



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, WARSAME & M'INOTI, J.J.A)

CIVIL APPEAL NO. 37 OF 2015

BETWEEN

STANLEY ATIRA ODERA.....APPELLANT

AND

JOHNSTONE ODERA AMBULULI.....1<sup>ST</sup> RESPONDENT

FRANCIS OMINDE.....2<sup>ND</sup> RESPONDENT

ISMAEL MULAMA.....3<sup>RD</sup> RESPONDENT

NGESA YAYA.....4<sup>TH</sup> RESPONDENT

JACKSON ABULI.....5<sup>TH</sup> RESPONDENT

WASHINGTON KHWALE.....6<sup>TH</sup> RESPONDENT

*(An appeal against the Judgment and Decree of the High Court of Kenya at Kakamega (Chitembwe J.) dated the 9<sup>th</sup> January, 2015*

*in*

*CIVIL CASE NO. 128 of 2009)*

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**JUDGMENT OF THE COURT**

**STANLEY ATIRA ODERA**, (appellant) brought this appeal against the judgment and decree of the High Court of Kenya at Kakamega (Hon. Mr. Justice J. Chitembwe) delivered on 9<sup>th</sup> January, 2015.

Briefly the facts of this appeal are that, **JOHNSTONE ODERA AMBULULI** (1<sup>st</sup> respondent) was registered as owner of all that parcel of land known as E.WANGA/ISONGA/2413 measuring approximately 16 acres. The appellant who is the son of the 1<sup>st</sup> respondent, sued the 1<sup>st</sup> respondent in Mumias Land Disputes Tribunal claiming a portion of the 1<sup>st</sup> respondent aforesated parcel of land. The 1<sup>st</sup> respondent did not enter appearance in the case before the Tribunal and the Tribunal ruled that the appellant and his brothers were to get a portion measuring 10 acres from the 1<sup>st</sup> respondent's land. The 1<sup>st</sup> respondent filed an appeal against that ruling in the Appeals Committee; however, his appeal was dismissed. The 1<sup>st</sup> respondent filed another appeal before the High Court sitting at Kakamega, which appeal was dismissed for want of prosecution.

Notwithstanding the above, the 1<sup>st</sup> respondent proceeded to sub-divide his parcel of land and sold it to the 2<sup>nd</sup>-5<sup>th</sup> respondents, with the 6<sup>th</sup> respondent purchasing a portion from Christine Namalwa who had bought from the 1<sup>st</sup> respondent. It is these actions by the 1<sup>st</sup> respondent that led to the appellant filing a suit before the High Court. In his case the appellant claimed that he was entitled as beneficial owner to 10 acres as ordered by the Mumias Land Disputes Tribunal. The appellant sought a declaration that the subdivision was unlawful and rectification of the register to cancel the new titles as well as an order of eviction of the respondents from the 10 acres. The respondents filed a joint statement of defence against the appellant's claim. The 1<sup>st</sup> respondent disputed the authority of the Disputes Tribunal to deal with the

matter and averred that it had no jurisdiction to entertain disputes pertaining to ownership of land. The High Court after hearing the matter agreed with the 1<sup>st</sup> respondent that the Disputes Tribunal lacked jurisdiction to force the respondent to sub-divide his land and transfer 10 acres to the appellant.

The appellant was aggrieved by that decision and he preferred this appeal against the entire judgment raising five grounds of appeal in his memorandum of appeal. When the matter came up for hearing before us the appellant, who appeared in person, submitted that the land in question belonged to his father. He further submitted that he had won three cases that is the case before the Disputes Tribunal and the two subsequent appeals before the Appeals Committee and the High Court. The appellant contended that he was claiming the land as a son of the 1<sup>st</sup> respondent and that the land was family land. He stated that all the other respondents apart from his father were purchasers for value. The 1<sup>st</sup> respondent who also appeared in person urged us to dismiss the appeal arguing that the land measured 14 acres and he has since sold 10 acres and remained with only 4 acres. The 2<sup>nd</sup> respondent on his part simply stated that he has since sold his parcel to Alex Owola. The 3<sup>rd</sup> respondent submitted that he bought 2 acres from the 1<sup>st</sup> respondent in 2004 and fully paid for the same. He further submitted that he stays in the parcel he bought. The 4<sup>th</sup> respondent submitted that he bought 2 and 1/2 acres from the 1<sup>st</sup> respondent wherein he does farming. He further stated that he is in possession of the title deed of the land he bought. The 5<sup>th</sup> respondent also stated that he bought 2 and 1/2 acres from the 1<sup>st</sup> respondent and he has the title deed thereof. The 6<sup>th</sup> respondent on his part submitted that he bought 2 and 1/2 from a lady called Namalwa who bought it from the 1<sup>st</sup> respondent. He also adopted his submissions filed in court on 17<sup>th</sup> July, 2010. In rejoinder the appellant disputed that the 1<sup>st</sup> respondent had left four acres of the land to the family.

We have considered the evidence on record and the respective submissions by the parties. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions whilst bearing in mind a precaution that we did not have the benefit of seeing and accessing the demeanor of the witnesses. (See Selle vs. Associated Motor Boat Co. [1968] EA 123; Jabane vs. Olenja, [1986] KLR 661, 664. This Court stated in Jabane vs. Olenja [1986] KLR 661, 664 that it will not lightly differ from the findings of fact of a trial Judge and will only interfere with them if they are based on no evidence. (See Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870).

We believe that the only issue for our consideration in this appeal is whether the Mumias Land Disputes Tribunal was vested with the powers to order sub-division of the 1<sup>st</sup> respondent's land and award the appellant 10 acres thereof. We say so because we are of the view that it is that ruling by the Land Disputes Tribunal that is the genesis of the dispute that was before the High Court.

The Lands Disputes Tribunal was established pursuant to **Section 4** of the now repealed **Land Disputes Tribunal Act, Section 3 (1)** of the Act provides for the limitation of jurisdiction of the Tribunal. It states:

***“Subject to this Act, all cases of a civil nature involving a dispute as to:***

***(a) The division of, or determination of boundaries to land, including land held in common;***

***(b) A claim to occupy or work land; or Trespass to land;***

***(c) Shall be heard and determined by a Tribunal established under Section 4.”***

From the above provision, it is clear that the powers of the Tribunal were limited and it could only deal with disputes of the nature captured under the above quoted Section of the Act. Though we did not have the benefit of looking at the claim that the appellant filed before the Tribunal, we can deduce from the proceedings thereof that the appellant was claiming a portion of the 1<sup>st</sup> respondent's land on the ground that the appellant had not given him and his brother's land. According to the ruling by the Tribunal the claim was to occupy and work on land under **Section 3(1) (b)** of the Act. Under the Act, we are of the view that the Tribunal was indeed vested with powers to deal with a dispute relating to occupation and working on parcel of land. However, the Tribunal ordered that the 1<sup>st</sup> respondent's parcel of land be sub-divided and a portion measuring 10 acres be given to the appellant and his family. The Tribunal went further and directed the court registrar to sign the subdivision documents in case of failure by the 1<sup>st</sup> respondent. The effect of a sub-division as we understand it is that upon sub-division of land a portion thereof is excised and new titles are issued for the subdivided portions.

What then would be the effect of subdividing the 1<sup>st</sup> respondent's land as ordered by the Tribunal? To our mind in order to put to effect the ruling of the Tribunal the 1<sup>st</sup> respondent would have been forced to transfer his land to the appellant and failing thereto the court registrar would have signed the transfer documents on his behalf. We do not think that under the Act the Tribunal has jurisdiction to transfer a person's land to another person. See Asman Maloba Wepukhulu & Another vs. Francis Wakwabubi Biketi CA No. 157 OF 2001. We are therefore of the view that the Tribunal acted *ultra-vires* and beyond its jurisdiction when it ordered for the subdivision and transfer of a portion of the 1<sup>st</sup> respondent's land to the appellant and his family. The jurisdiction of a Court or Tribunal is conferred either by the Constitution or by Statute and as was held in the case of Owners of Motor Vessel 'Lillians' vs. Caltex Oil Kenya Ltd 1989 K.L.R 1, jurisdiction is everything and once a Court forms the opinion that it has no jurisdiction, it must immediately down its tools because it has no power to make one more step in the matter before it.

The other issue is that the 1<sup>st</sup> respondent was registered as the absolute proprietor of the suit property to the exclusion of any other party. The interest of the appellant is that he is the son of the 1<sup>st</sup> respondent and that the 1<sup>st</sup> respondent has been dealing and disposing the suit land to his exclusion. It is common ground that the 1<sup>st</sup> respondent was the registered owner and proprietor of the subject land and we have not been told the basis for any deprivation. As was correctly held by the trial court the 1<sup>st</sup> respondent was and is at liberty to enjoy the fruits of his absolute proprietorship and that he has no legal obligation to provide for his son who is above the age of majority. In the premises, we find no basis to interfere with the decision of the trial court and accordingly we dismiss this appeal with costs to the respondents.

*Dated and delivered at Kisumu this 21<sup>st</sup> day of February, 2019.*

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**K. M'INTOTI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**