



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, MARAGA & KANTAI JJ.A)

CIVIL APPEAL NO. 34 OF 2014

BETWEEN

SAPIENTIA KHASATSHI SHIBACHI For and on behalf of the estate of

ANDREW SHIBACHI IKHUNYALO..... APPELLANT

AND

BOAZ ASHIONO SHISANYA RESPONDENT

(An appeal from the judgment and decree of the high court of Kenya at

Kakamega (Dulu, J.) dated 13th February, 2014

in

H.C.C.A. NO. 43 OF 2010)

JUDGMENT OF THE COURT

1. In 1978, **Andrew Shibachi Ikhunyalo** (the deceased) bought all that piece of land situate in Ikolomani Division and known as **Title No. Idakho/Shiseso/955** (the suit land) from **Simeon Ashiono Musindi** (Simeon) for Kes.8,500/=. It would appear that at that time there was a dispute over the ownership of that land between **Simeon** and **Boaz Ashiono Shisanya** (Boaz). The latter claimed entitlement to a half of the suit land.

2. On a date which is not clear from the record, Boaz lodged a dispute before Ikolomani Land Disputes Tribunal (the Tribunal) claiming his alleged half share of the suit land. After hearing that dispute, the Tribunal granted his claim and directed that the suit land be shared equally between Boaz and Simeon. Aggrieved by that decision, the deceased, who as we have stated had claimed to have bought the whole of the suit land from Simeon, apparently complained to the District Officer Ikolomani who on 26th August 1999 wrote to the Senior Resident Magistrate Kakamega and stated that the dispute had to be re-heard and requested the court not to do anything about the award. It is not clear if that letter was received by the court or brought to the attention of the presiding magistrate for whatever it was worth as on 13th October 1999, the Senior Principal Magistrate's Court adopted the Tribunal award as a decree of the court in SPM Misc. Award No. 127 of 1999 without mention of it.

3. There was no appeal against that adoption order. Instead in 2003 the deceased filed appeal No. 74 of 2003 before the Provincial Land Disputes Appeals Committee (the Appeals Committee) at the Provincial Commissioner's office Kakamega. That appeal was heard on 14th June 2006 and the Appeals Committee overturned the Tribunal Award and awarded the land to the deceased. That decision of the Appeals Committee was on 30th July, 2007 also adopted and made an order of the court by the Chief Magistrate's Court at Kakamega in the said Misc. Award No. 127 of 1999.

4. We need to mention that while the appeal to the Appeals Committee was pending hearing, on 25th June 2005 the deceased filed a Judicial Review Application (HC Misc. Appl. No. 77 of 2003) before the High Court at Kakamega and sought an order of certiorari to quash the original Tribunal Award. That application was dismissed on 15th April 2005.

5. Boaz was not amused with the decision of the Appeal Committee. So on 21st February 2008, he filed a Notice of Motion in the Chief Magistrate's Court in the said Misc. Award No. 127 of 1999 and prayed for the review and setting aside of the court's order of 16th July 2007 which adopted the Appeals Committee's decision as, in his view, the Appeals Committee's decision was illegal having been obtained long after the 30 days period given by the Land Dispute Tribunal Act for appeals to the Appeals Committee. In its ruling of 23rd March 2010, the Kakamega Senior Resident Magistrate dismissed the application holding that although there were two parallel awards in the file, it had no jurisdiction to review the Appeals Committee's decision and advised Boaz to go to the High Court if he so wished. Boaz took that advice and filed Kakamega HCCA No.43 of 2010. Dulu, J. allowed the appeal and set aside the award by the Appeals Committee holding that the appeal to the Appeals Committee having been filed way after the 30 days period had expired, the Appeals Committee had no jurisdiction to entertain it. This appeal, brought by **Sapientia Khasatshi Shibachi**, the legal representative of **Andrew Shibachi Ikhunyalo** (deceased), is against that decision.

6. The appellant raised 3 main points in his eleven grounds of appeal. They are that whereas the learned Judge quite correctly stated that he had supervisory jurisdiction to correct errors of the subordinate court, he erred in sustaining the Tribunal Award which had not only been given without jurisdiction and in defiance of the provisions of the Limitation of Actions Act but had also been withdrawn; that the learned Judge heard and decided the appeal when respondent had died and had not been substituted; that the learned Judge erred in finding that the subordinate court had jurisdiction to review its decision.

7. On ground 1 Mr. Mokuwa, learned counsel for the appellant, submitted that had the learned Judge properly re-evaluated the evidence on record and taken a broad view of the entire dispute, he would have noted that the Tribunal had no jurisdiction to entertain a claim of ownership to land and set aside both its award and that of the Appeals Committee thus leaving the parties to go to a court of competent jurisdiction to try their dispute; that the respondent's claim which was lodged before the Tribunal about 20 years after the deceased had been registered as the proprietor of the suit land had been time barred under the Limitation of Actions Act and the Tribunal had therefore no jurisdiction to entertain the original dispute; and that immediately after the Tribunal gave its award, by his letter of 26th August 1999, the District officer Ikolomani recalled that award and stated that the claim was to be heard *de novo* hence the Senior Resident Magistrate should not have adopted the Tribunal's award.

8. On ground 2 counsel submitted that at the time of hearing the appeal Andrew Shibachi Ikhunyalo who was the appellant in that appeal had already died. On ground 3 he faulted the learned Judge for finding that the subordinate court had jurisdiction to review its order adopting the Appeals Committee's decision. He said that under the Land Disputes Tribunal Act (the Act), the subordinate court's role with regard to the Tribunal's and the Appeals Committee's decision was purely administrative: to adopt them as they are without any alterations. With those submissions, Mr. Mokuwa urged us to allow this appeal.

9. In response to those submissions, Mr. Shifwoka, learned counsel for the respondent, submitted that this appeal has no merit at all as the appellant was indolent and failed to invoke the provisions of the Land Disputes Tribunal Act to challenge the Tribunal award. Under the Act, the appellant had a right to appeal

against the Tribunal award within 30 days but he did not do so. Instead he filed a judicial review application after 4 years which was dismissed after which he appealed to the Appeals Committee. The Appeals Committee made an award the adoption of which led to two contradictory judgments on the same issue. Those appeal proceedings were clearly irregular and the learned Judge was right in holding that the trial court had jurisdiction to review and set aside its order adopting the Appeals Committee's decision. In that regard counsel submitted that the case of **Zedekiah M. Mwale v. Bikeke Farm Directors & Another, Kitale HCCA No. 25 of 1998** is distinguishable as in that case the subordinate court was being asked to review its order and require the Tribunal to reconsider its award which is not the case in this matter.

10. Regarding the death of original appellant, the deceased, counsel pointed out that he died after the filing of written submissions pursuant to the directions given by the learned Judge and before the Judge gave the date for judgment. So as it were the appeal had been heard before the original appellant's death and all that was remaining was determining it. He said that there was therefore no error in the appeal proceedings.

11. We have considered these rival submissions. As we stated in **Callen Magoma Omari v. Suneka Land Disputes Tribunal & Others, Civil Appeal No. 87 of 2012,**

"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. "

12. The above holding also applies in this case. The deceased was indolent and failed to follow the procedure set out in the repealed Act. Being aggrieved by the Tribunal decision, he should have appealed to the Appeals Committee within 30 days. Instead he appealed after four years and even then after had filed a judicial review application which was dismissed.

13. In the circumstances, we find that the Appeals Committee had no jurisdiction to entertain the deceased's appeal. It follows that the learned Judge was right in setting aside that Committee's decision. Consequently, we find no merit in this appeal and we accordingly dismiss it with costs. We so order.

DATED and delivered at Kisumu this 5th day of March 2015.

W.KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR