



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEALNO.33 OF 2015

WAINAINA WAWERU.....APPELLANT

VERSUS

WAINAINA KAMANU

KEZIAH NJERI GACHANJA

CHARLES NGAMINI..... RESPONDENT

JUDGMENT

At all material times, the Appellant and the 1st Respondent were registered as the proprietor of all that parcel of land known as LR No. Dagoretti/Uthiru/T.232(hereinafter referred to as “the suit property”). The Appellant and the 1st Respondent were registered as proprietors of the suit property as tenants in common on 15th June 1970. On 9th October 1970, the name of the 1st Respondent was removed from the register of the suit property and replaced with the name of the 2nd Respondent. The Appellant and the 2nd Respondent became the registered owners of the suit property as tenants in common from that date.

On or about 2nd May 2001, the 1st Respondent lodged a claim against the Appellant and the 2nd and 3rd Respondents herein at Kikuyu Land Disputes Tribunal. The 1st Respondent claimed that in the year 1970, the Appellant who was jointly registered with him as tenants in common of the suit property sold his ½ undivided share in the suit property to the 2nd Respondent. The 1st Respondent claimed that he appeared before the Land Control Board with the Appellant and the 2nd Respondent for consent to transfer the said ½ undivided share in the suit property from the Appellant to the 2nd Respondent. The 1st Respondent claimed that the consent was duly granted by the Land Control Board for the said transaction. The 1st Respondent claimed that after the sale was approved by the Land Control Board, he handed over the original title deed to the Appellant to enable him effect the transfer of his share in the suit property to the 2nd Respondent. The 1st Respondent claimed that the Appellant brought a new title deed to him and caused him to believe that the Appellant had transferred his ½ undivided share in the suit property to the 2nd respondent in accordance with the agreement which had been reached between the Appellant and the 2nd Respondent. The 1st Respondent claimed that he kept the said title deed safely in the belief that the same was in his joint name with the 2nd Respondent. The 1st Respondent claimed that during this period, he continued to occupy his portion of the suit property where he had his residence while the 3rd Respondent who is related to the 2nd Respondent occupied and cultivated the portion of the suit property that the Appellant had sold to the 2nd Respondent after the Appellant and his mother demolished their houses on the property and relocated their residence to another place. The 1st Respondent claimed that all was well until sometimes in the year 2000 when the 1st and 2nd Respondents wanted to formally sub-

divide the suit property so that each can have a separate title. The 1st Respondent claimed that it is at this time that they discovered that when the Appellant was given the original title deed for the suit property so that he may transfer his ½ undivided share to the 2nd Respondent, he fraudulently transferred the 1st Respondent's share to the 2nd Respondent instead of his own share which remained intact. The 1st Respondent claimed that the Appellant thereafter once again without any notice, caused the suit property to be subdivided into two portions namely, Dagoretti/Uthiru/T.785 and T.786 of which the former was registered in the name of the Appellant while the latter was registered in the name of the 2nd Respondent. The 1st Respondent asked the Kikuyu Land Disputes Tribunal (hereinafter referred to as "the District Tribunal") to investigate and determine the legality of the Appellants actions and to proceed and issue appropriate orders to restore the suit property to its rightful owners. In his statement before the District Tribunal, the Appellant admitted that the 1st Respondent and he were jointly registered as owners of the suit property. The Appellant denied however that he sold his share in the suit property to the 2nd Respondent. The Appellant contended that he was still in possession of his half undivided share of the suit property. He claimed that the 3rd Respondent was occupying the same on a lease from him. The Appellant could not explain how the name of the 1st Respondent was removed from the register of the suit property and replaced with the name of the 2nd Respondent. He was also unable to explain why he neither consulted the 1st Respondent nor the 2nd Respondent when he caused the suit property to be subdivided. The Appellant who had admitted that the 1st Respondent was a joint owner of the suit property was also hard pressed to explain why he caused a portion of the suit property, namely, Dagoretti/Uthiru/T.786 to be registered in the name of the 2nd Respondent instead of the 1st Respondent.

The District Tribunal after hearing all the parties and their witnesses made a finding of fact that the Appellant had indeed sold his portion of the suit property to the 2nd Respondent and that he fraudulently transferred the 1st Respondent's ½ undivided share to the 2nd Respondent instead of his own share. The District Tribunal ordered that LR No. Dagoretti/T.785 rightfully belongs to the 1st Respondent and should be registered in his name after the cancellation of the Appellant's title over the same. The District Tribunal made a further order that LR No. Dagoretti/Uthiru/T.786 rightfully belongs to the 2nd Respondent and should remain in his name.

The Appellant was dissatisfied with the decision of the District Tribunal and appealed against the same to the Central Province Land Disputes Appeals Committee (hereinafter "the Appeals Committee"). The Appeals Committee heard the dispute afresh and confirmed the decision of the District Tribunal in a decision which was made on 16th August 2001.

The Appellant was not satisfied with the decision of the Appeals Committee and decided to appeal against the same to this court pursuant to section 8 (9) of the Land Disputes Tribunals Act No. 18 of 1990(now repealed). The Appellant has challenged the decision of the Provincial Appeals Committee on several grounds. The Appellant has contended that the Appeals Committee erred in admitting and hearing the appeal that was lodged before it when it had no jurisdiction to do so. The Appellant has also faulted the Appeals Committee for entertaining the appeal over a claim which was time barred. The Appellant has also contended that the Appeals Committee erred in entertaining the appeal while the Appellant had not been served with a claim and given an opportunity to respond to the same. The Appellant also faulted the Appeals Committee for giving extraneous orders which neither party had asked for.

The appeal was argued by way of written submissions. I have perused the record of appeal and considered the grounds of appeal and written submissions on record. An appeal lies to this court only on issues of law from the decision of the Appeals Committee. The Appellant has challenged the decision of the Appeals Committee on two main grounds. The first ground touches on jurisdiction of the Appeals Committee while the second ground is on a right to be heard. The Appellant has contended that the Appeals Committee entertained the appeal while it had no jurisdiction to do so. I find merit on this ground of appeal. I am in agreement with the Appellant that both the District Tribunal and the Appeals Committee had no jurisdiction to entertain the dispute that had been lodged by the 1st Respondent with the District Tribunal which touched on the ownership of the suit property and the subdivisions thereof,

LR No. Dagoretti/Uthiru/T.786 and T. 785. The District Tribunal and the Appeals Committee also had no jurisdiction to revoke or cancel the title that was held by the Appellant in respect of LR. No. Dagoretti/Uthiru/T.786.

The District Tribunal was established under the Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to only as “**the Act**”).The powers of the District Tribunal were clearly spelt out in the said Act. The District Tribunal could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act that the applicant has referred to in his submissions sets out the disputes over which the District Tribunal had jurisdiction as follows;

“.....**all cases of 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.”

It is clear from the foregoing that the District Tribunal did not have jurisdiction to determine disputes over ownership and/or title to land. The District Tribunal did not therefore have the power to declare the 1st and 2nd Respondents as the owners of the suit property and the 1st Respondent as the owner of LR No. Dagoretti/ Uthiru/T.785 which was registered in the name of the Appellant. The District Tribunal did not also have the power to revoke the Appellant’s title to LR No. Dagoretti/ Uthiru/T.785. It has been said on several occasions that jurisdiction is everything and without it a court or tribunal must lay down its tools. See, **the Lilian “S”** case cited by the Appellant. Jurisdiction cannot be assumed neither can it be conferred by agreement. As was stated in the case of **Desai-vs-Warsama[1967] E.A.351**, no court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are a nullity. Having come to the conclusion that the District Tribunal had no jurisdiction to entertain the claim that was brought before it by the 1st Respondent, it is my further finding that the proceedings before the District Tribunal and its decision made on 31st May 2001 were all nullities. If the said decision of the District Tribunal was null and void as I have already held, I am of the opinion that there was no valid decision which the Appeals Committee could have purported to uphold. If any authority is required to support that position, I would refer to the famous case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169**, in which Lord Denning stated as follows concerning an act which is a nullity at page 1172;

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

For the foregoing reasons, this appeal must succeed. That was an easy part to deal with. I have agonized on the appropriate order to make in this appeal. It is apparent on the material before me that the disposal of this appeal would not resolve the dispute between the parties. The appeal as can be seen from findings above has been determined merely on technical issues. There is an underlying issue which remains unresolved. The issue concerns the ownership of the suit property and the plots which came about after the subdivision thereof. The Respondents have submitted that serious injustice would be occasioned to them if the court was to allow this appeal and rest the matter there. The material that has been placed before me overwhelmingly points to the possibility of the Appellant having been involved in fraud in relation to his dealings with the suit property. I am in agreement with the Respondents that this court cannot close its eyes to the evidence of fraud placed before it. As much as I am in agreement with the Respondents that the parties should be given an opportunity to have their respective claims over the suit property determined on merit in a court of competent jurisdiction, I am of the view that these proceedings would not be the best forum to determine the said claims. I cannot convert the proceedings of the tribunal

which I have held to be a nullity into a suit before this court for the purposes of determining the dispute between the parties over the suit property.

I am of the view that all is not lost for the Respondents. I have noted that the Appellant is not in possession of the suit property or any portion thereof. The Appellant cannot forcefully take possession of the portion of the suit property in respect of which he has raised a claim. He will have to file a suit for the recovery thereof. I think that that would be the best forum for determining on merit the validity of the Appellant's claim over the portion of the suit property, namely, LR No. Dagoretti/ Uthiru/T.785 which was the subject of the tribunal proceedings.

In conclusion, I hereby allow the Appellant's appeal and overturn the decisions of the Appeals Committee and the District Tribunal made on 16th August 2001 and 31st May 2001 respectively. Due to the peculiar circumstances under which this appeal arose, each party shall bear its own costs of the appeal before this court and the proceedings before the two tribunals below.

Delivered and signed at Nairobi this 4TH day of November, 2016

S. OKONG'O

JUDGE

In the presence of

In person for the Appellant

Mr. Njogu for the Respondent

Kajuju Court Assistant