



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL NO. 29 OF 2013

JAMES KIRAGU.....APPELLANT

VERSUS

DAVID NDUNGU WAWERU.....RESPONDENT

JUDGMENT

On the 7.5.1985, **David Ndungu Waweru** (*hereinafter referred to as the respondent*) filed a claim dated 6.11.1985 against **Yamumbi Farmers Co-operative Society** through its Chairman James Kiragu and one Lilian Wangui claiming that he bought a share of land from Grace Nyambura Gitau a shareholder at Yamumbi in the year 1971 and took possession thereof. The share was bought to be registered in the name of a minor daughter Ludia Nyambura. The Society later forged the register and wrote the name of Lilian Wangui instead of Ludia Nyambura. Since 1971, he has been using the land until recently when Lilian Wangui entered his shamba and planted by force. The respondent found out that Lilian Wangui was authorized by the **Yamumbi Farmers Co-operative Society** to cultivate the shamba and that despite protests, Lilian Wangui continues to trespass.

The respondent prayed for an order that the **Yamumbi Farmers Co-operative Society** to be ordered to rectify the register and a permanent injunction against Lilian Wangui from trespassing onto the land.

Lilian Wangui filed defence and denied that during the year 1971, the respondent bought Plot No. 31 from Grace Nyambura Gitau and further claimed that her former name was Ludia Nyambura and that she provided the money for the purchase of the Plot in her name but denied that at the time of the purchase, she was a minor as alleged and that she instructed the 1st defendant to delete from the shareholder's register the name of Ludia Nyambura and replace it with her new name of Lilian Wangui and that the names of Ludia Nyambura and Lilian Wangui referred to one and the same person that is herself. She further stated that she was lawfully authorized to cultivate Plot No. 31 by the **Yamumbi Farmers Co-operative Society**

Yamumbi Farmers Co-operative Society also filed defence denying that the respondent bought Plot NO. 31 from Grace Nyambura Gitau during the year 1971 and took possession as alleged and put the respondent to strict proof thereof and that the share in respect of Plot No. 31 was bought for and registered in the name of an adult by the name of Ludia Nyambura and not a minor as alleged and further denied forging the register as alleged and averred that it deleted the name of Ludia Nyambura and inserted the name of Lilian Wangui on the instructions of Ludiah Nyambura, the shareholder. Moreover she denied the claim that the respondent had been using the land in dispute since 1971 as alleged but admitted authorizing Lilian Wangui to cultivate Plot No. 31 as alleged.

By consent of the parties, the case was referred to the District Commissioner as he then was for arbitration by the elders. The elders sat and heard the parties and after a lengthy discussion, found Mr. Ndungu's claim without foundation and therefore, the case was dismissed. An attempt to set aside the Elder's Award was dismissed by the Resident Magistrate, Eldoret on 25.2.1987. The matter later found itself before the Uasin Gishu Land Disputes Tribunal in Land Disputes Case No. 2 of 2010.

I have not seen the statement of claim hence I cannot ascertain when the same was filed. After hearing the parties, the Land Disputes Tribunal found that as a result of the director grabbing by force of Plot No. 21 which belonged to David Ndungu, it caused a prolonged dispute between the claimant and objector and that the directors were directed to allocate Mr. David Ndungu with his 4 acres of land thus Plot No. 21. The Elders ordered James Kiragu and other directors to be compelled by court order to give back 4 acres of land at Yamumbi Farm and that the directors were to pay costs of the dispute. It is not clear when the dispute was heard and the award made but it is clear that the award was adopted on the 16.3.2011 as a judgment of the court and the order issued on the 16.4.2014.

The Memorandum of Appeal was filed by the appellant on 5.4.2011 and amended on 18.7.2014. The grounds of appeal in the Memorandum of Appeal can be summarized into three grounds namely:

- 1. That the decision of the tribunal was tainted with illegality.**
- 2. That the decision of the tribunal was tainted with Procedural Impropriety**
- 3. That proceedings of the tribunal were a nullity due to the principle of Res judicata**

On illegality. Mr. Njuguna for appellant argues that the Tribunal lacked jurisdiction to entertain the dispute. He further argues that the matter had been determined by the Resident Magistrate's Court in Eldoret hence the Tribunal lack jurisdiction to entertain a matter already determined by the court.

On procedural impropriety. Mr. Njuguna argues that no statement of claim was filed and that the Land Disputes Tribunal was not comprised of a chairman and that the person sued was not a director of the society.

On res judicata. Mr. Njuguna argues that the claim was *res judicata* as the Resident Magistrate's Court had settled the dispute. Moreover, the appellant argues that the claim was time barred.

Mr. Ndungu on his part, argues that the appellant is a grabber. He bought the land from Samuel Gitau for Kshs.1000/= and therefore, Kiragu is not the owner of the land. I have considered the appeal and do find the following issues ripe for determination:

- (1) Whether the Tribunal had jurisdiction to entertain the dispute.**
- (2) Whether the proceedings were tainted with procedural irregularity.**
- (3) Whether the claim was time barred.**
- (4) Whether the claim was res judicata**

1. WHETHER THIS COURT HAS JURISDICTION TO DEAL WITH THIS DISPUTE

This court finds that before delving into the issues raised by the parties it is important to decide whether

this court has jurisdiction to hear this appeal. The *locus classicus* on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

Section 8 of the Land Disputes Tribunal Act No. 303 (repealed) provided that all appeals from the Land Disputes Tribunal lay in the Appeals Committee and appeals from this Appeals Committee lay in the High Court. However, with the establishment of the Environment and Land Court, the Tribunal and Appeals Committee were abolished and therefore, matters that were pending before the Tribunals were to be concluded by the Magistrates' Courts and matters pending in the Appeals Committee were to be concluded by the Environment and Land Court. This court holds that the appeal herein is rightly before the court as any appeal in respect of the issues raised was to be filed in the Appeals Committee. In the absence of Appeals Committee, and in view of the directions of the Chief Justice, the appeal lay in this court, however, only on points of law.

Having found that this court has jurisdiction to entertain the appeal, the next issue is whether the Tribunal had the prerequisite jurisdiction to entertain the dispute.

Section 3(1) of the Land Disputes Tribunal Act No. 303 (repealed) provided that.

(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 dispute before the Tribunal was basically who owns the suit-land and not a boundary dispute. There was no issue as to division of land or trespass to land. It is trite law that the Tribunals lacked power to determine ownership of land. I do hold that the Tribunal lacked jurisdiction to determine the issues herein which were based on ownership of land.

2. WHETHER THE PROCEEDINGS WERE TAINTED WITH PROCEDURAL IMPROPRIETY

Section 3(2) of the Land Disputes Tribunal Act No. 303 (repealed) provides that every dispute referred to in subsection (1) shall be instituted by presenting a claim to the Tribunal for the area in which the land is situated, and shall contain, and contain only, a summary of the material facts on which the claimant intends to rely.

Section 3(3) Every claim shall be registered in register of claims to be kept by the Tribunal in the prescribed manner and the claims shall be numbered consecutively in each year according to the order of their institution.

Section 3(4) Every claim shall be served on the other party, or, where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summonses shall thereafter apply.

To begin with, I have not seen a statement of claim. There is no evidence of service of the claim to the appellant and therefore the proceedings were tainted with procedural impropriety. I do find that Section 3(2), 3(3), and 3(4) of **the Land Disputes Tribunal Act No. 303** were flouted by the Tribunal and therefore resulting in procedural impropriety. Moreover, this court finds that Section 4 of the Land Disputes Tribunal Act was contravened by the Tribunal when the District Commissioner appointed 3 members to hear and determine the claim but failed to appoint a chairman amongst the three to preside over the proceedings. I do hold that the Tribunal was improperly constituted hence their decision was a nullity.

3. WHETHER THE CLAIM WAS TIME BARRED

I have considered the evidence on the record and do find that the dispute was in court until 1986 when the same was determined finally on 25.2.1987 by Hon. Boaz Olao, Resident Magistrate as he then was and now a Judge of the Environment and Land Court. Though the exact date of filing the claim is not known as there is no statement of claim, the record shows that the matter was revived in 2010, thus 23 years after the decision of the Resident Magistrate. I do hold that Section 3(1) of Land Disputes Tribunal Act should be read with **Section 7 of The Limitation Of Actions Act** in respect to claims revolving on land. The import of this section is that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. I do find that the claim was time barred. Having found that the Tribunal lacked jurisdiction to entertain the claim, it would be superfluous to delve into the issue of *res judicata*.

In conclusion, I do find that the appellant has satisfied this court that the appeal is merited and therefore, the same is allowed with costs to the appellant.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF DECEMBER 2015.

ANTONY OMBWAYO

JUDGE



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