



Case Number:	Environment & Land Case 8 of 2014
Date Delivered:	14 Dec 2017
Case Class:	Civil
Court:	Environment and Land Court at Kakamega
Case Action:	Judgment
Judge:	Nelly Awori Matheka
Citation:	Emmanuel Akusioma Kisanya v Adrian Aluba Shivayiro [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Kakamega
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL CASE NO. 8 OF 2014

EMMANUEL AKUSIOMA KISANYA :::::::::::::::::::: APPELLANT

VERSUS

ADRIAN ALUBA SHIVAYIRO :::::::::::::::::::: RESPONDENT

JUDGEMENT

The appellant being aggrieved and dissatisfied with the verdict and or orders of Western Provincial Land disputes Appeal Tribunal Committee delivered on the 27th May, 2010 prefers this appeal and puts forth the following grounds:-

1. THAT the Provincial Land Disputes Appeals Tribunal erred in law and facts by miscomprehending the matter and issues before it thereby condemning the appellant.

2. THAT the Provincial Land Disputes Appeals Tribunal erred in law and facts in upholding the Ikolomani land Dispute Tribunal ruling which had no jurisdiction to hear and determine the matter.

- The respondent's claim was time barred.

- The respondents lack the locus standi.

3. THAT the provincial land disputes appeal tribunal erred in law on dismissing the appellants appeal.

4. THAT the provincial land disputes appeal tribunal erred in law by not considering that the appellant was ready to attend court at any given time and date hence the proceedings and the verdict was done exparte and could have been fair when both parties concerned are heard and a fair verdict given.

5. THAT the appellant is ready to pay the outstanding balance of Ksh. 4,200/= to the respondent.

6. THAT the Provincial Land Disputes Appeal Tribunal failed to analyse the issue before it wholly and or properly or at all and its decision was evidently predetermined biased and was unlawful.

The appellant prays for judgment against the respondent for:-

(a) That the appellant appeal be allowed.

(b) That the verdict and or decision of the Provincial Land Dispute Appeals Tribunal and the Ikolomani Land Disputes Tribunal be quashed, set aside and or vacated.

The appellant submitted that, the respondent herein filed a claim at the Ikolomani Land Disputes Tribunal claiming L.R. IDAKHO/LUKOSE/632 from the appellant herein and the verdict made on 4th October 2017 was as follows:-

1. The objectors either pay the current price of 0.5 Ha to Mr. Aluba and transfer done accordingly or else vacate the land.
2. All costs be met by the objectors for inconveniencing the claimant.
3. The dissatisfied party to appeal within 30 days from the verdict was read (4th October, 2007.)

The appellant was dissatisfied with the said verdict and lodged an appeal at the Western Land Disputes Appeals Tribunal No. 4 of 2008 and his appeal was dismissed and the verdict of the Ikolomani Land Disputes Tribunal upheld but specifically the following orders were made on 27th May 2010.

1. The appeal is dismissed with costs at the court rate on production of receipts for travelling and subsistence.
2. The Ikolomani Land Disputes Tribunal court ruling stands as ordered THAT;-
 - (a) The appellants to pay either the current price of the Land of 0.5 Ha to Adrian Aluba for him to transfer the land accordingly or vacate the land.
 - (b) Appellants to pay costs for inconvenience to Adrian Aluba.
 - (c) The dissatisfied party to appeal within 30 days from the verdict date of reading.
3. The parties to keep peace.

The appellant was also aggrieved by that decision/verdict of the Western Land Disputes Appeals Tribunal prompting him to lodge this appeal pursuant to section 8 (9) of the Land Disputes Tribunal Act No. 18 of 1990 (now repealed) on points of law that; both the Ikolomani Land Disputes Tribunal and the Western Land Disputes Appeals Tribunal acted ultra vires in making the above mentioned decisions as they lacked jurisdiction to do so. The jurisdiction of a Land Disputes Tribunal is clearly set under section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 which limits the tribunals jurisdiction to determining disputes relating 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.

The dispute herein did not fall within any of the above stated categories to be determined by the Ikolomani Land Disputes Tribunal and the Western Land disputes Appeals Tribunal as the dispute therein is founded on a contract allegedly made on 23rd April 1983 between the appellant's late father and the respondent herein. Contractual matters and disputes are governed by the Law of Contract Act and relevant written laws and are also subject to the provision of the Limitation of Actions Act Cap 22 Laws of Kenya. Contractual disputes cannot therefore be heard and determined before the said tribunals as their jurisdiction is only limited to matters relating to customary laws as provided for under section 8 (7) which states:-

"The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law"

The Ikolomani Land Disputes Tribunal therefore had no jurisdiction to make an order of specific performance to enforce a contract by ordering the appellant to pay the current price of 0.5 Ha to Mr. Aluba and transfer accordingly. The said tribunal also lacked jurisdiction to issue an order of eviction and or vacation from the suit land herein L.R. IDAKHO/LUKOSE/632 as such orders could only be made by a court of law pursuant to the provisions of the Registered Land Act Cap 300 Laws of Kenya and Registration of Titles Act and/or the Environment and Land Court.

The dispute before the tribunal was founded on a contract between the appellant's late father a one Isaiah Mwole Kisanya and the respondent herein made on 23rd April 1983. The appellant was not a party to that agreement. The appellant's late father died on 4th February 1994 and yet the case before the Ikolomani Land Disputes Tribunal was registered in Ikolomani on 22nd February 2007 against the appellant herein who was and is still not the legal representative of the said deceased Isaiah Mwole Kisanya. The appellant thus lacked locus standi to be sued before the said tribunal. The appellant still lacks the locus standi to be sued as no succession proceedings in respect of his late father have ever been commenced. The Western Land Disputes Appeals Committee thus erred in upholding the Ikolomani Land Disputes Tribunal's verdict which was null and void in view of the foregoing. In a nutshell they urge that this honourable court makes the following orders:-

a. THAT the Ikolomani Land disputes Tribunal lacked jurisdiction to adjudicate on the dispute before it founded on a contract made on 23rd April 1983.

b. THAT the Ikolomani Land Disputes Tribunal lacked jurisdiction to make the verdict of 4th October 2007 thus its decision was ultra vires hence null and void.

c. THAT the Western Land Disputes Appeals Committee lacked jurisdiction to uphold the null and void decision of the Ikolomani Land Disputes Tribunal hence its verdict made on 27th May 2010 which was null and void.

d. THAT the appellant herein lacked the requisite locus standi to be sued thus both the proceedings before the Ikolomani Land Disputes Tribunal and the Western Land disputes Appeals Committee were and are null and void.

The respondent submitted that justice delayed is justice denied. The present appeal by the appellant is a mere delay tactic to shun the ends of justice being met timeously. The respondent herein acquired the land in question by way of voluntary transfer in form of a gift from his late uncle Joseph Mmanyisi. Thereafter he sold the same land to the appellant's father Isaiah Mwole Kisanya for a consideration of Ksh. 11,500/= on 23rd April 1983, to which only Ksh. 7,300/= was paid hence leaving a balance of Ksh. 4,200/= which has never been paid to date.

The respondent therefore after all reasonable efforts to settle the matter with the appellant and the deceased's family having been in vain sought redress from the Ikolomani Land Disputes Tribunal for an award of repossessing and occupying the land in question or be paid a sum of Ksh. 152,700/= being the current price of 0.5 Ha at the time the matter was first instituted in the District Tribunal. The tribunal's verdict was that the objectors either pay the current price of 0.5 Ha to Adrian Aluba or else vacate the land. It is this decision that precipitated the appeal to the Provincial Land Dispute Appeals Tribunal and subsequently the present appeal to this court by the appellant.

On 3rd March 2016 when the matter was coming up for hearing, the key issue before Justice Mukunya framed for determination was whether both the District and the Provincial Lands Disputes Tribunals had jurisdiction to deal with the matter. Notwithstanding the above stated issue for determination as

preferred by the court, the appeal herein is defective, a total contravention of law and which stands to be struck out in the first instance as it was brought out of time limitation stipulated by law. The Land Disputes Tribunal Act which was the law applicable at the time when the Provincial Appeals Tribunal rendered its decision was in clear terms and specifically section 8 (9) which stated as follows:-

“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.”

Therefore, the appellant was required by law to lodge his appeal to this court within 60 days but the decision of the Provincial Appeals Tribunal having been rendered on 27th May, 2010, it is until the 18th March, 2011 when they lodged their appeal which accents to almost a year. The appeal herein is therefore one which stands for dismissal and or being struck out having been brought outside the limitation of time prescribed by the law. Without prejudice to the foregoing the respondent further submitted as follows:-

Whereas the appellant will give a narrow meaning in interpreting the provisions of section 3 (1) of the now repealed Land Disputes Tribunal Act No. 18 of 1990, it is their submission that this matter was a proper one for the District Land Disputes Tribunal to adjudicate upon and subsequently the Provincial Land Disputes Appeals Tribunal. Section 3 (1) of the said act donates jurisdiction to the tribunal in all cases of a civil nature involving disputes 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.
- c. Trespass of land.

They submitted that the case presented before the Ikolomani District Land Disputes Tribunal falls under the category in subsection (1) b of section 3 above. In its wider interpretation, a claim to occupy as provided will include occupation by repossession as prayed under the instant case or occupation through any other means. Therefore it's clear that the respondent's claim to repossess the land will result in occupation as provided under section 3(1) (b) of the Act hence the tribunals had the jurisdiction. Whereas also the appellant may want to hide behind the fact that this is a contract entered into 24 years down the line hence statute barred, the law is crystal clear that a cause of action only arises when breach of the contract is deemed to have happened.

In the instant matter, the contract only provided for the upfront payment of Ksh. 7,300/= and the balance of Ksh. 4,200/= to be paid later hence rendering it impossible to ascertain as to when exactly breach occurred. Therefore, common law provides that in such cases, the payment should be within reasonable time not necessitated by unreasonable delay. From the respondent's evidence at the District Tribunal, it is evident that he has been patiently following this debt owed to him by the Isaiah's (deceased) family since 1983 but all in vain and that even at the burial of the appellant's father, he reminded them of this debt but they put him off. They submitted that this appeal should be dismissed having been instituted more than 60 days as required by the said act for an appeal. They further submit that the appellant, both at the District Tribunal and the Provincial Tribunal, deliberately absconded two bonds for them to appear for the hearing. At the District Tribunal, they only appeared on the last day for the verdict. At the Provincial Appeal Tribunal having deliberately absconded two bonds to appear for hearing of this appeal case on 29th April 2010 and 13th May 2010 which were served with the court summons through a High Court process server Ms. Enos Shihemi, it is when the appeal tribunal granted *ex parte* hearing on 27th May 2010 and thus the appellant cannot claim that he was not given an opportunity to be heard.

Otherwise, the respondent appeared before the tribunal and presented his case and evidence to the satisfaction of the arbiters hence resulting in the award given by the District Tribunal which was also adopted by the Provincial Appeals Tribunal. It is the respondent's submission that the appellant's appeal has no basis, it is an abuse of the court process and a waste of time as a delay tactic. They therefore pray that the appellant's appeal be dismissed with costs both in this appeal and those in the tribunals to the respondent and the award of Ikolomani District Tribunal be maintained.

This court has carefully considered both the appellant's and the respondent's submissions herein. The Land Disputes Tribunal Act which was the law applicable at the time when the Provincial Appeals Tribunal rendered its decision was in clear terms and specifically section 8 (9) which stated as follows:-

"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."

It is true that, the appellant was required by law to lodge their appeal to this court within 60 days but the decision of the Provincial Appeals Tribunal having been rendered on 27th May, 2010 it was until the 18th March, 2011 when they lodged their appeal which accents to almost a year. Be that as it may, in exercising the court's discretion to allow this appeal the court is guided by Article 159 (2) which states that in exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) Justice shall be done to all, irrespective of status;

(b) Justice shall not be delayed;

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) Justice shall be administered without undue regard to procedural technicalities; and

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

In the interest of justice this court shall proceed to determine this appeal. Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990, states that 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.

c. Trespass of land.

Shall be heard and determined by a tribunal established under section 4.

The issues in this case are that, the respondent herein acquired the land in question by way of voluntary transfer in form of a gift from his late uncle Joseph Mmanyisi. Thereafter he sold the same land to the appellant's father Isaiah Mwole Kisanya for a consideration of Ksh. 11,500/= on 23rd April 1983, to which only Ksh. 7,300/= was paid hence leaving a balance of Ksh. 4,200/= which has never been paid to date. The respondent submitted that, after all reasonable efforts to settle the matter with the appellant and the deceased's family having been in vain he sought redress from the Ikolomani Land Disputes Tribunal for an award of repossession and occupy the land in question or be paid a sum of Ksh. 152,700/= being the

current price of 0.5 Ha at the time the matter was first instituted in the District Tribunal.

The tribunal's verdict was that the objectors either pay the current price of 0.5 Ha to Adrian Aluba or else vacate the land. It is this decision that precipitated the appeal to the Provincial Land dispute Appeals Tribunal and subsequently the present appeal to this court by the appellant. I find that this is a contractual matter relating to title to land. The dispute before the tribunal was founded on a contract between the appellant's late father one Isaiah Mwole Kisanya and the respondent herein made on 23rd April 1983. The Ikolomani Land Disputes Tribunal therefore had no jurisdiction to make an order of specific performance to enforce a contract by ordering the appellant to pay the current price of 0.5 Ha to Mr. Aluba and transfer accordingly. The said tribunal also lacked jurisdiction to issue an order of eviction and/or vacation from the suit land herein L.R. IDAKHO/LUKOSE/632. I disagree with the respondent's submissions that in this case and in its wider interpretation, a claim to occupy as provided will include occupation by repossession as prayed under the instant case or occupation through any other means. Therefore the respondent submitted that it is clear that the respondent's claim to repossess the land will result in occupation as provided under section 3(1) (b) of the act hence the tribunals had the jurisdiction.

In the case of **Republic vs Chairman Eastern Provincial Appeals Tribunal & 4 Others (2015) eKLR** and in the Court of Appeal judgement in **Asman Maloba Wepukhulu & Anor vs Francis Wakwabubi Biketi Civil Appeal No. 157 of 2001 Kisumu**, both courts held that the tribunals under the said act lacked jurisdiction to deal with matters relating to title to land. From the foregoing, I find this appeal has merit and that the District Land Disputes Tribunal and the Provincial Land Disputes Appeals Tribunal in the present case lacked jurisdiction under Section 3 (1) of the said act to entertain the said matter and consequently I make the following orders;

1. That the appellant appeal be allowed.
2. That the verdict and or decision of the Provincial Land Dispute Appeals Tribunal and the Ikolomani Land Disputes Tribunal are set aside.
3. Costs of the appeal to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF DECEMBER 2017.

N.A. MATHEKA

JUDGE



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