



IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPEAL NO. 5 OF 2015

(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

BETWEEN

JONATHAN BWIRE OJIAMBO..... APPELLANT

AND

ROSEMARY AUMA ABANGI FIRST RESPONDENT

HERBERT ODUORI OKUMU SECOND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Busia (Kibunja, J.) dated 6th November, 2013

in

HIGH COURT ELC CASE NO. 10 OF 2011)

JUDGMENT OF THE COURT

A). INTRODUCTION

1. Although this appeal consists of 20 grounds some of which are rather repetitive, its determination largely turns on the question whether an award made by the Budalangi Land Disputes Tribunal, pursuant to the provisions of the **Land Disputes Act No. 18 of 1990** (now repealed), dispossessing the appellant of a parcel of land that had been duly registered in his name was valid in law.
2. The appellant's main argument before the trial court was that, being the registered absolute proprietor of land parcels Nos. **Bunyala/Bulemia 3603** and **Bunyala/Bulemia/3604** (*“the suit properties”*), the Budalangi Land Disputes Tribunal (the tribunal) had no jurisdiction to entertain the 1st respondent's claim over one of the suit properties, Bunyala/Bulmia/363 (parcel No. 363). The tribunal ruled in favour of the 1st respondent, after which the tribunal's award was adopted by a Magistrate's Court and the 1st respondent purported to sell that parcel of land to the 2nd respondent.
3. In his suit before the High Court of Kenya at Busia, the appellant sought, *inter alia*, a declaration that he was the registered owner of the suit properties, a permanent injunction to restrain the respondents from alienating or trespassing onto the suit properties, and an order to demolish

structures that the respondents had put up on parcel No. 363.

4. In their joint statement of defence, the respondents denied the appellant's claim and contended that the suit was *res judicata* and that there was another suit in the same court touching on the ownership of the suit properties.
5. In its judgment dismissing the appellant's case, the trial court concluded as follows:

***“11. That as the orders of the Budalangi Land Disputes Tribunal of 20th November, 2009 are yet to be successfully challenged on appeal or judicial Review application by any of the parties this Court cannot ignore their existence. It is through the said orders that the 1st Defendant took possession of a portion of the suit land and made some developments with the 2nd Defendant. The defendants cannot be said to be in trespass.....
.....***

This case therefore remains res judicata as no party to the tribunal proceedings, which have been adopted by the lower court, has successfully appealed against it, and in view of the fact that the judicial review interventions initiated by the parties were abandoned as detailed above.”

B). THE APPEAL

6. Being dissatisfied with the above decision, the appellant preferred an appeal to this Court. As earlier stated, the appellant raised 20 grounds of appeal; stating, *inter alia*; that the learned judge erred in fact and law:
 - ***By failing to consider that the appellant had inherited from Oluoch Sirindi (deceased), land parcel No. Bunyala/Bulemia/610 that was subsequently sub-divided to create the suit properties that were lawfully registered in his name as the absolute proprietor.***
 - ***By sustaining the ruling by the Budalangi Land Disputes Tribunal which exceeded its jurisdiction***
 - ***By failing to consider that the 1st respondent lacked legal capacity to claim any of the suit properties as the heir apparent of Ochecha Oluwa and Oluoch Sirindi (deceased), having never taken out letters of administration in respect of the estates of the said deceased persons.***

1. This being a first appeal, this Court is not bound by the finding of fact made by the trial court. It is under a duty to re-evaluate and reconsider the evidence on record and arrive at its own independent conclusions. See ***SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E. A. 123.***

C). SUMMARY OF EVIDENCE ADDUCED BEFORE THE TRIAL COURT.

2. From the evidence adduced by the appellant, it emerged that the appellant's uncle, **Oluoch Sirindi** (deceased), was the first registered proprietor of parcel No. 610, since 2nd October, 1985. That is the parcel of land that was later sub-divided and brought forth the suit properties. After the death of Sirindi on 27th May, 1993 the appellant applied for letters of administration of his late uncle's estate and the grant was issued to him on 1st July, 2008 and subsequently confirmed on 26th July, 2010. To date the grant has never been challenged by any one. The appellant had been living on the suit properties since 1991.
3. In 2009, the 1st respondent filed a claim over the suit properties before Budalangi Land Disputes Tribunal. She alleged that the original owner of Parcel No. 610 was **Ochecha Oruwa**, her grandfather. Ochecha had two wives, Miriana, (***the 1st respondent's grandmother***) and Achola.

Achola did not bear any child while Miriana gave birth to only one child, Thiodora, the 1st respondent's mother. Thiodora had three children who had all passed away, leaving the 1st respondent as the only surviving child.

4. After the death of Ochecha, Oluoch Sirindi, his brother inherited Ochecha's two widows, Miriana and Achola, but did not get any children with them. Ochecha was buried on land parcel No. 610 and his two widows continued to live there.

After the husband of Thiodora died, Miriana asked Thiodora to go and live with her at Land Parcel No. 610 and she relocated there with her children, including the 1st respondent. The 1st respondent got married in 1979 and moved out to live with her husband.

5. The Budalangi Land Disputes Tribunal in its decision of 20th November, 2009 held that the 1st respondent, being the only grandchild of Ochecha, was the rightful beneficiary of the suit properties but because the appellant had lived there for many years, he should get one half of the land, parcel No. 3604, and the 1st respondent the other half, parcel No. 3603. That decision was adopted by the **Busia Principal Magistrate's Court** in **PMCC NO. 132 of 2009**.
6. Both the appellant and the 1st respondent were dissatisfied with the tribunal's award and each commenced judicial review proceedings seeking to quash it. The 1st respondent withdrew her application after some time.

