



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: VISRAM, KOOME & ODEK, J.J.A.)
CIVIL APPEAL NO. 13 OF 2013

BETWEEN

KOGI KAMAU.....APPELLANT

AND

JANE NDUTA GITUTHA.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri (Makhandia, J.) dated 22nd March, 2010

in

H.C.C.A. No. 135 of 2007)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of *Makhandia, J.*, (as he then was), dated 22nd March, 2010, in *Civil Appeal No. 135 of 2007, Nyeri*. Koigi Kamau, the appellant filed a dispute before the Land Disputes Tribunal at Kagea in Muranga. The appellant's claim was that Jane Nduta Gitutha, the respondent, was illegally trespassing on his Parcel *No. Loc. 10/Kahuti/1665*, measuring about 0.5 acres. The land in question was registered in the name of the appellant. The appellant was also the registered proprietor of *No. Loc. 9/Kahuti/1660*, which is in a different locality although there was no dispute of this latter parcel.

[2] The respondent denied that she was trespassing or in illegal occupation of the appellant's parcel of land, she contended that she had been in occupation of the suit premises from 1966 when the land was consolidated; in effect she claimed the land belonged to her late husband one Gitutha Igeria.

[3] After hearing the parties to this dispute and their respective witnesses, the tribunal came up with the following findings which they referred to as:

“Observations”:

“1. The land in dispute Loc. 10/Kahuti/1665 is registered under the name Koigi Kamau as

per record produced before the Tribunal copy attached.

2. *The defendant's land is Loc/9/Kahuti/1660 as per record produced before the Tribunal copy of abstract is attached.*

3. *The defendant is the one using the land in dispute Loc. 10/Kahuti/1665.*

The tribunal observed that it is for District Land Registrar and District Surveyor to go into their records and address this issue and put proper records on the ground where parcel Loc 10/Kahuti/1665 and Loc 10/Kahuti/1660 should be as per the documents produced.”

[4] On the basis of that order issued to that effect which was also registered in the Senior Resident Magistrate at Kagama, the District Land Registrar and the District Surveyor, Murang'a prepared a report dated 11th May, 2006. The District Land Surveyor made the following findings:

“According to the Registry Index Maps Parcel No. Loc 10/Kahuti/1665 is appearing twice in sheet 386. The two numbers do not share a common boundary and are far from each other. This is a mistake since you cannot have one number appearing twice even if the parcels belong to one proprietor. The parcel being claimed by the defendant is on sheet 3 extending to sheet 6 and the plaintiff's parcel which he is in occupation is on sheet 3”.

The District Land Registrar made the following findings:

“The plaintiff's land as per records held in Land Registry Murang'a is on sheet 3. The Defendant's land as per the records appear on sheet 386. The duty of the Land Registrar and the District Surveyor in this case is to relocate the parcels. Therefore, parcel No. Loc 10/Kahuti/1660, is the one appearing on sheet 386 and occupied by the defendant. The District Surveyor to prepare Mutation Forms to amend Parcel No. Loc 10/Kahuti/1665 appearing on sheet 386 to read Loc 10/Kahuti/1660. Any other claim on the parcels to be directed to court”.

[5] The above findings and award were adopted as the orders of the court by the Senior Resident Magistrate Kangema Court on 28th November, 2007. Being dissatisfied with the orders of the Senior Resident Magistrate, the appellant appealed before the High Court. The appeal was admitted for hearing on 25th April, 2008, by Kasango, J., who certified that it “involved an issue of law”. The appeal subsequently fell for hearing before *Makhandia, J.* (as he then was). After considering the appeal, he found it incompetent. This is because it was filed in disregard of the provisions of the Lands Disputes Tribunal Act. According to the Judge, an appeal from a decision of a Land Disputes Tribunal ought to have been appealed to the Provincial Land Disputes Appeals Committee, Central Province. He held that the appeal must have been certified by Kasango, J. on a mistaken belief that the appeal emanated from the decision of the Provincial Land Disputes Appeals Committee. This is what the Judge concluded:

“Clearly, therefore, this is a matter which ought to have been sifted through the appellate provisions of the Land Disputes Tribunals Act.

The appellant, however, opted not to pursue the appeal as aforesaid. Instead, he opted for a shortcut, which in law is always a dangerous undertaking. He opted to appeal directly to the High Court from the decision of the learned magistrate adopting the awards as orders of the court. The Land Disputes Tribunals Act does not provide for such appellant mechanism. The only appellate process allowable under the said statute is to the Provincial Land Disputes Appeals Committee and thence to the High Court. The appellant did not pursue that channel. Hence this appeal for that reason is incompetent.”

[6] The appellant is not relenting; he filed this second appeal which by dint of the provisions of *Section*

72 of the *Civil Procedure Act* turns only on points of law. See also the case of–; *SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD* [1968] E.A. 123 and *WILLIAMSON DIAMONDS LTD. V. BROWN* [1970] E.A. 1.

The Memorandum of Appeal raises 7 grounds of appeal to wit:

1. *That the learned Judge erred in law in holding that the appellant's appeal was incompetent in law.*
2. *That the learned Judge erred in law in holding that the court did not have jurisdiction to entertain the appeal taking into account the appeal raised issues of law.*
3. *That the learned Judge erred in law failing to appreciate the fact that before filing the appeal in the High Court, the appellant had sought for and had been granted leave to appeal by the subordinate court.*
4. *That the learned Judge erred in law in failing to appreciate the fact that the moment the appeal was admitted, the court was seized with jurisdiction to hear the appeal.*
5. *That the learned Judge misdirected himself at law faulting another Judge's (Kasango, J.) decision to admit the appeal.*
6. *That the learned Judge misdirected himself in holding that Land Disputes Tribunal Act did not provide appeal mechanism for a party to appeal directly to the High Court on issues of law.*
7. *That the learned Judge erred in law in failing to address all issues raised in the appeal.*

[7] During the hearing of this appeal, Mr. Ng'ang'a Ngigi, learned counsel appeared for the appellant. The firm of J. M. Kagwi & Company Advocates who are on record for the respondent did not appear although they were duly served with a hearing notice.

Mr. Ngigi argued all the grounds together. He submitted that an issue of law arose as to whether the District Land Registrar and Surveyor had power to make alterations to the area Survey Map of an area and to alter a title that was registered in the name of the appellant. That is why the appellant sought and obtained leave of the trial magistrate to file an appeal in the High Court to pursue an issue of law; the appellant complied with the provisions of the Civil Procedure Rules when he filed the appeal before the High Court; the matter went for directions before Kasango, J. and the learned Judge admitted the appeal which she observed raised an issue of law.

[8] According to Mr. Ngigi, if the respondent was not comfortable with the appeal being admitted, she should have objected to its admission on the basis of the jurisdiction of the High Court regarding appeals from the Land Disputes Tribunal. Counsel for the appellant faulted the judgment of Makhandia, J. on the grounds that it was tantamount to overturning the order of Kasango, J., a Judge of co-ordinate jurisdiction. As a result, the appeal was not addressed on merit especially the fact that the District Land Surveyor lacked jurisdiction to amend Mutation Forms of *Parcel No. Loc 10/Kahuti/1665 to read Loc 10/Kahuti/1660*.

[9] We have considered this appeal with anxious minds because the appellant's appeal before the High Court was not determined on merit. It was found incompetent because under the provisions of *Section 8(1)* of the repealed *Land Disputes Tribunal Act* it provided:

8. *“Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated”.*

[10] In view of this statutory provision, the learned Judge was right that the appellant by passed a legal requirement and filed the appeal in the High Court instead of the forum that was provided, and obviously the leave by the trial magistrate could not supersede a statutory provision. What, however, causes us concern is the fact that the appellant's appeal was admitted for hearing and another Judge, Kasango, J. observed the appeal raised an issue of law. Perhaps as argued by counsel for the appellant, it cannot be ruled out that the admission of the appeal raised the appellant's legitimate expectation that he would be heard in the High Court.

[11] By dint of the provisions of **Article 159(2) (d)** of the **Constitution of Kenya**; justice shall be administered without undue regard to procedural technicalities. We are not at all countenancing the appellant's failure to follow the statutory procedure as a matter of technicality. We are merely emphasizing that since his appeal was admitted for hearing and taking into consideration the overriding objectives in the administration of justice as provided for also under **Section 3A** and **3B** of the **Civil Procedure Act** the learned Judge of the High Court was too required to take a broad view of justice and ensure proportionality of parties who come to court.

See the case of:

Douglas Mbugua Mungai -vs- Harrison Munyi, Civil Application No. Nai. 167 of 2010:

“We are as a matter of statute law required to take a broad view of justice and taking into account all the necessary circumstances, factors and principles and be satisfied at the end of the exercise that we have acted justly.”

As we stated in **Stephen Baro Gititha v Family Finance Building Society & 3 Others, C.A. No. Nai. 263 of 2009:**

“The overriding objective over shadows all technicalities, precedents, rules and action to..... And whether is in conflict with it must give way.”

