days permitted under the law under Section 8(9) of the Land Disputes

Tribunals Act.

19. In the result, I find the appellant's appeal to have merit and I allow the same. I set aside the order of the Nyanza Provincial Appeals Committee, dismissing the appellant's appeal and substitute the same with an order setting aside the Nyamira Land Disputes Tribunal decision and award dated 28<sup>th</sup> January 2009. The order of the Nyamira Senior Resident's Magistrate's Court Land Case No. 23 of 2009 dated 16<sup>th</sup> July 2009 adopting the award is equally set aside.

20. Each party will bear their own costs of the appeal before this court and of the Tribunal and the Appeals Committee.

21. Orders accordingly.

**Judgment dated, signed and delivered at Kisii this 24<sup>th</sup> day of November, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the Appellant

M/s Momanyi for the Respondent

Ms. Milcent court assistant

**J. M. MUTUNGI**

**JUDGE**