Warema v Nyamu (Environment and Land Appeal 72 of 2014)
[2015] KEELC 844 (KLR) (17 June 2015) (Judgment)

Austine Kihara Warema v George Gituku Nyamu [2015] eKLR

Neutral citation: [2015] KEELC 844 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL 72 OF 2014

L WAITHAKA, J

JUNE 17, 2015

BETWEEN

AUSTINE KIHARA WAREMA ..... APPELLANT

AND

GEORGE GITUKU NYAMU ..... RESPONDENT

JUDGMENT

Introduction

1. This appeal relates to an award of the Laikipia Lands Dispute Appeals Tribunal case No. 89 of 2007 made on 14th October, 2008.

2. The award appealed from was that:-

> "
>
> 4. Findings/Discussion/Reasons
>
> a) Both parties applied and were issued with title deeds for their individual parcels of land by the Land Registrar, Laikipia, viz:-
>
> (a) Appellant-George Gituku Nyamu-Uaso Nyiro/ Suguroi Block 6/5-area, 6.47 Ha inclusive of disputed area.
>
> (b) Respondent-Austine Kihara Warema-Uaso Nyiro/ Suguroi Block 6/168-Area, 1.4 Ha exclusive of the disputed area.

b) The RIM should be changed to conform to the boundary on the ground.

5. Verdict

Both parties to maintain their present land boundaries which have existed since demarcation time hitherto

1.

(a) George Gituku....

(b) Austine Kihara....

2. The District Land Registrar Laikipia is hereby ordered to amend the R.I.M to conform to the present boundary margin as the land presently.

6. Cost of the award

Both parties to meet their respective costs."

3. Aggrieved by the aforesaid award/decision, the appellant (Austine Warema Kihara) brought the current appeal on the grounds that the Appeals Tribunal erred in law in purporting to sit on appeal against a judgment of the court to wit, Nanyuki SPMC award case No. 31 of 2007; that the Appeals Tribunal erred in law by purporting to order amendment of the Registry Index Map (R.I.M) while it had no jurisdiction to do so and that the Appeals Tribunal erred in law by adjudicating on a matter outside its jurisdiction.

4. The appeal was disposed of by way of written submissions.

5. In the submissions filed on behalf of the appellant, it is reiterated that the Appeals Tribunal had no power to set aside or overturn the judgment of the District Tribunal whichhad already been adopted by the lower court. It is contended that given the fact that the award by the District Tribunal had been adopted by a court of competent jurisdiction, the proceedings that ensued at the Appeals Tribunal were res judicata the decision of the lower court.

6. The appellant urges this court to find that once a judgment has been entered by the lower court in accordance with the award of the District Tribunal, an appeal cannot be brought to challenge the award.

7. On whether the Appeal Tribunal had power to order amendment of the R.I.M, reference is made to Section 18 to 20 and Section 159 of the Registered *Land Act*, Cap 300 Laws of Kenya (now repealed) and submitted that amendment of the R.I.M is the preserve of Land Registrar and the High Court. The Provincial Land Disputes Appeals Tribunal is faulted for exceeding its mandate under the Land Disputes Tribunals *Act No. 18 of 1990* (now repealed).

8. Contending that the decision of the District Tribunal which was adopted by the lower court was fair in the circumstances of this case, the appellant urges the court to allow him to execute that judgment since it will conclusively end the dispute hereto.

9. In the submissions filed by the respondent, it is contended that the appellant has raised issues that should not be raised before this court, to wit whether the award of the District Tribunal having been adopted by the lower court could be challenged before the Provincial Land Disputes Appeals Tribunal.

The respondent contends that such an issue ought to have been raised before the Appeals Tribunal and not before this court.

10. It is pointed out that the Land Disputes Tribunals Act, gave parties to a dispute before the District Tribunal the right to appeal to the Appeals Tribunal and submitted that the respondent had a right to exercise that right. Explaining that the Appeals Tribunal had made it a requirement that an appeal to it be accompanied by the award and the decree adopting the award, the respondent submits that he cannot be faulted for having complied with that requirement.

11. It is pointed out that before moving to the Land Disputes Tribunal, the respondent had got the boundary fixed under Section 21 of Cap 300 and submitted that any person aggrieved by the decision of the Registrar ought to have filed an appeal to the Chief Land Registrar within 60 days or moved to the High Court.The appellant is faulted for havingmoved to the Tribunal instead of preferring an appeal against the decision of the Registrar or having filed a suit at the High Court.

12. The Provincial Appeals Tribunal is said to have concurred with the decision of the Land Registrar on the boundary dispute, hence right in its determination.

13. Contrary to the contention by the appellant that the tribunal had no powers to make the orders it made, the respondent submits that the tribunal had jurisdiction to order that the boundaries remain the way they were.

14. With regard to costs of the appeal, it is submitted that in the event that this court finds that the Appeal Tribunal erred and made orders out of its jurisdiction, it should not penalize the respondent for the mistakes of the Tribunal. Instead it should order each party to bear his own costs.

Analysis and determination

15. It is not in dispute that the subject matter before the Land Disputes Tribunal and the Appeals Tribunal was registered land. That being the case, the sole issue for this court's determination is whether the District Tribunal and by extension the Appeals Tribunal had jurisdiction to hear and determine a dispute concerning registered land?

16. In answering this question, I adopt the decision in the case of Mateo Githua Ngurukie vs. Hon. Attorney General and 5 Others; Nyeri High Court Civil Suit No. 206 of 1999 where Ombwayo J., stated:-

> "Over and again the Court of Appeal and High Court have held that the Land Dispute Tribunal lacks jurisdiction over registered land especially where the matter at hand touches on title of land. (See Wachira Wambugu Case (supra) and Julius Mburu Mbuthia case, supra). It follows therefore that the instant issues are not Res judicata due to the fact that they were deliberated upon and determined by an incompetent tribunal that lacked jurisdiction over the same...
>
> In the case of Vincent Kipsongok Rotich v. Orphah Jelangat Ngelechei (2014) e KLR supra, the learned judge (Munyao J.), declined to declare the suit therein res judicata despite the existing decision/order that had been made by the LDT and adopted by the Hon. Magistrates Court."

17. Although the above determination suffices to determine the appeal, there is a question of law raised by counsel for the appellant that I need to address to wit, whether the Tribunal had jurisdiction to entertain an appeal after the award of the District Tribunal had been adopted by a Magistrate's court under the Act.

18. In answering this question, I begin by pointing out that the law did not contemplate a situation whereby the award of the tribunal would be adopted as a judgment of the lower court before the time limited for appeal had expired. If the Appeals Tribunal had made it a requirement to have an appeal preferred to it accompanied by a decree of the lower court adopting the award of the District Tribunal before admitting the appeal, then that, in my view, was a serious misdirection. From the record before me, it appears that the appeal filed before the Appeals Tribunal was filed out of time. The same was filed on 8th October, 2007 when the time within which it ought to have been filed lapsed on 3rd October, 2007. That being the case, the Appeals Tribunal was not properly seized of the Appeal. Notably, the Land Disputes Tribunals *Act, No.18 of 1990* does not have a provision for extension of time within which the appeal from the District Tribunal ought to have been filed. If the decision of the District Tribunal is adopted after the time reserved for appeal is over, then the Appeals Tribunals would clearly lack jurisdiction to entertain the appeal. Indeed as submitted by advocate for the appellate, the Tribunal lacked jurisdiction to set aside the decree of the lower court.

19. Noting that the boundary that is the subject matter of this appeal was fixed by the Land Registrar as early as 17th October, 2007 I direct that the parties abide by that decision until and unless it is lawfully set aside by a court or a body with competent jurisdiction to do so. In this regard see Section 21 of the Registered *Land Act*, (now repealed) which, inter alia, gave power to the Land Registrar to fix boundaries to registered land. The Section provides as follows:-

> " 21.
>
> (2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.
>
> (3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary torecord his decision.
>
> (4) No court shall entertain any action or otherproceedings relating to a dispute as to the boundaries of registered land unless theboundaries have been determined as provided in this section."
>
> (5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit." (Emphasis supplied)

20. As both parties to this dispute contributed to the direction this dispute took; the appellant by first initiating the dispute to a tribunal without jurisdiction and the respondent by failing to challenge that action in the proper forum, say the High Court to have the proceeding quashed, I agree with the proposal of the respondent that parties bear their own costs of the appeal.

21. The upshot of the foregoing is that the appeal is dismissed and parties are ordered to bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 17TH DAY OF JUNE, 2015.

L N WAITHAKA

JUDGE

In the presence of:-

Mr. King'ori h/b for Mr. Karweru for the applicant

Mr. Njuguna for h/b for Mr. Kamange for the respondent

Court assistant - Lydia