



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU

CIVIL APPEAL NO.110 OF 2011

MARGARET ORWA OPIYO.....APPELLANT

VERSUS

RASHID AGOLA OWINO.....RESPONDENT

(Being an appeal from the ruling of the Nyanza Land disputes Appeal

Committee case No.049 of 2010 delivered on 4.8.2011)

JUDGMENT

1. **Margaret Orwa Opiyo**, the Appellant, being aggrieved by the decision of the Nyanza **Land Disputes Appeals Committee** in case number 049 of 2010 filed this appeal through the memorandum dated 15th August 2011 based on seven grounds that are set out hereinbelow;

“ 1. The Appeal Committee misdirected itself in considering irrelevant issues that were not before it for determination.

2. The Appeals Committee erred in including other persons who were not party to the suit to benefit from the Appellant’s suit land parcel.

3. The Appeals committee erred in law in indicating that there was consensus to include strangers in the appeal while there was no such consensus reached.

4. That the Appeals Committee erred in law in failing to consider the submissions of the appellant while arriving at its decision.

5. The Appeals Committee erred in law in failing to find that the Respondent was never an administrator of the estate of the appellant’s husband and that there was no such thing as “Luo Customary Law appointed Administrator” while arriving at its decision.

6. The Appeals Committee erred in law in failing to find that the transfer of South **Sakwa/Barkowino/4529 and 429** from the name of the deceased **Portas Owino** to that of the Respondent was illegal unprocedural and unlawful.

7. The ruling/judgment was against the weight of evidence.’’

2. The appeal was admitted on 3rd March 2016 and set down for hearing on 19th April 2016 when Mr. Odeny for the Appellant and Rashid Ogola Owino, the Respondent agreed to file written submissions. The Appellant's counsel and the Respondent filed their submissions dated 6th May 2016 and 2nd June 2016 respectively.

3. The dispute started when the appellant lodged a claim against the Respondent with Bondo Land Disputes Tribunal under case number 74 of 2008 over land parcel **South Sakwa/Barkowino/4529**. The dispute was heard as shown in the proceedings appearing between Pages 7 to 62 of the record. The tribunal award is at page 62 of the record in the following terms:

“a) Rashid Ogola Owino remains the administrator of Protus Owino’s estate as is established by customary law.

b) Margaret Orwa Opiyo to stay in the home but can leave if she wishes to any place but not to sell the land No. South Sakwa/Barkowino/4529 or 429.”

The Appellant was not satisfied and preferred her first appeal with Nyanza land disputes appeals committee in case No.049 of 2010. The appeals Committee observed that the suit land was registered in the names of the Respondent who was appointed the administrator of the estate of the late Protus Owino in accordance with Luo Customary Law and that the Appellant was the fifth wife to the late Protus Owino. The committee then ruled as follows:

“ Owing to the issues and findings listed above, the Provincial Appeal Committee, with the consensus of both parties have recommended that:-

The following persons be included in the registration plot No. South Sakwa/Barkowino/4529 (1.7HA)

- **Rashid Agola owino**
- **Margaret Orwa Owino**
- **Mathews Owino ID 22561361**
- **Abdalla Rashid Ochieng ID 2232342.”**

The Appellant was once again not satisfied and preferred the current appeal. This being a second appeal the court will only be concerned with issues of law and not fact in accordance with **Section 8(9) of the Land Disputes Tribunals Act No.18 of 1990** (now repealed).

4. The Appellant's counsel collapsed the seven grounds on the memorandum of appeal into three which he submitted on as follows:

a. That in view of the limitation of Tribunals jurisdiction **in Section 3(1) of Land Disputes Tribunal Act No.18 of 1990** (Repealed), the Appeals Committee decision that the land be registered in the names of four persons amounted to a decision of ownership which was ultra vires their mandate. The counsel referred the court to the decided case in **Kisumu HC.C. J.R. NO.60 of 2011. Joseph Ouma Adongo –V- Nyanza Land Disputes Appeals Committee.**

b. That both the Bondo Land Disputes Tribunal and Nyanza Land Disputes Appeals Committee approved the Respondent as the administrator of the estate of **Protus Owino Ochieng** estate on the basis of Luo Customary law which contravenes **Section 2, 4 and 45(i) of the Law of Succession Act Chapter 160 of Laws of Kenya**. That the ruling of the Appeals committee amounted to sanctioning an illegality as the Respondent had transferred the property of a deceased person to his names without obtaining a confirmed grant under the Law of Succession Act. That in terms of **Section 3 of the Judicature Act** chapter 8 of Laws of Kenya Luo customary law does not take

procedure over the Law of Succession Act which is the written law.

c. That the appeals committee erred in directing that the suit property be registered in the names of the persons who were neither parties before it or the Bondo Land Disputes Tribunal ostensibly by consent of the parties which consent has been disputed by the Appellant.

The Appellant therefore prays for the following;

a. That appeal be allowed and land parcels **South Sakwa/Barkowino/4529 and 429** be awarded to the Appellant.

b. That alternatively the title registrations of the two parcels of land be reverted back to the names of the deceased, **Portus Owino Ochieng** to be succeeded in accordance with the Law of Succession Act.

c. That the costs of the appeal be awarded to the Appellant.

5. The Respondent submitted that this being a second appeal, the Appellant can only deal with the issues of law. The Respondent referred to **Section 3(1)(b) of the Land Disputes Tribunal Act (repealed)** and submitted that the dispute having been about the use of the land and eviction attempt it was therefore within the jurisdiction of the tribunal as it concerns “**a claim to occupy or work on land.**” That the decided case cited by counsel for the appellant deals with title to land and has no relevance in this matter. That the appellant cannot raise the issue of his appointment as administrator under Luo customary law in view of **Section 9 of the Land Disputes Act** which states that a question of customary law to be deemed to be a question of fact. The Respondent further submitted that the Appeals Committee acted within the provisions of **Section 8(7) of the Land Disputes Tribunals Act** and its ruling was with the consensus of both parties. The Respondent finally submitted that the appeal lacks merit and ought to be dismissed with costs.

6. The following are the issues for the court’s determinations;

a. Whether the Appeal’s Committee had jurisdiction to entertain the dispute before it.

b. Whether the ruling of the Appeals Committee was ultra vires its Jurisdiction.

c. Which orders to issue

d. Who pays the costs.

7. The court has considered the records of appeal, the submissions of both parties and come to the following conclusions;

a. That from the translated versions of the Appellant’s sworn testimony before the Tribunal that appears at Page 54 of the record of appeal she took the matter to the tribunal because the Respondent was “**grabbing from me the said parcel South Sakwa/Barkowino429 which was jointly left for both of us by my husband Protus Owino Ochieng**” who died in 2000. That at page 56 of the record, the Appellant indicated that what she was seeking was “**land rights**” and further stated that the Respondent had done wrong to change the land registration without consulting her.

b. That the dispute before the Tribunal was not just one of a claim to occupy or work land which would be within the jurisdiction of the Tribunal under **Section 3(1) of the Act**, but was one of title and ownership to the parcels of land left by the late **Protus Owino Ochieng** upon his death in 2000.

c. That under the provision of **Section 2(1)** of the Law of Succession Act Chapter 160 of Laws of

Kenya, the succession of estates of all deceased persons who died after the commencement of the Act, which is 1st July 1981, shall be done in accordance with the provisions of the Act. That from the evidence adduced before the Tribunal, especially the statement of the Appellant, **Protus Owino Ochieng** died in the year 2000 and therefore the appointment of the administrator for his estate and the distribution of his estate had to be done in accordance with the Law of Succession Act. That the alleged appointment of the Respondent as the deceased's estate administrator reportedly under Luo Customary Law and his registration with the suit land not having been done in accordance with the provisions of the Law of Succession Act is illegal, irregular, unprocedural and hence null and void ab initio.

d. That in view of the foregoing the Bondo Land Disputes Tribunal and the Nyanza Land Disputes Appeals Committee erred in law in sanctioning or appearing to sanction the process through which the estate of the late **Protus Owino Ochieng** was transmitted without adhering to the provisions of the Law of Succession Act.

e. That though the **Nyanza Land Disputes Appeals Committee** ruling if implemented would add the name of the Appellant to the title of the land, the ruling touches an ownership and title of **South Sakwa/Barkowino/4529** which is beyond the jurisdiction of the Appeals committee as set out in **Section 3(1)** of the Land Disputes Tribunal Act (repealed) and hence null and void.

f. That the ruling also contravenes the provision of the Law of Succession Act on the dealings of the property of a deceased person which would in addition call for criminal sanctions.

8. That the Appellant has established her appeal on the ground that the matter before the Tribunal and the ruling made thereof by the Appeals committee was beyond their powers and contrary to the provisions of the Law of Succession Act. That the Appellant would ordinarily have been entitled to costs, but the court has noted that it is her action of taking her claim to the wrong forum that has precipitated, the situation she finds herself in. That therefore each party will bear their own costs. That the court therefore allows the appeal and the Nyanza Land Disputes appeals ruling of 4th August 2011 in case No.49 of 2010 is hereby set aside and substituted with the following orders:

a. That the registration of **Rashid Agola Owino**, the Respondent, with land parcels **South Sakwa/Barkowino/4529 and 429**, which were previously registered in the names of Protus Owino Ochieng who died in 2000 was done in contravention of the provisions of the **Law of Succession Act Chapter 160 Laws of Kenya** and is hereby cancelled.

b. That the Land Registrar do revert the title of the said parcels to the names of **Protus Owino Ochieng** (deceased) to be dealt with in accordance with the **Law of Succession Act**.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2016

In presence of;

Appellant Present

Respondent Present

Counsel M/S Omboto for Odeny for Appellant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2016

11/10/2016

Before S.M. Kibunja J.

Oyugi court assistant

M/s Omboto for Odeny for the Appellant

Court: Judgment dated and delivered in open court in presence of both parties and M/S Omboto for Odeny for Appellant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2016