



NO.121

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND, TRIBUNAL APPEAL NO. 6 OF 2013

BETWEEN

MARY BIYAKI BASWETI.....APPELLANT

VERSUS

SAULO ONDIEKI ONDIEKI.....1ST RESPONDENT

GATARINA NYABOKE ONDIEKI.....2ND RESPONDENT

JUDGMENT

1. Introduction:

The appellant herein, **Mary Biyaki Basweti** (hereinafter referred to only as “**the appellant**”) is the widow of one, **Basweti Kengari**(deceased). The respondents, **Sauro Ondieki Ondieki** and **Gatarina Nyaboke Ondieki** are husband and wife respectively. They are hereinafter referred to only as “**the respondents**” where the context so admits. The 1st respondent was a step brother to the appellant’s deceased husband, **Basweti Kengari**, the two having been the sons of **Kengari**, deceased. The appellant is therefore the 1st respondents’ step-sister-in-law. At all material times, the parcel of land known as **LR No. South Mugirango/ Nyataaro/ 1721** (hereinafter referred to as “**the suit property**”) was and still is registered in the name of the appellant’s said deceased husband, Basweti Kengari and has been and still is in the occupation of the respondents since the year 1993. Sometimes in the year, 2010, the 1st respondent lodged a claim against the appellant before, **Etago Land Disputes Tribunal** (hereinafter referred to as “**the tribunal**”) under the provisions of the Land Disputes Tribunal Act, 1990(now repealed) with respect to the suit property. The 1st respondent sought the assistance of the tribunal to restrain the appellant from evicting him from the suit property. The 1st respondent’s case before the tribunal was that the appellant’s deceased husband had sold all the ancestral land that had been allocated to his mother and which he was entitled to inherit and thereafter came and settled on the suit property which belonged to the 1st respondent’s mother and which the 1st respondent was entitled to inherit. The 1st respondent contended therefore that he was in occupation of the suit property as of right and as such the appellant who had not occupied the suit property had no right to demand that he vacates the same. The tribunal heard the 1st respondent’s claim and made it decision on or about 12th July, 2010 by which it ordered that the 1st respondent having stayed on the suit property for over 17 years was entitled to a share of the same. The tribunal awarded to the 1st respondent a portion of the suit property measuring 0.618 hectares out of the total area of 1.95 hectares that was comprised in the suit property. For reasons which are not clear from the record, the 2nd respondent who as I have stated above is the 1st

respondent's wife filed yet another claim against the appellant sometimes in the year 2011 before the same tribunal over the suit property. The 2nd respondent's claim was similar to the 1st respondent's claim aforesaid and the tribunal arrived at the same verdict on 20th January, 2011. The 2nd respondent was also awarded a portion of the suit property measuring 0.618 hectares which I believe was one and the same portion that had been awarded to the 1st respondent although the tribunal did not say so in its decision. The tribunal did not even mention the earlier claim by the 1st respondent.

2. Appeal against the decision of the tribunal;

The appellant was aggrieved with the two decisions of the tribunal in favour of the respondents and lodged separate appeals against the same with the Nyanza Province Land Disputes Appeals Committee. The appeal against the decision in favour of the 1st respondent was filed on 28th July, 2010 and was given registry No. 57 of 2010 while the appeal against the decision in favour of the 2nd respondent was filed on 17th March, 2011 and was assigned registry No. 24 of 2011. The said decisions were challenged by the appellant on several but similar grounds. In summary, the tribunal's decisions aforesaid were challenged on the following grounds, namely that;

- i. The tribunal had no jurisdiction to entertain the respondents' claims against the appellant which concerned the determination of the issue as to the ownership of the suit property;**
- ii. The tribunal's decision amounted to intermeddling with the property of a deceased person contrary to the provisions of section 45 of the Law of succession Act, Cap. 160, Laws of Kenya since the suit property is registered in the name of Basweti Kengari who is deceased and with respect to whose estate no grant of letters of administration had been taken out;**
- iii. The decision in the claim that was lodged by the 1st respondent was decided by members of the tribunal who had not been gazetted;**
- iv. There were no formal complaints laid before the tribunal on the basis of which the tribunal could conduct a hearing and reach a decision;**
- v. The decision reached by the tribunal with regard to the claim by the 2nd respondent was reached without having regard to the fact that a similar claim had been brought earlier by the 1st respondent over the same subject matter and with respect to which the tribunal had given an award and against which award, the appellant had already lodged an appeal;**

The two appeals came up for hearing before the Nyanza Provincial Land Disputes Appeal Committee on 21st July, 2011 when the same were consolidated and heard in part. The committee did not however get to hear the appeal to conclusion as the Land Disputes Tribunals Act, 1990 was subsequently repealed by the Environment and Land Court Act, 2011 and with it went the tribunals and the Provincial Land Appeals Committees. The appeals were therefore forwarded to this court for disposal pursuant to the Practice Directions that were issued by the Chief Justice on 9th November, 2012 under the transitional provisions of the Environment and Land Court Act, 2011 aforesaid.

3. Hearing of the appeal by this court;

The consolidated appeals came up for hearing before this court on 27th June, 2013 in the presence of both the appellant and the respondents who all appeared in person. In her address to the court, the appellant relied on her grounds of appeal that were lodged with the Nyanza Province Land Disputes Appeals Committee that I have already mentioned herein above. The appellant submitted that the suit property was registered in the name of her deceased husband and as such the 1st respondent who had his own parcel of land had no right over the said property. The appellant urged the court to overturn the decisions of the tribunal that awarded to the respondents a portion of the suit property measuring 0.618 hectares. The appellant referred the court to a copy of the death certificate of her deceased husband and

a copy of a certificate of official search for the suit property which she had produced before the Nyanza Province Land Disputes Appeals Committee to demonstrate that the registered proprietor of the suit property was deceased as at the time the tribunal was determining the respondents claim against her.

The respondents' defence to the appeal by the appellant was put forward by the 1st respondent. The 1st respondent in his address to the court maintained that the suit property belonged to his father, Kengari (deceased). The 1st respondent submitted that after the death of his father, he left for Naivasha. He contended that his father died after he had shared his land among his two wives one of whom was the mother of the 1st respondent and the other the mother of Basweti Kengari, the appellant's deceased husband. The 1st respondent contended that the adjudication process took place while he was still at Naivasha and Basweti Kengari's mother took advantage of his absence to register the suit property that belonged to the 1st respondent's mother in the name of Basweti Kengari instead of the 1st respondent. The appellant submitted that the appellant's deceased husband, the said Basweti Kengari sold all the ancestral land that belonged to his mother and which he was entitled to leaving only the suit property which he was not entitled to. The 1st respondent contended that when he settled on the suit property, there was no one in occupation thereof and that he had occupied the property for over 17 years by the time he lodged a claim against the appellant before the tribunal. The 1st respondent contended that he was forced to lodge a claim against the appellant at the tribunal when the appellant who was all along not staying on the suit property came back to lay a claim over the same. He maintained that the suit property belongs to him and that he has no other parcel of land. The 1st respondent urged the court to uphold the decision of the tribunal. In reply to the respondents' submissions, the appellant reiterated that the suit property belongs to her deceased husband and as such the respondents should vacate the same.

4. Consideration of the grounds of appeal;

As I have set out above, the appellant put forward five (5) main grounds of appeal. I am of the view however that the determination of the first two grounds of appeal that touched on the jurisdiction of the tribunal would dispose of this appeal if held in favour of the appellant. I would therefore consider grounds I and II of the appeal set out herein above together.

Grounds I and II of appeal:

The tribunal was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to as "**the Act**"). The powers of the tribunal were spelt out in the said Act. The tribunal could not therefore exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the tribunal had jurisdiction as follows; "**.....all cases of 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."**

It is clear from the foregoing that the tribunal did not have jurisdiction to determine disputes over ownership of or title to land. The tribunal also lacked jurisdiction to determine disputes over the estates of deceased persons. The respondents' claims against the appellant before the tribunal were over title and/or ownership of the suit property. It was not contested before the tribunal and before this court that the suit property is registered in the name of the appellant's deceased husband, Basweti Kengari. The tribunal did not therefore have the power to order the transfer of a portion of the suit property to the respondents. Due to the foregoing, I am persuaded by the appellants' submission that, the tribunal acted outside its statutory powers when it entertained the respondents claim and proceeded to make the decisions appealed herein. The dispute between the respondents and the appellant concerned the issue of the ownership and distribution of the suit property which is part of the estate of a deceased person. Section 47 of the Succession Act, Cap.160, Laws of Kenya, divested the tribunal of jurisdiction to deal with disputes relating to the estates of deceased persons. The suit property was registered under the

Registered Land Act, Cap. 300 Laws of Kenya (now repealed) and as at the time when the respondents lodged their claims with the tribunal against the appellant, the jurisdiction to determine disputes concerning title to or possession of land registered under the Registered Land Act, (supra) was conferred exclusively upon the High Court and the Magistrates Court's in limited cases by section 159 of the said Act. The tribunal had no jurisdiction to determine issues to do with the ownership or title to land registered under the said Act. See, the Court of Appeal Cases of, **Jotham Amunavi-vs-The Chairman Sabatia Division Land Disputes Tribunal & another, Court of Appeal at Kisumu, Civil Appeal No. 256 of 2002 (unreported)** and **Dominica Wamuyu Kihu-vs-Johana Ndura Wakaritu, Court of Appeal at Nyeri, Civil Appeal No. 269 of 2007(unreported)**. Due to the foregoing, I am in full agreement with the submission by the appellant that the tribunal acted outside its jurisdiction in making the decisions the subject of this appeal. The two grounds of appeal therefore succeed.

Grounds III, IV and V:

Having reached the conclusion that the tribunal had no jurisdiction to entertain the respondent's claim, it is not necessary to consider these other grounds of appeal. It has been said that

jurisdiction is everything and without it a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement. In the case of **Desai-vs-Warsama (1967) E.A.351**, it was held that, no court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are a nullity. Having come to the conclusion that the tribunal had no jurisdiction to entertain the claim that was brought before it by the respondents, it is my finding that the proceedings before the tribunal and its decisions that are the subject of this appeal were nullities. It is therefore not necessary to consider whether the members of the tribunal who reached the decision complained of were gazetted or not and whether the decision was made pursuant to a formal complaint or not.

5. Conclusion;

I have reached the conclusion that the tribunal had no jurisdiction to entertain and determine the claims that were lodged with it by the respondents. The tribunal's decisions which are the subject of this appeal were therefore erroneous, null and void. The appellant's appeal is well merited in the circumstances. The appellant's appeal No. 57 of 2010 and 24 of 2011 which were consolidated and heard by this court as Tribunal Appeal No. 6 of 2013 are allowed. The order of the tribunal that awarded to the respondents 0.618 hectares each of the suit property is set aside. For the avoidance of doubt, the order herein does not entitle the appellant to evict the respondents from the suit property. If the appellant requires vacant possession of the suit property from the respondents who are in occupation thereof and who are said to have been in occupation of the suit property for the last 17 years,

she will have to file a suit for that purpose unless the respondents agree to vacate voluntarily. Each party shall bear its own costs of this appeal. Orders to issue accordingly.

Dated, signed and delivered at Kisii this 20th day of September,2013.

S. OKONG'O,

JUDGE.

In the presence of:-

The Appellant Present in person.

No appearance for the 1st Respondent.

2nd Respondent present in person.

Mobisa Court Clerk

S. OKONG'O,

JUDGE.