Ojwang v Attorney General & 7 others (Civil Appeal 8 of 2018) [2022] KECA 850 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KECA 850 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 8 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MAY 13, 2022

BETWEEN

TOM LUKURU OJWANG ..... APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

BONIFACE KACHINA ..... 3RD RESPONDENT

ERNEST SHIYUKA OMURWA ..... 4TH RESPONDENT

JULIUS INGWESI OMURWA ..... 5TH RESPONDENT

DISMAS BOYI OMURWA ..... 6TH RESPONDENT

CHARLES MAKOKHA MURWA ..... 7TH RESPONDENT

JAMES AMANYA OMURWA ..... 8TH RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Kakamega (N. A. Matheka J) dated 24th January, 2018 in ELC Petition No. 22 of 2016)

JUDGMENT

JUDGMENT OF MUMBI NGUGI, JA.

1. In his petition before the Environment and Land Court (ELC) in Kakamega dated 24th November, 2016, the appellant alleged violation of his constitutional rights in relation to a property known as North Wanga/Kholera/588 that had been the subject of a decision of the Matungu Land Disputes Tribunal rendered on 6th September 2004. The petitioner alleged that his right to a fair hearing had been breached, that he had been subjected to illegal and irregular proceedings, and there had been breach of

rules of natural justice with respect to him. He prayed for orders of fair administrative justice (sic) and a restoration and protection of his fundamental rights to own property. He also sought such damages as the court would deem fit to give.

2. In his affidavit sworn in support of the petition on 24th November 2016, the appellant averred that his father, one Sylvester Ojwang Khachina, had bought the suit land at a public auction from the Kenya Commercial Bank. The land had been charged to secure a loan of Ksh. 15,000 advanced to Sylvester Ojwang Khachina's brother, one Omurwa Khachina. When Omurwa Khachina failed to repay the loan, the appellant's father bought the property and a title was issued to him. Upon the demise of Sylvester Ojwang Khachina, the appellant was registered on 22nd April 1998 as the proprietor on transmission and was issued with a title deed.

3. The appellant averred that sometime in 2016, he learnt that the 3rd to 8th respondents, children of the late Omurwa Khachina, had commenced proceedings before the Matungu Land Disputes Tribunal claiming the suit land and alleging that the appellant's father had acquired it fraudulently. The Tribunal had rendered its decision on 6th September, 2004 restoring the suit land to the name of the 4th to 8th respondents' father, the late Omurwa Khachina. The award was adopted as a judgment of the court vide Kakamega Resident Magistrate's Court Award No. 73 of 2004 on 5th May, 2006.

4. In its decision, the ELC dismissed the appellant's petition with costs, holding that he had not established violation of his constitutional rights, and that the issues raised in the petition were *res judicata*.

5. The appellant was aggrieved by the decision of the ELC. In his Memorandum of Appeal dated 12th February, 2018, he impugns the judgment of the ELC on seven grounds. These are that the court erred in law and fact in finding that: a decision of a Land Disputes Tribunal over titled property commenced without jurisdiction is a good judgment merely because it was not timeously challenged; an award of a Land Disputes Tribunal commenced without jurisdiction can and did gain legitimacy once it was adopted by the Chief Magistrate's Court in exercise of its administrative function of adopting and implementing the award; under the Land Disputes Tribunal Act No. 18 of 1990, the Tribunal had and properly exercised jurisdiction over all land in Kenya including titled land, which misdirection resulted in holding that jurisdiction issues raised were res judicata; a succession court exercising its statutory jurisdiction under Cap 160 was a proper forum to address the propriety or otherwise of an asset of an estate that was acquired through a flawed process, which misdirection led to the conclusion that failure to challenge the decision meant forfeiture of the appellant's rights to question the process through which he lost the suit land.

6. The appellant further alleged that the ELC erred in failing: to appreciate that jurisdiction in civil disputes is key and can be raised either in an application for review or in a constitutional petition; and to appreciate previous holdings that Land Disputes Tribunals had no jurisdiction over titled land and any award purporting to confer such jurisdiction was a nullity ab initio. Further, that the ELC erred in adopting a narrow interpretation of Article 23 of the *Constitution*; and in failing to appreciate the general provisions of the Constitution and the methods of enforcement which, if applied, would have led to the quashing of the award of the Tribunal and its adoption by the Chief Magistrate's Court.

7. Finally, the appellant contended that the ELC erred in law and fact in placing reliance on the *Civil Procedure Act* and thereby invoking the doctrine of *res judicata* to dismiss the petition while ignoring sections 18 (a) (vi) (c) — (d) and section 19(2) (the appellant does not indicate the statute he refers to in this ground) to invoke natural justice over procedure laid down by the *Civil Procedure Act*, which is expressly excluded, as a result of which the ELC arrived at an unjust decision.

8. Under Rule 29(1) of the *Court of Appeal Rules*, we are required, as the first appellate court, to re-appraise the evidence before the trial court and to draw our own inferences of fact. In *Sumaria & Another v Allied Industries Ltd* (2007) KLR 1 this Court held that:

> " Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did."

9. In its judgment, the ELC analysed the history of the dispute between the appellant and the 3rd to 8th respondent and observed as follows with regard thereto:

> " The dispute herein commenced in the year 2004 before the Matungu Land Disputes Tribunal constituted under the then Land Disputes Tribunal Act No. 18 of 1990 (now repealed). The 4th respondent and his siblings were the claimants against the petitioner and another. The dispute concerned the piece of land N/Wanga/Kholera/588. The petitioner participated fully in the said proceedings. The said tribunal rendered its decision dated 6th September 2004 which was filed in court as Kakamega CMCC Award No. 73 of 2004. The said award was adopted as judgment of court on 5th May 2006. The petitioner did not challenge the said decision of the tribunal either through the appellate procedure provided under the said Land Disputes Tribunals Act No. 18 of 1990 or by judicial review. The land N/Wanga/Kholera/588 was restored to the name of the 4th to 8th respondents' deceased father necessitating succession proceedings."

10. Regarding the succession proceedings, the ELC observed that:

> The succession proceedings were undertaken in Kakamega High Court Succession Cause No. 572 of 2008 wherein the petitioner raised an objection which he failed to prosecute. The grant was confirmed and the said land vested into the names of the 4th to 8th respondents in specific shares. The petitioner then returned to the lower court in the said Kakamega CMCC Award No. 73 of 2004 in 2016 with an application for review and for injunction which application was on 19th September 2016 dismissed with costs. The petitioner then filed this petition before this court for hearing and determination and did not appeal the decision from Kakamega High Court Succession Cause No. 572 of 2008 which had competent jurisdiction to entertain his objection. He also did not challenge the decision of the tribunal or its adoption by the court as a judgment decision by appeal or through judicial review which judgment remains in place to date."

11. The ELC concluded that the petition before it was *res judicata*, stating that:

> " The plea of res-judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward (in the instant case the objection raised by the petitioner in the Kakamega High Court Succession Cause No. 572 of 2008). In that case, the court gave the petitioner herein time of 90 days to invalidate the title sought to be inherited by the respondents [when] he did not, the court went ahead and distributed the

suit land between the 3rd -8th respondents. Indeed Judge S. J. Chitembwe on the 19th March 2013, ruled as follows:

"The objector is given 90 (ninety days) to take whatever action he would wish to take in respect to the title deed issued to the petitioner's father and the proceedings before the Land Disputes Tribunal".

12. The ELC noted that the doctrine of res judicata was applicable to the petition before it. It observed that:

> " For these reasons the court finds that the petitioner is debarred by application of the doctrine of res judicata. It seeks to circumvent the law which then required the petitioner to challenge the decision by appeal or through judicial review. The petitioner did not take advantage of the said avenues of redress then available to him and he not be allowed to use *the constitution* as a cover up to re-open a closed matter. The doctrine of res judicata requires that there should be an end to litigation in that where a court of competent jurisdiction has rendered a conclusive decision on a matter, parties should not be allowed to litigate over the same issues again. Res judicata helps avoid conflicting decisions over the same issues and gives finality to judicial decisions."

13. While the appellant has raised several grounds of appeal before us, the crux of his appeal centres on the finding of the ELC that his Petition raised issues that were res judicata. Section 7 of the *Civil Procedure Act* provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided."

14. Contrary to his averments at paragraphs 9 and 10 of his affidavit in support of the petition where he suggests that he only learnt in early 2016 that he had been dispossessed of the suit land, the appellant had participated in the proceedings before the Land Disputes Tribunal in 2004. He had given evidence before it, and was aware when the Tribunal's decision was rendered and thereafter adopted as an order of the court. He did not then appeal to the Provincial Appeals Committee, nor did he file judicial review proceedings in the High Court which had the jurisdiction to review the orders of the Tribunal and address any issues that the appellant could have raised, including whether or not the Tribunal had the requisite jurisdiction to hear the matter.

15. These avenues were open to the appellant under the provisions of the said Act. Section 8 (1) of the *Land Disputes Tribunal Act* (now repealed) provided that:

> (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 constituted for the province in which the land which is the subject matter of the dispute is situated".

16. Section 8(9) of the Act provided the jurisdiction of the High Court on points of law as follows:

> (9) Either party to the appeal may 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".

17. The appellant also had the option of filing judicial review proceedings to quash the decision of the Tribunal if he was of the view that it had entertained and rendered a decision on a matter in which it had no jurisdiction. Additionally, the appellant had the opportunity in 2008 to ventilate the issues that he raised in his petition when he was given 90 days in Kakamega High Court Succession Cause No. 572 of 2008 to take any action he deemed appropriate. Indeed, in that succession cause, as averred by the 4th respondent before the ELC, Ernest Shiyuka Omurwa, in his affidavit sworn on 1st March 2017, it is the appellant who issued a citation to the respondents to file the succession cause touching on the suit property.

18. It must be acknowledged that the appellant is correct when he contends that the Tribunal had no jurisdiction to deal with the issues pertaining to the suit land in this case. Indeed, in *Joseph Kirui v Sally Jeptoo Keittany and Mohammed Kiptarus Keittany (administrators of the Estate of Said K. Keitany (deceased)* Civil Appeal No. 81 of 2013, this Court recently held that:

> "19...The jurisdiction [of the Tribunal] was conferred under section 3(1) of the Land Disputes Tribunal Act, 1990 (now repealed). The section provided that:
>
> 3(1) Subject to the 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.
>
> 20. The section thus limited the Tribunal's jurisdiction to boundary disputes, claims to use and work land, and questions of trespass to land."

19. This Court therefore held in that case that the decision of the Tribunal purporting to direct the respondent to transfer part of his land to the appellant, and at what price, was made without jurisdiction and was therefore null and void. Accordingly, this Court upheld a decision of the High Court on a petition alleging violation of the respondent's constitutional rights.

20. A notable distinction between the Joseph Kirui v Sally Jeptoo Keittany and Mohammed Kiptarus Keittany (administrators of the Estate of Said K. Keitany (deceased) case above and this case is that the uncontroverted evidence before the High Court was that the respondent in the latter case had not been served with the notice setting the date for the adoption of the Tribunal's decision before the Magistrate's Court. He had only learnt of the adoption when proceedings were instituted against him.

21. In this case, the appellant was an active participant in the proceedings before the Tribunal; he was a participant in succession proceedings in which he was given an opportunity to litigate his claim; he had more than 10 years between the decision of the Tribunal and filing of the Petition leading to the present appeal, and at least three opportunities to bring proceedings either on appeal or by way of judicial review proceedings to raise the matters he purported to raise in the petition. In my view, the ELC cannot be faulted for finding that the issues raised in the petition were res judicata.

22. I appreciate that the assumption of jurisdiction under the repealed Land Disputes Tribunal Act by tribunals established under the said Act often led to injustice, for the members tended to overreach and deal with matters that were clearly outside their jurisdiction. Where a party did not act expeditiously and take the appropriate steps to set aside or quash the decision of the Tribunal, a lot of injustice would result. Unfortunately, however, and as has been recognized by this Court, such injustice cannot always

be remedied. In its decision in *Sapientia Khasatshi Shibachi v Boaz Ashiono Shisanya* [2015] eKLR this Court cited with approval the sentiments expressed in *Callen Magoma Omari v. Suneka Land Disputes Tribunal & Others*, Civil Appeal No. 87 of 2012 that:

> " The Tribunals constituted all over the country under the repealed Land Disputes Tribunal Act hardly appreciated the scope of their jurisdiction. We know this from the many appeals that have come to the High Court and this Court from their decisions. To the best of our knowledge, they adjudicated on all claims placed before them. In the process, they caused grave injustice in many cases. Thank God they are no more, the Land Disputes Tribunal Act having been repealed. Although we are aware of those injustices and in the present case it is manifest that the Tribunal had no jurisdiction to entertain a claim of title to land, we have no choice but to dismiss this appeal. This is because we entirely concur with the learned Judge that public policy demands that litigation must come to an end even where, at no fault of the court, justice has not been done. To allow this appeal and uphold the appellant's claim will open a Pandora's box and set a dangerous precedent that will lead to the resurrection of numerous determined cases in respect of administrative bodies not only under the Act but also in other areas. That will create havoc in the country."

23. I believe I need say no more on the issue of the Tribunal's zeal in exceeding its jurisdiction and the consequences thereof.

24. The appellant has also faulted the ELC for not finding in his favour with regard to his contention that there were violations of his constitutional rights. From my perusal of his petition and the averments in his affidavit, there was no evidence before the ELC that could lead to a finding of violation of the appellant's constitutional rights. The necessity for a party alleging violation of rights to plead with specificity and precision the provisions of *the Constitution* that have been violated, and the manner of violation, is now old hat. I need not rehash the holding of this Court in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

25. In view of my findings above, I would dismiss the appeal. However, in light of what I have stated above with regard to the jurisdiction of the Tribunal, I would direct that each party bears its own costs of the appeal.

JUDGMENT OF KIAGE, JA.

1. I have read in draft the judgment of my learned sister Mumbi Ngugi, JA. I am in full agreement and need not add a word.

2. As Tuiyott, JA. is of the same view, the appeal is dismissed in the terms proposed by Mumbi Ngugi, JA

JUDGMENT OF TUIYOTT, JA.

1. I have read in draft the judgment of my learned sister Mumbi Ngugi, JA. I am in full agreement and need not add a word.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I confirm that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR