



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.5 OF 2002

THERU NDIRANGU)

WAMUHU NDIRANGU).....APPELLANTS

VERSUS

MUTAHI NDIRANGU)

MARGARET WANJIKU NDIRANGU).....RESPONDENTS

R U L I N G

On the 10th of January 2002, Theru Ndirangu (deceased) and Wamuhu Ndirangu (deceased) filed appeal no 5 of 2002 at the High Court of Kenya, Nyeri, from the ruling of learned magistrate W.K. Korir sitting at Nyeri dated 30/11/2001 in Nyeri Chief Magistrate's Court Award No.103 of 2000 on grounds that the learned trial magistrate erred in law and in fact in failure to enter the award of the Land Disputes Tribunal Nyeri as the Judgment of the Court in accordance with the Land Disputes Tribunal Act. **Secondly** that the learned trial magistrate erred in law and in fact in failure to find that the said default amounted to sufficient reason and was as a result of some mistake or error apparent on the face of the record. **Thirdly** that the learned trial magistrate at any rate erred in law in failure to adequately redress this gross breach of statutory duty through the inherent jurisdiction of the court invoked by the appellants' in their application of section 3A of the Civil Procedure Act.

They prayed that the judgment in Nyeri Chief Magistrate's Court Award No.103 of 2000 be entered in terms of the award filed therein and they be awarded costs. The appeal was placed before Justice Juma on the 3/10/2002 who summarily rejected it .

On the 4/4/2003, the appellants filed this application dated 18 March 2003 under Order 45 rule 1 of the Civil Procedure Rules praying for a review of the order made on 3/10/2002 rejecting the appeal summarily. The application is based on ground that there is an apparent error on the face of the record in that the lower court role is to enter judgment in terms of the award as provided for in the Land Disputes Tribunals Act No.18 of 1991.

The application is supported by the affidavit of Theru Ndirangu (deceased) who states that they filed the appeal because the Nyeri Municipality Disputes Tribunal made an award to their benefit but the Chief Magistrate's Court refused to adopt the award in accordance with the provision of the Act.

She believed that this was an error apparent on the face of the record as the lower court ought to enter

judgment in terms of the award of the Disputes Tribunal and any dissatisfied party should file an appeal to the Provincial Appeals Committee before approaching the High Court. Whilst the respondents were not satisfied with the decision of the District Land Disputes Tribunal they never appealed, however the senior resident Magistrate declined to adopt the award an act that prompted the appeal. The application is further supported by a supplementary affidavit of the said Theru Ndirangu sworn and filed on 1st December 2003 whose import is that the award in Nyeri Municipal Tribunal Land case no 2 of 2000 was to the effect that land parcel no AGUTHI/GATITU/27 which comprised of 30 acres or thereabouts was to be subdivided into four(4) commercial plots of 0.25 acres for one acre and the remaining 29 acres were to be subdivided into four(4) portions of 7.25 acres to be given to each wife of the the deceased. On the 20th August 2013 the Respondent filed a replying affidavit stating *inter alia* that a succession cause to their father's estate was heard and determined on the 7th of October 1976 in the presence of before all the parties or those that they substituted and no formal appeal was filed. Thereafter the suit property was subdivided and separate titles issued, and in reply to the replying affidavit the applicants filed answer to the replying affidavit stating that whose sole import is that the Nyeri Disputes Land Tribunal was recommended by the then Land Registrar Nyeri Mr S.M Nguturi under the orders of from the District Officer Nyeri Municipality and there fore should have been adopted by the Magistrate.

The application was never prosecuted until the 18th of September 2013 due to other interlocutory applications and death of parties. Much later, Joseph Wangombe Ndirangu, Karago Ndirangu, Ibrahim Murira Ndirangu applied to be substituted as the appellants as a result of the death of their mothers who were the appellants then. Though the application had been initially dismissed by Justice Kasango on the 26/2/2009, the same was reviewed by Justice Sergon on 3/6/2011 where upon the chamber summons dated 27/10/2009 was allowed and whose import was that the suit that could have abated was revived and the applicants allowed to substitute the deceased parties and therefore the applicants are properly before court.

The genesis of this matter is a dispute before the Land Disputes Tribunal Ruringu filed by Theru Ndirangu and Wamuhu Ndirangu (both deceased) claiming to be entitled to the parcel of land known as LR No.Aguthi/Gatitu/27. They were awarded the land by the Tribunal and sought the same to be adopted as the decision of the Chief Magistrates Court Nyeri. The application was dismissed by the magistrate on grounds that the land in issue had been subdivided and new title deeds issued on 24/7/1981 and that the issue had been dealt with both in the lower court and the High Court and Court of Appeal. Furthermore that the land in issue had been subdivided as per a consent order signed by all the parties including the applicants' mothers (initial appellants before substitution). The learned magistrate found that the Land Disputes Tribunal had no mandate to deal with the matter in respect of the suit land as the Courts established by law had already made decisions on ownership of the suit land.

I have considered the Memorandum of Appeal and the application for review, the supporting affidavit the replying affidavit and the answer to the replying affidavit and the rival submissions by parties to the application and do find that this matter was determined through Civil Appeal No.5 of 1974 by J.S. Patel Senior Resident Magistrate Nyeri on the 7/10/1976 when it was agreed by consent signed by Theru w/o Ndirangu, Wamuhu w/o Ndirangu, (**mothers of the appellants**)Wanja w/o Ndirangu and Nyamatira w/o Ndirangu (**mothers of the the respondents**) that parcel no Aguthi/Gatitu/27 was to be subdivided into 4 equal shares and shared amongst the four wives of Ndirangu. This court finds that the consent order has never been set aside.

The land subject of the appeal has been subdivided and does not exist as new title deeds were issued.

The decision of the District Land Disputes Tribunal was made in the year 2000 approximately 24 years after the decision of the Senior Resident Magistrate's Court Nyeri.

The powers of the Land Disputes Tribunal are set out in Section 3 of the Land Disputes Tribunal Act No.18 of 1990(repealed). The Tribunal as it existed then could not deal with issues of succession, moreover, the Tribunals did not have the power to arbitrate on matters where the courts had made decisions, therefore the decision by the Nyeri Disputes Land Tribunal was illegal, null and void for attempting to reverse the decision of the Resident Magistrate made on 7/10/1976. The decision was an illegality for attempting to give title or interest in land other than the right to occupy and work on land.

The learned magistrate in Nyeri whose orders were sought to adopt Award No.103 of 2000 did not have the power to ratify nullities but had the duty to ensure that the decision of the Tribunal sought to be adopted was arrived at properly by a body that had mandate to do so. Magistrates adopting the awards of Tribunals had the residual power to reject an award that was illegal. This residual power is recognized by the law as the inherent power to do justice. The same has previously been referred to as the oxygen rule but was subsequently enshrined in Article 159(2) of the Constitution which provides that justice shall be administered without undue regard to technicalities. Holding that the magistrate was bound to adopt the decision of the tribunal without inquiry into its legality would amount to administering justice with undue regard to technicalities.

The upshot of the above is that there is no error apparent on the face of record in the lower court declining to enter judgment in terms of the award as provided for in the Land Disputes Tribunal Act as the magistrate had duty to reject an award that was tainted with illegality. The learned Magistrate acted properly and did not err by making a legitimate inquiry into the process of obtaining the award when the application to adopt the same as a judgment of the court was placed before him. He acted legitimately by inquiring into the Mandate of the Tribunal to issue the award in view of the decision of the Senior Resident Magistrates Court Nyeri on appeal from the original decree after retrial in civil suit no 29 of 1971 of the District Magistrate's Court at Ruringu before S.M Njaakio.

This court believes that the above matters were considered by the learned judge when rejecting the appeal summary as there are on record and there is no evidence of discovery of new and important matter or evidence which, was not within the knowledge or could not be produced by the applicants or was not on record when the judge made the order rejecting the appeal summarily. The applicants have not demonstrated that there is a mistake or error apparent on the face of the record or any other sufficient reason to justify the review of the decision of the court summarily rejecting the appeal. Ultimately the application is dismissed with no order as to costs this being a family dispute. It is so ordered.

Dated, signed and delivered on 20th day of September 2013.

A. OMBWAYO

JUDGE



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