



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 154 OF 2012

BETWEEN

SILVANUS WAMBIA RABURU APPELLANT

AND

HENRY OTIENDE ODEP.....1ST RE.SPONDENT

JOSEPH WASUNA ORAMBO2ND RESPONDENT

(An Appeal from a judgment of the High Court of Kenya

at Kisumu (Aroni, J.) dated 26th November, 2010

in

H.C.C .C.A. NO. 85 OF 2008)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (*Ali-Aroni, J.*) dated 26th November, 2010 whereby the learned Judge allowed the appeal lodged in that court by the respondents, **Henry Otiende Odep** and **Joseph Wasuna Orambo** against the decision of the Nyanza Provincial Appeals Committee (*Appeals Committee*) dated 17th July, 2005 and adopted by the subordinate court – (*Chief Magistrate's Court – Kisumu*) in Land case **No. 28 of 2008**. The Appeals Committee had confirmed the decision of Kisumu Land Disputes Tribunal (*Land Disputes Tribunal*).

The appeal has reached this Court in this way. The appellant went before the Land Disputes Tribunal, claiming land parcel No. **KISUMU/MARERA/1112** on the ground that the land was originally owned by his father but was later through unclear means and in circumstances which were not entirely honest, taken by the 1st respondent who sold the same to the 2nd respondent who is now the registered proprietor of the disputed land. The Kisumu Land Disputes Tribunal agreed with him and awarded him the land.

The Appeals Committee also awarded the land to him. These events triggered the appeal before the High Court. The appeal was heard by *Ali-Aroni J.*, who, in a considered judgment, allowed the appeal on the ground that both the Land Disputes Tribunal and the Appeals Committee had no jurisdiction to

entertain the appellant's claim.

It was now the turn of the appellant to be aggrieved. He therefore lodged the appeal before us premised upon four (4) grounds. The following issues have been raised in those grounds.

1. ***That the respondents invoked the wrong provisions of the law instead of invoking the Judicial Review jurisdiction of the High Court.***
2. ***That the learned Judge of the High Court erred in law in considering the appeal when it was filed out of time without leave and yet allowed the appeal on a technicality contrary to her own view on procedural technicalities.***
3. ***That the learned Judge failed to consider the substantive complaint of the appellant that the 1st respondent had sold the disputed land which belonged to his deceased father to the 2nd respondent even before a Grant of Representation had been issued to him.***

At the hearing of this appeal the appellant although lay in matters of law, still articulated the above issues.

Mr Omollo, learned counsel for the respondents, opposed the appeal contending, in the main, that the appeal is incompetent as, in his view, no appeal lies to this Court from the decision of the High Court on appeal from a decision of the Appeals committee. Mr. Omollo submitted that notwithstanding the issue of our jurisdiction, both the Land Disputes Tribunal and the Appeals Committee had no jurisdiction to entertain the appellant's claim which was a claim for the disputed land.

We have considered the record, the grounds of appeal and the submissions made to us. Our jurisdiction to entertain this appeal has been challenged and we think we should dispose of that issue first. The jurisdiction of this Court is circumscribed by **Article 164 (3)** of the Constitution which limits this Court's jurisdiction to hearing appeals from decisions of the High Court, the courts with the jurisdiction of the High Court and any other courts or tribunals as prescribed by an Act of Parliament.

The Article states:-

“(3) The Court of Appeal has jurisdiction to hear appeals from

(a) the High Court and

(b) any other court or tribunal as prescribed by an Act of Parliament.”

The Constitution, in **sub-article (3) of Article 164**, does not seem to limit the Court of Appeal to hearing only appeals from the High Court in its original jurisdiction. **Sub-article 3(a)** of the said Article appears to give the Court of Appeal jurisdiction to hear all appeals from the High Court. The appeals which appear to depend on donation from an Act of Parliament are appeals from decisions of other courts other than the High Court or tribunals. So, does the restriction implicit in **section 3 (1)** of the Appellate Jurisdiction Act have Constitutional underpinning?

That section reads:-

“3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law”

(underlining ours)

This subsection, clearly imposes limitation to the jurisdiction of the Court of Appeal in hearing appeals from the High Court to only where an appeal lies to the Court under any law, which limitation is not in the Constitution.

The appeal before us is from the judgment of the High Court. Being such a judgment, by dint of the provisions of **Article 164 (3)** of the Constitution aforesaid, we would, *prima facie* appear to have jurisdiction. However, does the appeal lie given the provisions of **section 3 (1)** of the Appellate Jurisdiction Act which limits our jurisdiction only to matters where the law says so? **Section 8 (8)** and **(9)** of the Land Disputes Tribunals Acts provides:-

“(8). The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9). Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of.”

So, under the Land Disputes Tribunals Act, appeals from the Appeals Committee to the High Court are on points of law only. There is no provision for a further appeal to this Court. So, by dint of the provisions of **Section 164 (3)** of the Appellate Jurisdiction Act, it would appear that we have no jurisdiction to entertain appeals to this Court from decisions of the High Court in its appellate jurisdiction from decisions of the Appeals Committee. That was our finding in the case of ***Domnica Wamuyu -Vs- Johana Nduva Waritu – Nyeri Civil Appeal No. 269 of 2007 (UR)***. We however, did not, in that appeal, determine the issue conclusively and still considered the other issues raised in the Appeal. We cannot determine the point conclusively in this appeal either because we were not fully addressed upon the same, no doubt, because only one side was represented by counsel. We shall therefore consider the other issues raised in this appeal. Starting with whether the learned Judge of the High Court was right in overlooking the three (3) days delay in lodging the appeal before the High Court, we observe that the reason given by the learned Judge for ignoring the delay was her fidelity to substantive justice rather than adherence to technicalities of procedure. It is significant that the learned Judge made her decision on 26th November, 2010 only a few months after the people of Kenya gave themselves a new Constitution which frowns upon slavish adherence to procedural technicalities. **Articles 159 (2) (d) and (h)** provides:-

“(2) In exercising judicial authority the courts and tribunals shall be guided by the following principles-

(h) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.”

The learned Judge, in overlooking the delay of three (3) days in lodging the appeal at the High Court, was being loyal to the dictates of the Constitution 2010. We cannot fault her for doing so.

We now turn to a consideration of the second substantive issue raised in this appeal which is whether the learned Judge of the High Court was right in holding that the Appeals Committee and the Land Disputes Tribunal had jurisdiction to entertain the appellant's claim.

The Appeals Committee and the Land Disputes Tribunal could only consider the appellant's claim if they had jurisdiction to do so which jurisdiction is circumscribed by **section 3 (1)** of the Land Disputes Tribunals Act. The section provides:-

“3 (1) Subject to this Act all cases of a civil nature involving a dispute 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, shall be heard and determined by a Tribunal established under section

4.”

The Proceedings of the Land Disputes Tribunal are not in this record. The record however, has the proceedings before the Provincial Appeals Committee which show that the appellant's claim was for transfer to the appellant of Title No Kisumu/Marera/1112 from the 2nd respondent and the latter's eviction therefrom. To put the matter beyond argument we reproduce the "**Judgment**" of the Appeals Committee dated 11th January, 2008:

"JUDGMENT

With the above background facts put into consideration, the committee gives the verdict as follows;

- 1. The parcel of land in dispute be handed back to the heir/heirs of the Raburu family who are the rightful owners of Land – Silfanus Wambia Raburu.**
- 2. The second respondent Mr. Wasuna Orambo who in this case is the buyer and current user of the land to make arrangements to move out of the land and surrender the title deed to the land registry for cancellation.**
- 3. The repossession of the land by the Raburu family to be done immediately.**

Judgment arrived at in the presence of;

- 1. Michael Midheme – Chairman**
- 2. Cannon Mary Ominda – Member**
- 3. Shem Muo Member**

Date 11/1/2008."

It is clear to us that the proceedings before the Appeals Committee related to title to land. The committee indeed ordered transfer of the disputed land from the 2nd respondent to the appellant. The committee also ordered eviction of the 2nd respondent from the disputed land and cancellation of the title deed in respect of the same parcel of land. In our view, it cannot be gainsaid that the appellant's claim was not within the purview of **section 3 (1)** of the Land Disputes Tribunals Act. The Appeals Committee and the Land Disputes Tribunal clearly had no jurisdiction to entertain the appellant's claim. The learned Judge of the High Court was therefore right in setting aside the decision of the Provincial Appeals Committee and the Kisumu Land Disputes Tribunal. We do not agree with the appellant that determining the issue of jurisdiction was giving undue regard to technicality as jurisdiction is everything and without it a court or tribunal cannot take one more further step on a matter. It must down tools. (*See the case of the Owners of the Motor Vessel "Lillian S" -Vs- Caltex Oil (Kenya) Limited 1989 KLR 1*).

For those reasons we dismiss this appeal. We make no order as to the costs of this appeal and confirm the order of the learned Judge of the High Court with regard to costs of the appeal in that court.

This is however, not the end of the road for the appellant. He is at liberty to pursue his claim in a court with competent jurisdiction.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF JULY, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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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