IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 54 OF 2013

BETWEEN

BARASA W. WABOMBA …………………… 1ST APPELLANT

CATHOLIC DIOCESE OF BUNGOMA

MALABA SUB-PARICH …………………… 2ND APPELLANT

VERSUS

OMUNYIN KITUYI ……………………………1ST RESPONDENT

PRINCIPAL MAGISTRATE BUSIA

LAW COURTS ……………………………… 2ND RESPONDENT

ATTORNEY GENERAL ………………… 3RD RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Busia, (Kibunja, J.) dated 23rd September, 2013

in

HCC MISC. APPLICATION NO. 79 OF 2010)

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JUDGMENT OF THE COURT

1. The appellants, Barasa W. Wabomba and Catholic Diocese of Bungoma, Malaba Sub-Parish, have appealed the judgment of the High Court at Busia (S. M. Kibunja, J.) delivered on 23rd September 2013, dismissing their motion for an order of certiorari to quash the decision of Busia Resident Magistrate's court made on 17th June 2010 in Busia Land Disputes Tribunal Case No. 29 of 2007, cancelling their title deeds, amongst others. The appellants complain that the Judge erred in failing to find that the Magistrate's court did not have powers to cancel their title deeds; that the Judge should have appreciated

that the appellants were not privy to the Amagoro Land Disputes Tribunal proceedings whose decision the Magistrate's court was purporting to give effect and the appellants were therefore condemned unheard; that the appellants titles that the Magistrate's court ordered to be cancelled were not the subject of proceedings before that tribunal; and that the 1st respondent's claim was in any event barred by the Limitation of Actions Act.

Background

2. The genesis of the matter was a complaint by the 1st respondent (Kituyi) against the 1st appellant (Wabomba) before the Teso District Land Disputes Tribunal, also referred to as Amagoro Land Disputes Tribunal, (the tribunal) in respect of a parcel of land known as Title Number North Teso/Kocholya/210 (the property) measuring approximately 7.0 Hectares. Kituyi asserted before the tribunal that the property was given to him by his father; that in 1960 he left the property under the care of one Basiliano Wabomba, the father of Wabomba, as he went to seek treatment; that upon his return in 1974, he discovered, to his consternation, that the property had been registered in the name of Basiliano Wabomba.

3. On his part, Wabomba told the tribunal that his father, Basiliano Wabomba Ngutuku, gave him the property in 1975; that after the death of his father, and succession proceedings in that regard, the property was divided among himself and his two deceased brothers.

4. After hearing Kituyi and Wabomba and their respective witnesses, the tribunal found that other than the first registration in 1974, there was no evidence of purchase of the property by Basiliano Wabomba and that the land does not belong to Wabomba. The tribunal ruled that the property "*belonged to Mr. Omunyin Kituyi but was falsely/fraudulently acquired by Mr. Basiliano Wabomba the father of*" Wabomba. However, taking into account that the family of Basiliano Wabomba "*has been the custodian*" of the property for 35 years, the tribunal awarded Kituyi 5.0 Hectares and Basiliano Wabomba family 2.0 Hectares. The tribunal instructed the Busia/Teso District Lands Registrar to "*withdraw the Title Deed for parcel No. North Teso/Kocholya/210 and others that have arisen from it and be registered in the name of Omunyin Kituyi 5.0 Hac and 2.0 Hac to Mr. Barasa Wabomba Ngutuku*." That award was read and adopted as a judgment of the magistrate's court on 19th July 2007.

5. Wabomba appealed to the Provincial Land Dispute Appeals Tribunal at Kakamega. On 26th February 2009, the Appeals Tribunal upheld the decision of the tribunal having observed, that the property was first registered in the name of Basiliano Wabomba in 1974; that the property was transferred to Mathew Sitati Wabomba on 3rd February 1993; and that the title to the property was closed on 5th October 1993 upon subdivision and creation of parcels Teso/Kocholya/1444 measuring 6.2 Hectares for Mathew Sitati Wabomba and Teso/Kocholya/1445 measuring 0.8 Hectares for Busia County Council. The award of the Appeals Tribunal was read and adopted as an order of the court on 14th May 2009.

6. Kituyi encountered difficulties in executing the judgment resulting from the awards. On 2nd June 2009, the District Land Registrar wrote to the Magistrate's Court at Busia stating that he was unable to effect the court orders as the property had "*changed hands to about twenty nine people*" and set out in that letter how the title to the property had mutated to subdivisions 1444 and 1445; that those parcels had in turn been subdivided into several portions and registered in the names of different persons.

7. Faced with that situation, Kituyi then presented an application dated 3rd June 2009 to the Magistrate's court at Busia under Sections 3 and 3A of the Civil Procedure Act seeking orders against Wabomba that:

> "1. *That the Honourable court be pleased to substitute the Parcel number of the land in issue from L.R. NO.*
>
> *NORTH TESO/KOCHOLIA/210 to;-*

a) NORTH TESO/KOCHOLIA/2241

b) NORTH TESO/KOCHOLIA/2242

2. That the Executive Officer to sign all relevant documents instead of the respondent to enable the Applicant herein to obtain Title on land parcel;-

a. *NORTH TESO/KOCHOLIA/2241*
b. *NORTH TESO/KOCHOLIA/2242*

3. That the Busia Lands Registrar be ordered to cancel and dispense off with production of Title deed in respect to the said parcels of land."

8. After hearing the parties to that application, the learned magistrate delivered a ruling dated 17th June 2010 holding that there was undoubtedly an award in favour of Kituyi in respect of the property North Teso/Kocholya/210; that under Section 143(1) & (2) of the repealed Registered Land Act, "*this court is empowered to order such rectification with notice to the parties who are likely to be affected*" and proceeded to allow the application dated 3rd June 2009 on terms that, "*North Teso/Kocholia/210 (sic) be reverted to and all subsequent titles as a result of subdivision be cancelled. The applicant be granted 5 Hectares and the respondent be granted 2 Hectares. The respondent is condemned to pay the applicant costs of this application*."

9. Having obtained leave of the High Court on 12th October 2010 to do so, the appellants applied, by a notice of motion dated 16th October 2010, for an order of certiorari to quash the decision of the Magistrate's court given on17th June 2010. The grounds in support of that application were that the magistrate had exceeded his jurisdiction under the Land Disputes Tribunal Act by cancelling 23 registered titles on the basis of an application and without a substantive suit having been filed; that the titles cancelled by the magistrate were not the subject of proceedings before the court; that the claim was barred by the Limitation of Actions Act; and that the court attempted to rectify the award by inserting titles which did not form part of the claim before the tribunal.

10. The High Court considered the application, the affidavits in support and in opposition and the submissions and delivered judgment, the subject of this appeal, on 23rd September 2013. The court (S. M. Kibunja, J.) held that the awards by the tribunal and the appeals tribunal had been read and adopted as a judgment of the court in accordance with Section 7(2) of the repealed Land Disputes Tribunal Act; that the application by Kituyi dated 3rd June 2009 to the Magistrate's court at Busia under Sections 3 and 3A of the Civil Procedure Act "*was an application for execution following the reading and adoption of the tribunal award*" in accordance with Section(2) of the repealed Land Disputes Tribunal Act that provides for enforcement of decrees issued pursuant to a tribunal award in the manner provided under the Civil Procedure Act; that Order 22 of the Civil Procedure Rules 2010 provides various ways of executing decrees without interference with the tribunal award by the court dealing with execution; and that the argument that the order of the Magistrate's court given on17th June 2010 was made without jurisdiction has no merit.

11. In effect, the Judge took the view that in granting the orders on 17th June 2010, the Magistrate's court did no more than give effect to the award of the tribunal and that it had jurisdiction to do so. The Judge concluded, "*the order of 17th June 2009 complained of is more or less in the same terms of order 4 in the order extracted from the Tribunal award on 19th July, 2007, and though it may appear superfluous, as it is already contained in the earlier order, the Learned Trial Magistrate was within his powers to issue it in execution proceedings under the Civil Procedure Rules."*

12. Aggrieved, the appellants lodged the present appeal.

<u>The appeal and submissions by counsel</u>

13. Learned counsel for the appellants, Mr. Situma, referred us to the memorandum of appeal and submitted that the 22 titles to the land cancelled by the Magistrate's court were not the subject of the proceedings before the tribunal and the appeals tribunal; that based on the material that was before the Magistrate's court, it was demonstrated that by the time Kituyi initiated his claim before the tribunal in 2006, the property had been subdivided and the respondent did not, at that time, own the property. Consequently, counsel argued, the tribunal award was not capable of implementation; that the 2nd appellant as owner of one of the resultant subdivisions of the property was brought into the proceedings after the delivery of the award and the Magistrate's court could not purport to cancel titles registered in the name of a person who was not privy to the tribunal proceedings.

14. In those circumstances, counsel argued, the learned Judge should have quashed the decision of the Magistrate's court as the registered owners were deprived of the titles to their properties without having been accorded an opportunity to be heard.

15. Furthermore, Mr. Situma went on to say, the lower courts should have had upheld the appellant's complain that Kituyi's claim should have, at the latest, been filed by 1986 by dint of Section 7 of the Limitation of Actions Act and Kituyi was not at liberty to wait, as he did, for 32 years to pursue his claim.

16. Counsel urged us to allow the appeal, set aside the judgment of the High Court and substitute therewith an order allowing the notice of motion dated 16th October 2010 and filed in that court on 18th October 2010. The appellants, counsel stated, will be content without an order for payment of costs of the appeal by the respondents.

17. Opposing the appeal, learned counsel for the 1st respondent, Mr. E. Etyang, submitted that learned Judge was right in taking the view that the duty of the court on receiving an award from a tribunal is to adopt it and to grant judgment in accordance with it and to ensure the process of execution is followed; that that is what the Magistrate did and cannot be faulted. Counsel further submitted that the complaints by the appellant are not within the province of judicial review and are matters on the basis of which an appeal from the decision of Magistrate's Court being Civil Appeal No.14 of 2009, is pending before the High Court.

18. According to Mr. Etyang, the process leading up to the tribunal award and subsequent adoption of the award by the court was lawful, and there was therefore no basis for intervention by the High Court. Accordingly, the High Court was right to dismiss the appellants' application for judicial review. With that, Mr. Etyang urged us to dismiss the appeal and uphold the decision of the High Court and award the costs of the appeal and of the proceedings in the High Court to the 1st respondent.

19. Though served, there was no appearance at the hearing for the 2nd and 3rd respondents.

Determination

20. We have considered the appeal and the submissions by learned counsel. The issue in this appeal is whether, in the circumstances of this case as enumerated above, the learned Judge erred in declining to quash, by an order of certiorari, the decision of the magistrate given on 17th June 2010 ordering that title to the property North Teso/Kocholya/210 be reverted and all subsequent titles resulting from its subdivision be cancelled.

21. We are alive to the fact that an appeal, being Civil Appeal No. 14 of 2009, from the decision the Magistrate's court that was the subject of the application for judicial review was filed by the appellants and is pending before the High Court. We must therefore refrain from expressing views that may embarrass the court in that appeal or otherwise prejudice the parties as far as the pending appeal is concerned.

22. As the learned Judge correctly observed, judicial review proceedings are limited to the review of the process and not the merits of the decision. In that regard, the only complaint with which we are concerned

is that the decision of the Magistrate's court was made in violation of the rules of natural justice. In **Kenya National Examination Council vs.Republic Ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** this Court was clear that:

> "**An order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons**."

23. It is not in dispute that the subject matter of the proceedings before the tribunal was the property, North Teso/Kocholya/210. Material was placed before the magistrate, in the form of a letter from the District Land Registrar, Busia, dated 2nd June 2009 showing that the property was subdivided into parcels 1444 and 1445 way back in October 1993, and further subdivision of the subdivisions done in November 1995 resulting in parcel numbers 1577 and 1578. Further subdivisions were carried out and transfers in favour of third parties were registered.

24. Those are the circumstances that predicated the application by Kituyi dated 3rd June 2009 for substitution of parcel number North Teso/Kocholya/210 with parcel numbers North Teso/Kocholya/2241 and 2241. Clearly, the property known as North Teso/Kocholya/210 did not exist from the onset of the proceedings before the tribunal in 2006 and the registered owners of the subsequent subdivisions were not privy to, nor were they heard in the proceedings before the tribunal. To order the cancellation of the titles in the names of those parties, including that of the 2nd appellant, at a stage subsequent to those proceedings in which they were not heard or to which they were not privy to, was in our view in breach of the principles of natural justice.

25. In the circumstances, we are satisfied that the learned Judge erred in taking the view that in granting Kituyi's application dated 3rd June 2009 made under Sections 3 and 3A of the Civil Procedure Act that court was doing no more than giving effect to the award of the tribunal.

26. We accordingly allow the appeal, set aside the judgment of the High Court dated and delivered on 23rd September 2013, and substitute therewith anorder allowing the appellants' notice of motion dated 16th October 2010 and filed in that court on 18th October, 2010. In accordance with the wishes of the appellants, we order that each party will bear its own costs of the appeal and of the proceedings before the High Court.

Dated at Kisumu this 4th day of March, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR