



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 184 OF 2011

BETWEEN

FLORENCE NYABOKE MACHANI.....APPELLANT

AND

MOGERE AMOSI OMBUI.....1<sup>ST</sup> RESPONDENT

SIMON TENGERI MOGERE.....2<sup>ND</sup> RESPONDENT

NELSON OMWENGA NYAKUNDI.....3<sup>RD</sup> RESPONDENT

*(An Appeal from the Judgment and Decree of the High Court of Kenya at Kisii (Asike Makhandia, J) dated 29<sup>th</sup> day of October, 2013*

*in*

*HCCC NO. 139 OF 2009)*

\*\*\*\*\*

JUDGMENT OF THE COURT

In the original plaint filed at the High Court of Kenya at Kisii on 20<sup>th</sup> July, 2009, the plaintiff was **Naftali Machani Amosi** who sued the defendant **Mogere Amosi Ombui**. The plaintiff died in the course of the proceedings before the High Court and was replaced by his widow **Florence Nyamboke Machani**, the appellant in this appeal. In the final version of the amended plaint **Simon Tengeri Mogere** and **Nelson Omwenga Nyakundi** were added as defendants. It was averred that the plaintiff became a member of Kineni Farmers Co-operative Society Limited in or about 1965, a company established for purposes of acquiring land which was to be allocated to members. That company duly acquired land and the plaintiff was allocated about 99 acres which was eventually registered in or about 2001 as **parcel number Isoge/Kineni/Block 1/70** (the suit land). It was further alleged that in 1974 the original plaintiff invited his brother **Mogere Amosi Ombui** to reside on the parcel of land and to use that part and that the plaintiff moved into another part of the said land in 1976 and allocated 8 acres to his said brother to use it as a gift. In September 2007 the plaintiff was asked to attend a hearing before the Borabu Land Disputes Tribunal in a case **No. 005 of 2007** lodged by his said brother which tribunal after a hearing awarded 40 acres of land to the 1<sup>st</sup> respondent to be excised from the original suit land. What followed was **Miscellaneous Application No. 18 of 2007** filed by the 1<sup>st</sup> respondent at Keroka Magistrate's Court

which court was asked to adopt the said award as a judgment of the court in terms of the **Land Disputes Tribunal Act Chapter 303A Laws of Kenya** (now repealed). Judgment was duly entered and the 1<sup>st</sup> respondent proceeded and executed the decree resulting in the suit land being subdivided and the 1<sup>st</sup> respondent became the owner of land **parcel number Isoge/Kineni/311** measuring about 40 acres. It was further averred that the 1<sup>st</sup> respondent later subdivided the said parcel of land resulting in **parcel number Isoge/Kineni/686** and **Isoge/Kineni/687** respectively, and that he transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively. It was therefore prayed that a permanent injunction be issued against the respondents to restrain them from dealing with the said parcels; that the respondents be evicted from the said parcel of land that the District Land Registrar, Nyamira, be directed to cancel the said titles; that a declaration do issue declaring the decision of Borabu Land Disputes Tribunal to be null and void; that the said Registrar expunge documents from the Lands registry records; that the plaintiff be awarded compensatory and general damages; that the plaintiff also be awarded mesne profits, costs of the suit and other or further reliefs that the court would find appropriate.

In the amended statement of defence the 1<sup>st</sup> respondent denied the claims and stated that he was entitled to his parcel of land because he had contributed to the purchase of the same by paying half of the total sum to the said company which acquired the original land. The 1<sup>st</sup> respondent further alleged that the plaintiff had wrongfully had himself registered as sole proprietor of the original land ignoring the 1<sup>st</sup> respondent's claim. The 1<sup>st</sup> respondent therefore counterclaimed seeking the said 40 acres already registered in his name.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their written statements of defence denied the plaintiffs claim alleging that they were bona fide purchasers for value without notice and were entitled to their respective parcels of land. The hearing took place before Asike-Makhandia, J (as he then was) who delivered judgment on 29<sup>th</sup> October, 2010 dismissing the suit. That is what provoked this appeal.

Being a first appeal it is our duty to re-evaluate the evidence and arrive at our own independent conclusions - See the decisions of this court on this point in the cases such as **Maimuria s/o Patrick Mutoo v Wilson Njau Nyaki (Civil Appeal No. 131 of 1994)** where it was held that on a first appeal the court is entitled to a reappraisal of the evidence to draw its own conclusion from it and interfere if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence. In **Peters v Sunday Post [1958] EA 424** it was held that this court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand. That jurisdiction is exercised with caution – if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstance admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide.

In the evidence recorded by the learned Judge the original plaintiff repeated the averments in the plaint on how he became a member of the said company; how he invited his brother the 1<sup>st</sup> respondent to occupy the land; registration of the same and how he gave as a gift 8¼ acres of land to the 1<sup>st</sup> respondent. He testified that the 1<sup>st</sup> respondent sued him at the Borabu Land Disputes Tribunal which ordered that the 1<sup>st</sup> respondent was entitled to 40 acres of the land and that award was adopted and became a judgment of the court. On cross-examination, the plaintiff confirmed that he attended the hearing at the said tribunal and also attended the Magistrate's Court where the award was adopted. In his own words:-

***“... I attended the court. I had an advocate on record then. The court advised me that if I was not satisfied with the award, I should appeal...”***

And that he chose to file the declaratory suit at the High Court instead of taking the advice given by the Magistrate's Court.

The 1<sup>st</sup> respondent testified for himself and for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. He stated that he bought the

suit land with his brother the plaintiff and they were to share it equally. He produced as evidence receipts issued by the said company in support of his claim and repeated the facts relating to the tribunal case; the judgment adopting the award and eventual decision on the part of the land that became registered in his name. He therefore denied the plaintiff's claims stating that he was entitled to the excised parcel of land.

The learned Judge considered the Plaintiff's case and that of the defendants and dismissed the suit. Five grounds are taken in the Memorandum of Appeal drawn by counsel for the Appellant. In the first ground the learned Judge is faulted for not holding that The Land Disputes Tribunal had no jurisdiction to deal with titles to land making its decision illegal, null and void; in the second ground, the learned Judge is faulted for rendering the concept of sanctity of title useless; in the third ground, the learned Judge erred by failing to make a decision on the counterclaims in the fourth ground, the learned Judge misdirected himself fundamentally by:-

***“(a) Ignoring material evidence on record hence arrived at a wrong decision.***

***(b) Misunderstood and misapprehended documentary evidence on record.***

***(c) Failing to take into account the credibility of evidence of the 1<sup>st</sup> respondent during trial.”***

while in the last ground the learned Judge failed to do justice in the case before him.

The appeal came for hearing before us on 23<sup>rd</sup> July, 2014 and was urged by the learned counsel for the appellant Mr. Bosire Gichana while the Respondents were represented by learned counsel Mr. Reuben Masese. Learned counsel for the appellant condensed all the grounds of appeal and submitted that the appellant was entitled to the suit land while the 2<sup>nd</sup> respondent was only entitled to the 8¼ acres gifted to him by the appellant. Counsel urged further that the Land Disputes Tribunal had no jurisdiction to deal with the land which was already registered in the name of the appellant and therefore, having no jurisdiction its decision was illegal null and void and the award adopted by the Magistrates Court was also a nullity - **Macfoy v United Africa Company Limited [1961] 3 AII ER 1169** and **Lukenya Ranching & Family Cooperative Limited v Machakos Land Disputes Tribunal & Chief Magistrates Court Machakos (Nairobi HC Misc. Application No. 162 of 2007)** were cited for the proposition that if the award by the said tribunal was a nullity the award could not be adopted as a judgment of the court.

Counsel for the Respondents in opposing the appeal submitted that the Appellant erred by not following the appeal procedure provided in the Land Dispute Tribunal Act which failure made it possible for the award of the tribunal to be adopted as a judgment of the court.

The learned Judge identified the following as the issues calling for his determination:-

***“– Whether the Borabu Land Disputes Tribunal award should be declared null and void.***

- ***Pursuant to the foregoing whether the defendants should be evicted and injunction to issue.***
- ***Whether land register should be rectified back to the original Isoge/Kineni/Block 1/70 in the name of the plaintiff.***
- ***Damages/mesne profits if at all.***
- ***Costs.”***

The learned Judge held that he had jurisdiction to nullify actions of a subordinate tribunal if such tribunal exercised jurisdiction which it did not have but he found that the tribunal in the case before him did not exceed jurisdiction because:-

***“In the circumstances of this case, and in accordance with the Land Disputes Tribunals Act, once an award is rendered, it has to be filed in the subordinate court. Once that is done, any of the parties to***

*the same may apply to the subordinate court to adopt the said award as a judgment of the court. Once it is done, a decree shall issue which is executable. This is perhaps a scenario not contemplated by Madan J, (as he then was) when he made those observations. I think those observations were limited to a one stop tribunal. In other words it was only applicable to a tribunal whose decisions would not be taken a step further.*

*Once the award of Borabu Land Disputes Tribunal was adopted as a judgment of Senior Resident Magistrate's Court at Keroka, it ceased to exist on its own. It cannot be the subject of a declaration. And even if it remained alive of what use will it be to declare it a nullity if the decree ensuing therefrom, by SRM's court at Keroka does not face the same fate. The plaintiff has not invited this court to do so. I am sure that he was aware that that would have been an uphill task. The award having become a judgment of the court of competent jurisdiction can only be varied, vacated, set aside or reviewed either by the same court or by an appellate court in appropriate proceedings. That has not been done by the SRM's court at Keroka nor have I been asked to do so in this suit. In any event I do not think that the SRM's court at Keroka has jurisdiction under the Land Disputes Tribunals Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is bad in law and therefore void ab initio. It will therefore be a legal absurdity for me to declare the award a nullity but the judgment and subsequent decree ensuing therefrom by SRM's court Keroka is left intact and standing...."*

We have considered the record of appeal, the memorandum of appeal, the submissions of counsel and the law.

A hearing took place at the Borabu Land Disputes Tribunal Board on 20<sup>th</sup> August, 2007 when testimony of the original Plaintiff, the 1<sup>st</sup> respondent and their witnesses were taken. A "verdict" was issued the next day 21<sup>st</sup> August, 2007 where the 1<sup>st</sup> respondent was held as being entitled to 40 acres of land from the suit land. The Tribunal advised the parties to file an appeal within 30 days if they were dissatisfied with its findings. There was no appeal. The 1<sup>st</sup> Respondent thereafter filed a suit in the subordinate court being SRMCC No. 18 of 2007 at Keroka court where the prayers were that the court adopt the award by the said tribunal as a judgment of the court. The learned Judge found as a fact that the original plaintiff and the 1<sup>st</sup> respondent participated in those proceedings. We have no reason to doubt that finding. The said subordinate court duly entered judgment on 23<sup>rd</sup> May, 2008 in effect adopting the said award as a judgment of the court. The appellant then filed the declaratory suit on 20<sup>th</sup> July, 2009 subject of this appeal.

**Section 8 of the repeated Land Disputes Tribunal Act** provided for a case where a tribunal had made an award that:

*"(1) 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.*

(2) .....

(3) .....

(4) .....

(5) .....

(6) .....

(7) .....

**(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 Appeal Committee to the High Court on a point of law within sixty days from the date of the decision complained of.**

**Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.**

**(10) .....**

It will therefore be seen that the said Act provided an elaborate procedure for resolution of disputes relating to the division of, or determination of boundaries to land, a claim to occupy or work land or trespass to land where jurisdiction was donated to a tribunal established under the Act and further established an appeal process for parties dissatisfied with determinations by such a tribunal. The Act limited appeal to the High Court on questions of law only.

The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The Appellant instead chose to file the suit for declaratory orders and compensation. As the learned Judge found in the judgment appealed from:-

***“The 1<sup>st</sup> defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed he was even advised by the SRM’s court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate’s court at Keroka and in particular the order adopting the award as a judgment of the court dated 23<sup>rd</sup> May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the court would have allowed the application unless it was satisfied that the respondent’s counsel was duly served with the application and or a hearing notice and had failed to turn up.*”**

***It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1<sup>st</sup> defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”***

We, in our own, find the above proper and legally founded. We see no reason to interfere with it. Appellants appeal has no merit and we accordingly dismiss it with costs to the respondents.

***Dated and Delivered at Kisumu this 19<sup>th</sup> day of September, 2014.***

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**