The appellant did not file the substantive application within the statutory period after obtaining leave and so the leave lapsed. Consequently, the appellant also withdrew his judicial review application and commenced the proceedings that gave rise to this appeal. When the High Court was granting leave to the appellant it also ordered stay of execution of the decision in Busia PMCC No. 132 of 2009 which had adopted the tribunal's award. But while the order of stay was subsisting, the 1st respondent purported to transfer a portion of parcel No. 3603 to Herberet Oduori Okumu, the 2nd respondent, despite the fact that the said parcel of land was still registered in the appellant's name.

D). DETERMINATION OF THE APPEAL

7. **Mr. Oundo**, the appellant's learned counsel, submitted that his client was the registered absolute proprietor of the suit properties under the **Registered Land Act (now repealed)** and consequently the Budalangi Land Disputes Tribunal was devoid of jurisdiction to grant the 1st respondent parcel No. 3603. He cited the provisions of **section 3** of the **Land Disputes Tribunal Act, (now repealed)** which limited a tribunal's jurisdiction to disputes 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.

8. **Mr. Ipapu**, learned counsel for the respondents, conceded that the tribunal had no jurisdiction to cancel the appellant's ownership of parcel No. 363 but was quick to add that the High Court had jurisdiction to hear and determine the appellant's suit before it, pointing out that it was not an appeal against the decision of the tribunal.
9. We agree that the appellant's suit before the High Court was not an appeal against the tribunal's decision. The appellant had indeed filed an appeal before the Western Province Land Disputes Appeal Committee, Appeal No. 122 of 2009, but when the Land Disputes Tribunal Act under which the Appeals Committee was constituted was repealed, the hearing of the appeal could not proceed as the committee ceased to exist.

10. The 1st respondent had filed her claim before Budalangi Land Disputes Tribunal, contending that she was the rightful owner of the suit properties, being the only surviving heir of her late grandfather's estate. The tribunal agreed and awarded her one of the disputed properties. It was not disputed by the respondent's learned counsel that since the suit properties had been duly registered in the appellant's name, the tribunal had no jurisdiction to entertain the 1st respondent's claim.

The *Land Disputes Tribunals Act No. 18 of 1990* (now repealed) did not confer upon a tribunal power to interfere with the proprietary interest of a registered proprietor of land, whose title was protected under *section 27 and 28* of the Registered Land Act, (now repealed). In *M'MARETE V REPUBLIC & 3 OTHERS* [2004] eKLR, this Court delivered itself thus:

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under the Land Registration Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

We adopt that holding and indeed find that the Budalangi Land Disputes Tribunal exceeded its statutory jurisdiction.

11. That being the case, the trial judge could not rightly base his findings on the decision made by the tribunal as it lacked jurisdiction to determine the matter. A decision made by a court or a tribunal in exercise of a jurisdiction which it does not possess amounts to nothing.

The dictum of Nyarangi, J. A. in *MOTOR VESSEL LILIAN “S” VS CALTEX OIL KENYA LIMITED* [1989] KLR 1 bears repetition in this appeal:

“Jurisdiction is everything. Without it a court has no power to make one more step. ... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. The trial judge thus erred in law in upholding the decision of the tribunal. But that is not all. The learned judge also erred in law in holding that in view of the findings made by the tribunal, the matter before him was *res judicata*. *Section 7* of the *Civil Procedure Act* explains the doctrine of *res judicata* in the following words:

“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 by such court.”

If the tribunal did not have jurisdiction to determine the dispute filed before it by the 1st respondent, its decision could not be said to be *res judicata*.

13. The other important issue for determination is whether the 1st respondent had *locus standi* to claim the suit properties or any portion thereof under the doctrine of trust. Although that issue was not expressly pleaded, the 1st respondent testified that the appellant was holding the suit land in trust for her, being the only grandchild of Ochecha Oruwa, her grandfather. Ochecha Oruwa died in 1974 and that was before land adjudication in the area commenced. According to the evidence on record, from 2nd October, 1985, the first registration of the suit properties was in the name of Oluochi Sirindi, who later sub-divided parcel number 610 to numbers 3603 and 3604. When later on the appellant applied for letters of administration in respect of the estate

of Oluoch Sirindi and became the registered proprietor thereof, there is nothing to indicate that he was to hold the same in trust for the 1st respondent.

14. Under **section 143 (1)** of the **Registered Land Act** (now repealed) a first registration may not be challenged even if it was obtained by fraud or mistake but that does not exclude recognition of a trust, provided that it is pleaded and proved. See **GATIMU KINGURU V MUYA GACHANGI [1976] KLR 253. Order 2 rule 10 (1) (a)** of the **Civil Procedure Rules** requires that particulars of breach of trust be pleaded. That was not done.

15. Having carefully considered all the evidence on record, we are satisfied that this appeal is merited. Consequently, we allow the appeal, set aside the trial court judgment and substitute therefor a finding that the appellant is the registered proprietor of the suit properties and the respondents are hereby ordered to vacate the same forthwith.

Each party shall bear its own costs of the High Court suit as well as the costs of this appeal.

DATED and Delivered at Kisumu this 17th day of November, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR