



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 117 OF 2014

N G.....PLAINTIFF

VERSUS

S W M.....1ST DEFENDANT

SENIOR RESIDENT MAGISTRATE KERUGOYA.....2ND DEFENDANT

JUDGMENT

This is yet another dispute over land involving former spouses.

At all material time, the plaintiff was and is the registered proprietor of land parcel No. BARAGWI/GUAMA/ *[particulars withheld]* (the suit land). Following differences between them, the 1st defendant filed a claim at the Gichugu Land Disputes Tribunal (the Tribunal) being Case No. 48 of 2006 seeking to be awarded a portion of the suit land. The Tribunal, after hearing the parties and their witnesses, delivered an award dated 13th September 2006 in which it ordered that the suit land be subdivided as follows:-

- 1. J C N - ½ acre
- 2. L G N - ½ acre
- 3. M N N - ½ acre
- 4. F M N - ½ acre
- 5. P W N - ½ acre
- 6. S U W N - ½ acre
- 7. N G - 6 acres

That award was on 13th June 2007 adopted as a judgment of the Court in Kerugoya Senior Resident Magistrate’s Court LDT Case No. 33 of 2007 and a decree followed in those terms. There is no evidence to show that the plaintiff appealed against that award as he was entitled to do under the provisions of the ***now repealed Land Disputes Tribunal Act***. However, he filed an application for Judicial Review vide Nairobi High Court Miscellaneous Application No. 4 of 2009 seeking to quash that award. That application was dismissed on 16th March 2012 for want of prosecution and by that time, the plaintiff could not challenge the orders for dismissal because the Tribunal had ceased to exist having been abolished by operation of the law.

The plaintiff therefore filed this suit on 12th May 2014 seeking the following prayers:-

- a. Declaration that the plaintiff is the absolute proprietor of land parcel No. BARAGWI/GUAMA/[particulars withheld].***

b. Declaration that the Gichugu Land Disputes Tribunal did not have jurisdiction to order for sub-division and alienation of land parcel No. BARAGWI/GUAMA/[particulars withheld].

c. Declaration that the award given by the Gichugu Land Disputes Tribunal and adopted in Kerugoya Senior Resident Magistrate's LDT Case No. 33 of 2007 is null and void ab-initio.

The 1st defendant filed a defence pleading inter alia, that the Tribunal did not order alienation of any title to the suit land and in any case, she is the wife of the plaintiff and therefore has a beneficial interest in the suit land which the plaintiff is holding in trust for his family. The 1st defendant further pleaded that the Tribunal had jurisdiction to determine how land parcel Number BARAGWI/GUAMA/[particulars withheld] could be cultivated and utilized by individual members of the plaintiff's family.

The parties testified in support of their respective cases with the plaintiff stating that the suit land was given to him by his clan before he married the 1st defendant with whom they have since parted ways. He also added that J C N who is named in the Tribunal's award as his son is not his son.

The 1st defendant on her part testified that the plaintiff has only filed this suit because he is not happy with the decision of the Tribunal.

She added that when the plaintiff married her, he knew that she had two other children. She therefore asked the Court to order the plaintiff to give her a parcel of land on which to work.

The 1st defendant was acting in person and in such cases, those litigants who have no access to counsel are unable to bring out their cases well. In this case, for instance, the defendant may have had a good claim in trust or division of matrimonial property but there is no such case before me.

From the pleadings herein, this Court has to determine the following:-

a. Whether the Tribunal had the jurisdiction to determine the dispute and make the orders that it did.

b. Whether the plaintiff is the proprietor of the suit land and

c. Whether the plaintiff is entitled to the orders sought.

During the trial, no evidence was led to suggest that pursuant to the award and resultant decree, the suit land has been alienated. It would appear from the certificate of search that the suit land has not been alienated and is still in the names of the plaintiff.

The decision of the Tribunal has been re-produced above.

It ordered the sub-division of the suit land among seven parties including the plaintiff and defendant. The other parties are indicated in the award as children of the parties herein although the plaintiff denies being the father to one of them. But that is really not material to this case. What is relevant is whether the Tribunal had the jurisdiction to make the award that it did. In making that award, the Tribunal was exercising powers bestowed upon it by the now repealed **Land Disputes Tribunal Act (the Act)**. **Section 3 (1)** of the said Act provides for the jurisdiction of the Tribunals established under it in the following terms:-

3 (1) Subject to this Act, all cases of a civil nature involving a dispute as from

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 clear from the award of the Tribunal that it ordered the sub-division of registered land. That was beyond its mandate as provided under **Section 3 of the Act**. That has been established by a long line of authorities including:-

1. ***JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL C.A. CIVIL APPEAL NO. 256 OF 2002 (KISUMU).***
2. ***MERCIA MULIRO & OTHERS VS SABOTI LAND DISPUTES TRIBUNAL C.A. CIVIL APPEAL NO. 82 OF 2011.***
3. ***JOSEPH LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL NO. 82 OF 2006 ELDORET.***

What runs through all these cases is that a Land Disputes Tribunal had no jurisdiction to determine a dispute relating to title or ownership of registered land. By making an award ordering the sub-division of the suit land which is registered under the now repealed **Registered Land Act**, the Tribunal exceeded its jurisdiction. Such jurisdiction only lay with the High Court by virtue of the provisions of **Section 159 of the repealed Registered Land Act**. Clearly therefore the Tribunal did not have the jurisdiction to determine the dispute or to make the award that it did and it follows that the said award is a nullity – see **MACFOY VS UNITED AFRICA CO. LTD 1961 3 ALL ER 1169** and also **OWNERS OF MOTOR VESSEL “LILLIAN’S” VS CALTEX OIL KENYA LTD 1989 K.L.R 1.**

As to whether the suit land is registered in the names of the plaintiff, that is not in dispute. The certificate of search is clear on that.

Finally, is the plaintiff entitled to the declaratory orders that he seeks? **BLACK’S LAW DICTIONARY 9th Edition** defines a declaratory judgment as follows:-

“A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement”.

From the history of this dispute as captured above, no appeal was proffered against the Tribunal’s award as the plaintiff could have done in accordance with the provisions of the **Land Disputes Act** which was the applicable law. And his attempts to file Judicial Review proceedings came to naught. Does that bar him therefore from filing this suit? It is clear from the Court of Appeal’s decision in the case of **NICHOLAS NJERU VS THE ATTORNEY GENERAL & OTHERS C.A CIVIL APPEAL NO. 110 OF 2011 (NYERI) citing the English case of PYX GRANTE CO. LTD VS MINISTRY OF HOUSING & LOCAL GOVERNMENT 1958 1 QB 554,** that there is no limit to the powers of the High Court to grant a declaratory order except such limit as it may in its discretion impose upon itself. It is also clear from the case of **JOHANA NYOKWOYO BUTI VS WALTER RASUGU OMARIBA & OTHERS C.A CIVIL APPEAL NO. 182 OF 2006 (KISUMU)** that the proper way of impeaching a judgment or order delivered by a Court or Tribunal which had no jurisdiction to entertain the dispute is by filing a declaratory suit.

Further, **Section 13 (7) of the Environment and Land Court Act** which provides for the jurisdiction of the Court states that among the orders and reliefs that this Court may grant are declarations.

Having found, therefore, that the Tribunal had no jurisdiction to make the award that it did, it follows that the said award is a nullity and so too is the decree that followed from it. The plaintiff is therefore entitled to an order declaring the said award and the decree issued by the Senior Resident Magistrate’s Court Kerugoya in LDT No. 33 of 2007 as null and void.

Ultimately therefore, judgment is entered for the plaintiff against the defendant as per his plaint. Each party to meet their own costs.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Judgment delivered in open Court this 26th day of February, 2016

Ms Kiragu for Plaintiff present

1st Defendant present in person

Right of appeal explained.

B.N. OLAO

JUDGE

26TH FEBRUARY, 20916