This Court also observed in the case of **Richard Ncharpi Leiyangu -vs- Independent Electoral and Boundaries Commission and 2 Others, C.A. No. 18 of 2013, Nyeri:**

“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

[12] Bearing in mind the above principles, the dispute in this appeal emanated from a determination of Kangema Land Disputes Tribunal. The parties had submitted themselves for a determination of the occupation of a parcel of land known as **Loc 10/Kahuti/1665** which the appellant alleged was in his name. It turned out that there were two parcels of land bearing the same number which were not even adjoining each other. The respondent who was in occupation of one of the parcels from 1966 when the land adjudication exercise was completed and she claimed ownership of the same.

[13] Counsel for the appellant submitted that he had no issue with the proceedings before the tribunal which were in accordance of the mandate given under Section 3 of the Land Disputes Tribunal. What he took issue with, was the order by the Registrar that the District Surveyor was to make corrections on the Land Registry Map in order to correct the error that was identified regarding the appellant's ownership of the subject parcel of land. This was the crux of the appeal before the High Court which was also emphasized by counsel in his oral submissions to us.

[14] Having found Makandia J was correct in his findings that the appellant should have first filed an appeal before the Provincial Appeals Committee, we have nonetheless taken the liberty to look into the aforementioned issue so as to bring this matter to finality. We also have at the back of our minds that the

Land Disputes Tribunal has since been repealed there is nowhere the appellant can go backwards for the determination of the said issue. The appellant alleged the Registry Map was amended by the District Surveyor as opposed to the Director of Surveyor. He however did not annex a copy of the survey map that was allegedly amended by the District Surveyor to this appeal. Secondly, the proceedings before the Land Disputes Tribunal were within the law: thus, even their findings that the matter be referred to the District Land Registrar and Surveyor were within the law. However, the appellant challenges the order by the Senior Resident Magistrate who adopted the findings of the Land Registrar and Surveyor as the orders of the court. On this point we hasten to add that the Land Disputes Tribunal Act did not give the Magistrate any room not to adopt the findings of the Tribunal. As some excerpts of the proceedings here below will demonstrate, even the appellant did not object to the adoption of the findings.

[15] In dealing with this issue, we revert to the proceedings before the Senior Resident Magistrate, Kangema where the dispute was registered as ***Land Disputes Tribunal Case No. 7 of 2005***. This is where the Award by the Tribunal was filed. Subsequently, the parties attended court for the reading of the award. On 8th November, 2006, the record shows Mr. Ngigi appeared for the appellant while Mr. Kagwi appeared for the respondent. This is how Mr. Ngigi addressed the court:

“There was an order issued to the Land Registrar to do certain things. They ought to file a report to their findings. We pray that the Land Registrar and the District Surveyor to file their report so that thereafter, parties can (sic) decide whether to appeal. I pray for a date”.

The Court makes the following orders:

“Stood over to 6th December, 2006. District Land Registrar and District Surveyor to be summoned to present the findings”.

[16] The matter was in court on several other occasions and finally on 28th November, 2007, both Mr. Ngigi and Mr. Kagwi were before court and this is what is recorded:

“Mr. Ngigi; the Land Registrar and the Land Surveyor have filed their awards. We are not satisfied with awards. We ask the court to adopt the awards as the court orders so that we can appeal against the same”.

Mr. Kagwi: ***“That is the position”.***

Court: “Both awards by Land Registrar and Land Surveyor be adopted as the court orders as requested. Parties are at liberty to appeal”.

[17] That became the decree of the court; the appellant was supposed to appeal before the Appeals Committee if dissatisfied with that decision. As stated elsewhere in this judgment, the granting of leave by the trial magistrate did not oust the statutory underpinnings. Secondly in the record of appeal before us, the appellant has not demonstrated how the Index Map was altered. The document that is annexed as a survey map is stamped Survey of Kenya, there is nothing to show whether it was prepared by the Director of Survey or the District Land Surveyor. The Registrar is empowered under sections 17 of the repealed Registered Land Act to cancel any entry in the register which he is satisfied ceased to have any effect. Further the effect of the adoption of the order by the court is the one that would have resulted into the rectification of the register as provided for under ***Section 143*** of the ***Act***. In our understanding, the adoption of the order is what would result in further proceedings of rectifying the maps and register. For this reason we also agree with the Makhandia J., that the appeal was totally misplaced.

[18] Accordingly, we find no merit in this appeal for the above additional reasons and for the same reasons that were reached by the High Court. We order it dismissed with no order as to costs as the respondent did not appear.

Dated and delivered at Nyeri this 11th of February, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR