IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 4 OF 2016

BETWEEN

ALFRED SAGERO OMWERI.....APPELLANT

AND

KENNEDY OMWERI ONDIEKI.....RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Kisii (S. Okong'o, J), dated 17th July, 2015

in

ELC No. 266 of 2012)

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JUDGMENT OF KIAGE, J.A

The appellant was the registered proprietor of a parcel of land known as LR No. Ekerubo Settlement Scheme/12 ("Plot No. 12"). Through a Plaint filed in the Land and Environment Court at Kisii, the appellant averred that on or about 14th January 2009, the respondent lodged a claim against him before Borabu District Land Disputes Tribunal ("the tribunal") with respect to Plot. No 12. On 10th February 2009, the tribunal awarded the respondent a portion of Plot No. 12 measuring 18.5 Hectares acres. The tribunal's decision was duly adopted by the Resident Magistrate's court at Keroka in **Misc. Civil Suit No. 16 of 2009** as a judgment of that court on 18th June, 2009. A decree was subsequently issued on 18th June 2009, which the respondent proceeded to execute. The execution caused Plot No. 12 to be sub-divided into two (2) portions namely, LR No. Ekerubo Settlement Scheme/158 ("Plot No. 158") and LR No. Ekerubo Settlement Scheme/ 159 ("Plot No. 159"). The respondent then caused Plot No. 159 which measured 2.02 Hectares or 5 acres to be registered in his name.

The appellant contended that the sub-division of Plot No. 12 and the creation of Plot No. 158 and Plot No. 159 were carried out fraudulently; that he was not served with the documents relating to the claim at the tribunal; that the decision of the tribunal was null and void to the extent that it interfered with the sanctity of his title over Plot No. 12; and the adoption of the same by the Resident Magistrate's Court was also null and void as it amounted to an infringement on his right to own property. He sought the intervention of the court and prayed for the following orders;

i) A declaration that the appellant was the lawful owner of land parcel No. Ekerubo Settlement Scheme/159.

ii) An order that the Nyamira Land Registrar do cancel the certificate of title issued to the defendant in respect of land parcel No. Ekerubo Settlement Scheme/159 and proceed to register the appellant as the lawful owner of the same and to issue him with the relevant certificate of title.

iii) A declaration that the decision of Borabu Land Disputes Tribunal in case No. 001 of 2009 was void and unconstitutional.

iv) An injunction to restrain the respondent by himself or through his servants, agents and/or any other person claiming under him from interfering with the appellant's quiet possession of land parcel No. Ekerubo Settlement Scheme/159.

v) The costs of the suit to be paid by the respondent.

vi) Any other relief that the court may deem fit to grant.

In response, the respondent filed a Statement of Defence contending that he is the lawful owner of Plot No. 159. He denied acquiring Plot No. 159 fraudulently. It was his assertion that he was in occupation of Plot No. 159 since the year 2000. The said occupation was done in his capacity as a purchaser thereof from the appellant, who is his uncle. The respondent claimed that the appellant acquired Plot No. 12 through his financial assistance and in consideration thereof, the appellant agreed to give him a portion of the said parcel of land measuring 5 acres. The agreement that led to the transaction was made orally and was later reduced into writing via an agreement dated 6th December 2006. Subsequent to the acquisition of Plot. No 12, the appellant allocated him a portion thereof measuring 5 acres pursuant to the aforesaid agreement.

In a twist of events, in the year 2008, the appellant's wife blocked the respondent's access to the main road from the portion of land allocated to him. The appellant further demanded that the respondent surrenders one (1) acre from the five (5) acres that he had given him. As a result, the respondent successfully lodged a claim against the appellant at the tribunal. Once the decision was adopted as a judgment of the court, the appellant did not prefer an appeal against the same. Pursuant to the decree issued by the Resident Magistrate's court, the respondent acquired title to Plot No. 159 on 12th August 2009.

That much emerged from the testimonies of the parties before S. Okong'o, J. who then delivered a judgment on 17th July 2015 and dismissed the suit, as he was not satisfied that the appellant had proved his case against the defendant to the required standard. Consequently, he held that the appellant was not entitled to the reliefs sought in the Plaint.

Aggrieved by that judgment, the appellant filed this appeal based on 3 grounds, condensed as, the learned Judge erred in law and fact by;

> ***a) Dismissing the appellant's suit after making a finding that the Tribunal lacked jurisdiction to grant the reliefs it purported to grant the respondent.***
>
> ***b) Finding that the process through which the respondent obtained title was lawful.***

When the appeal came up for hearing, learned Counsel **Mr O.H Bunde** appeared for the appellant but there was no appearance for the respondent. Counsel for the respondent had, however filed its written submissions together with a bundle of authorities.

Mr. O.H Bunde submitted that the learned Judge erred in law and fact by dismissing the appellant's suit even after finding that the tribunal lacked jurisdiction to grant the reliefs sought. Therefore if the process had no legal foundation then the end result could not be legal. He admitted that a Judicial Review application filed by the appellant at the High Court was dismissed.

The firm of Nyamorongi & Co. Advocates for the respondent in their submissions argued that the essence of the suit was to attack the tribunal's decision as being null and void. Since the appellant had filed a Judicial Review on the same grounds but later withdrew it, by virtue of **Order 3 Rule 4** of the **Civil Procedure Rules**, it was not open to him to advance similar claims in the subsequent suit. Further, the appellant failed to establish the allegation of fraud.

Counsel further contended that although the repealed **Land Disputes Tribunal Act** provided that any party aggrieved by the decision of a Tribunal was at liberty to appeal within 30 days to the Provincial Appeals Committee, no such appeal was made by the appellant. Moreover, the Resident Magistrate's Court was under duty to adopt the decision of the tribunal as a judgment of the court, as held in **CHEGE MACHARIA V FRANCIS KIMANI KIRIMIRA [2015] eKLR**. Finally, no substantive relief was set out among the reliefs sought in the Plaint on the basis of which the adoption of the decision of the tribunal could be impugned. We were urged to dismiss the appeal.

As the first appellate Court, I am cognisant of our duty as was spelt out in **SELLE -VS- ASSOCIATED MOTOR BOAT CO. [1968] EA 123**;

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

Upon perusing the record of appeal and hearing the submissions made by Counsel, I have distilled the matters to be considered as whether the learned judge erred; by dismissing the appellant's suit after making a finding that the tribunal lacked jurisdiction to grant the reliefs to the respondent and by holding that the process through which the respondent obtained title was lawful.

The learned Judge held that the tribunal had jurisdiction to determine the claim in as far as it concerned the alleged trespass by the appellant and his wife. However, the tribunal fell into error and granted reliefs that it had no power to grant. In particular, it had no jurisdiction to rectify the register for Plot No.12 by directing that Plot No. 12 be sub-divided and a portion thereof measuring 5 acres transferred to the respondent. That power was reserved for the court by dint **section 143** of the **Registered Land Act** (now repealed).

The exact wording of the verdict of the tribunal on this aspect was as follows;

> ***"Having listened to plaintiff, defendant and their witnesses the court ruled that the plaintiff who is Kennedy Omweri Ondieki should get his five acres (5 acres) and have access road to the main road……..We therefore request the honourable court to order the executive officer to sign transfer forms and the relevant documents on behalf of the defendants."***

It is clear from the foregoing excerpt that the decision of the tribunal had the effect of conferring ownership rights to land that was duly registered in the name of the appellant. This was in excess of its jurisdiction which was limited under **section 3 (1)** of the **Land Disputes Tribunal Act** (now repealed). The tribunal exceeded its mandate as provided for by the law was applicable at the time and therefore the decision of the tribunal was null and void *ab initio*. The Resident's Magistrate's subsequent adoption of the same could not sanitize the illegality nor inject any essence of legality into the decision. It remained null and void and no legal effect on that aspect. I would adopt with approval the dicta of J.M. Mutungi, J. in **REPUBLIC V CHAIRMAN MOSOCHO LAND DISPUTES TRIBUNAL & 2 OTHERS [2017] eKLR**;

> ***"[T]he 1st respondent acted in excess of its mandate and jurisdiction and consequently its decision was null and void and therefore amenable to judicial review. The decision of the 1st respondent being null and void there was no valid decision that the 2nd respondent could properly adopt as a judgment of the court. Even if the decision had infact been adopted as a judgment it would be inconsequential as no interest or right could flow from a decision that is itself a nullity. Such judgment would be liable to be quashed if an appropriate application is made as in the instant matter."***

Be that as it may, that was not the end of the matter. The learned Judge proceeded to consider the effect of the plaintiff failure to appeal against that decision of the tribunal to the Provincial Appeals Committee and his failed attempt to challenge the decision of the tribunal and its adoption as a judgment of the court in the High Court thorough judicial review. His application for leave was dismissed by Musinga J. (as he then was) on 12th October 2009, and the learned Judge held that it followed that the decree that was issued by the Resident Magistrate's court was not reviewed or set aside. In effect the appellant failed, to invoke the court's jurisdiction to declare the same invalid or void.

The learned Judge observed that the decision of the tribunal ceased to exist upon adoption of the same by the Resident Magistrate's Court, as it subsequently was replaced by the decree. Hence the declaration the appellant sought would be futile as it would have no effect since the decree that emanated from was still intact as an unchallenged decree. He correctly held that a court of law will not make "an idle and ineffectual order". I concur with this self-evident assertion and affirm the same consistent with holdings by this Court in various cases, including **ERIC V. J. MAKOKHA & 4 OTHERS V LAWRENCE SAGINI & 2 OTHERS [1994] eKLR**;

> ***"One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes."***

See also RUTH NYAMBURA CHUCHU & 2 OTHERS V STEPHEN GATHOGA CHUCHU ALIAS STEPHEN MUNGAI GITHU [2015] eKLR, ALUOCH POLO ALUOCHIER V ATTORNEY GENERAL [2018] eKLR and RAYTHEON AIRCRAFT CREDIT CORPORATION & NAC AIRWAYS LIMITED VS AIR ALFARAJ LIMITED [1998] eKLR.

On the crucial question of whether or not the respondent's title was obtained fraudulently, I echo the learned Judge's holding that the closure of the register for Plot No. 12 upon sub-division thereof that gave rise to Plot No. 158 and Plot No. 159 was carried out pursuant to the decree. Since the same had not been set aside, varied or declared void, the title issued to the respondent pursuant to it cannot be said to be fraudulent. As the appellant did not provide more or any evidence of the alleged fraud, the learned Judge did not err in his holding.

At any rate, considering the facts established before the trial Court as leading to the respondent's acquisition of title to the disputed land, my fidelity to the doing of substantive justice untrammelled by niceties and technicalities of procedure leave me persuaded that the learned Judge's decision was fair and conduces to the day of justice between the parties. I would therefore not disturb that decision.

This appeal has no merit and I would dismiss it with costs to the respondent.

As Makhandia, JA concurs, orders shall issue accordingly under ***Rule 32(3),*** Odek, JA having died before this Judgment could be delivered.

Dated and delivered at Kisumu this 31st day of January, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF ASIKE-MAKHANDIA, J.A

I have had the benefit of reading in draft the Judgment of Kiage, J.A. I wholly agree and concur with the contents. I have nothing useful to add.

ASIKE-MAKHANDIA

…….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.