



NO.147

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

E & L CIVIL CASE NO. 115 OF 2010

CHARLES MAINGA NYAGAKA.....PLAINTIFF

VERSUS

NAFTAL MOKUA KENYARIRI.....DEFENDANT

JUDGMENT

1. The facts of this case are straight forward. The Plaintiff was at all material times the registered proprietor of all that parcel of land known as **L.R. No. Majoge/Bokimonge/1494** (hereinafter referred to as “**the suit property**”). On or about 10th May, 2007, the defendant herein lodged a complaint against the Plaintiff before the Land Disputes Tribunal at Kenyeny Division, Gucha District. The defendant’s complaint against the Plaintiff before **Kenyeny Division Land Disputes Tribunal** (hereinafter referred to only as “**the tribunal**”) was that the suit property was part of the defendant’s parcel of land known as **L.R. No. Majoge/ Bokimonge/1391**. The defendant contended that the Plaintiff had unlawfully acquired the suit property. The tribunal heard the defendant and his witness, after which it made its decision on 16th April, 2008. From the record of the tribunal’s proceedings, the Plaintiff was supposed to appear before the tribunal on 16th January, 2008, 20th February, 2008 and 19th March, 2008. The plaintiff seems not to have appeared before the tribunal as there is no record of his testimony in the tribunal’s proceedings. In its decision, the tribunal held that the suit property was illegally curved out of the defendant’s parcel of land L.R. No. Majoge/Bokimonge/1391 aforesaid. The tribunal ordered that the title of the suit property be revoked.
2. The tribunal’s decision aforesaid was filed at the Chief Magistrate’s Court at Kisii in Kisii CM Misc. Case.No. 55 of 2008 for adoption as a judgment of the court. The same was adopted as a judgment of the court on 4th December, 2008 by G.H. Oduor, SRM. The Plaintiff made attempts to set aside the said order of 4th December, 2008 but it is not clear from the record as to what became of the Plaintiff’s application that was filed for that purpose. The plaintiff thereafter moved the High Court to review the said decision of the tribunal and its adoption as a judgment of the court. The Plaintiff’s judicial review application in the High Court was also abandoned under circumstances the details of which have not been disclosed to this court. The Plaintiff ultimately decided to file this suit to challenge the said decision of the tribunal.
3. In his plaint dated 26th April, 2010, the Plaintiff has claimed that the tribunal’s order revoking his title to the suit property was wrongful and that the same was adopted by the Chief

Magistrate's court at Kisii without notice to his advocate who was on record in the Kisii Miscellaneous Civil Case No. 55 of 2008 (hereinafter referred to as the **"adoption case"** where the context allows). The plaintiff has contended that he learnt of the tribunal's said decision after six (6) months had lapsed and that the said decision was null and void as it purported to interfere with the Plaintiff's title to the suit property which was issued on a first registration. The Plaintiff has contended that the tribunal had no jurisdiction to revoke the title of the suit property. The Plaintiff has claimed that following the said decision of the tribunal, the defendant purported to carve out a portion of the suit property measuring 0.56ha. for himself. The Plaintiff has sought; a declaration that the suit property was a subject of first registration under the Registered Land Act, Cap 300, Laws of Kenya (now repealed), a declaration that the said decision of the tribunal that interfered with the title of the suit property is null and void and, an order directing the Kisii Central/Gucha District Land Registrar to expunge any document executed for the purpose of revoking the Plaintiff's title to the suit property and the transfer thereof to the defendant pursuant to the said decision of the tribunal.

4. The defendant was served with the summons to enter appearance but failed to do so. The Plaintiff requested for and obtained interlocutory judgment against the defendant on 27th July, 2010. This matter was thereafter fixed for formal proof on 14th May, 2013. On that day, the Plaintiff gave evidence and did not call any witness. The defendant who had been served with a hearing notice did not attend court. In his testimony, the Plaintiff reiterated the contents of the plaint that I have highlighted above. The Plaintiff testified that he acquired the suit property from his father in the year 1981 and had the same registered in his name. The Plaintiff produced in evidence a copy of the land certificate for the suit property dated 9th June, 1981, a copy of the undated extract of the register for the suit property and a copy of the certificate of official search with respect to the suit property in proof of his title to the suit property. He testified further that the defendant had claimed that the suit property belongs to him which claim was upheld by the tribunal on 16th April, 2008. The said decision of the tribunal was subsequently adopted by the Chief Magistrate's court at Kisii as a judgment of the court. The Plaintiff produced in evidence a copy of the proceedings and decision of the tribunal and a copy of the proceedings and order of the Chief Magistrate's court. The Plaintiff testified that the suit property was registered in the name of his father in 1969 and that the defendant had never made any claim over the same until 2007 when he lodged a claim against the Plaintiff with the tribunal. He testified that he was not aware of the proceedings of the tribunal until the year 2008. The Plaintiff urged the court to grant the prayers sought in the plaint. The Plaintiff's advocate closed the Plaintiff's case with the plaintiff's testimony and opted to put in written submissions.
5. In his written submissions, the Plaintiff submitted that the tribunal had no jurisdiction to revoke the Plaintiff's title over the suit property and that a decision arrived at in absence or in excess of jurisdiction is a nullity. The Plaintiff submitted that the decision of the tribunal was null and void and as such its adoption by the Chief Magistrate's court as a judgment of the court could not clothe it with any legal force. In support of this submission the Plaintiff cited several authorities.
6. I have considered the evidence tendered by the Plaintiff and the Plaintiff's advocates written submissions. The only issues that arise for determination are, whether this court can grant the reliefs sought herein by the Plaintiff and, whether the Plaintiff has proved his claim. In this suit, the Plaintiff's complaint is against the decision of the tribunal. The Plaintiff has no direct complaint against the defendant. The tribunal was established under the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed) to arbitrate on certain land disputes the nature of which are set out in the said Act. The defendant who had a dispute with the Plaintiff over the suit property lodged his complaint against the Plaintiff with the tribunal. The tribunal heard the defendant's complainant and made a decision which is now being challenged in this suit. It is not clear why the Plaintiff did not appear before the tribunal. In the proceedings of the tribunal, the plaintiff was to appear before the tribunal on three occasions but he seems not to have appeared at all as there is no reference to his testimony in the tribunal's proceedings. The tribunal made its decision on 16th April, 2008. The said decision was adopted as a judgment of the court by the Chief Magistrate's court at Kisii on 4th December, 2008. From the proceedings of the Chief Magistrate's court, the

Plaintiff was duly served with the defendant's application that was made in the Chief Magistrate's court for the adoption of the tribunal's decision. The plaintiff appeared before the Chief Magistrate's court through an advocate. In this suit, the Plaintiff has not challenged the decision of the Chief Magistrate's court that adopted the decision of the tribunal as a judgment. The Plaintiff's attack is directed against the decision of the tribunal only. The issue that arises from the foregoing is, whether the decision of the tribunal that has already been adopted as a judgment of the court can be declared as null and void where no similar order is sought against the decision of the Magistrate's court. The other issue that arises is whether the court can declare a decision of the tribunal as null and void in a suit in which neither the tribunal nor the Attorney General is a party. I am of the view that once the decision of the tribunal was adopted as a judgment of the court, it ceased to have a life of its own. On this proposition, I find support in the decision of Khamoni J. in the case of, **R.vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another, Exparte Kariuki, [2005] 2 KLR 10**, in which it was held as follows,

“ when a decision of the Land Disputes Tribunal has been adopted by a Magistrate's court in accordance with the provisions of the Land Disputes Tribunals Act, the adoption makes the decision of the Tribunal or the Appeals Committee to be a decision of the Magistrate's court. Consequently, the decision of the Tribunal or Appeals Committee in law ceases to exist as an independent decision challengeable separately in an appeal or judicial review.”

7. The tribunal's decision once adopted becomes a judgment of the court and any challenge to the same must be directed not only as against the decision of the tribunal but also against the decision of the Magistrate's Court that has adopted it. This is because, if the decision of the tribunal that has been adopted as a judgment of the court is declared as null and void, the decision of the Magistrate's court that adopted it as a judgment still stands and can be executed. It is the decree of the Magistrate's court that is executed and not the decision of the tribunal. On the issue of non-joinder, the Plaintiff is challenging the decision that was made by the tribunal. Natural justice demands that before a decision of the tribunal is declared a nullity, the tribunal should be heard. When this suit was filed on 26th April, 2010, the tribunal was in existence. It was necessary for the Plaintiff to either join the tribunal or the Attorney General in this suit as a representative of the tribunal so that the tribunal is heard before a decision is made on its decision. In the absence of a challenge to the Chief Magistrate's court order that adopted the tribunal's decision and in light of the failure by the plaintiff to join the tribunal in this suit, can the court still grant the declaratory and other reliefs sought by the Plaintiff herein? Order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated on account of misjoinder or non-joinder and that the court may in every suit deal with the matter in controversy so far as rights and interests of the parties before it are concerned. On the other hand, Order 3 rule 9 of the Civil Procedure Rules provides that, no suit shall be open to objection on the ground that merely a declaratory judgment or order is sought thereby. This was the *ratio decidendi* in the ruling of Musinga J. (as he then was) in case of, **Samwel Chacha Rioba vs. George Joseph Kiginga & 2 others, Kisii Hccc No. 174 of 2008(unreported)** that was cited by the Plaintiff. The court is empowered to make a binding declaration of right whether any other consequential relief is claimed or not. In the Court of Appeal case of, **Johana Nyakwoyo Buti vs. Walter Rasugu Omariba & 2 Others, Kisumu Civil Appeal No.182 of 2006 (unreported)**, it was held that, a decision of the Land Disputes Tribunal that has been adopted as a judgment of the Resident Magistrate's court can be challenged in a declaratory or ordinary civil suit. In the said case in which the Attorney General was joined as a party to represent the Land Disputes Tribunal, the court observed that, where the decision of the Land Disputes Tribunal has been adopted by the Resident Magistrate's court as a judgment of that court, **“The decision of the Tribunal has been merged in the judgment of the magistrate's court”**. Due to the foregoing, this court has jurisdiction to grant the declaratory and other reliefs sought by the Plaintiff if the court is satisfied that the Plaintiff is entitled to the same as against the defendant before it the non-joinder of the tribunal notwithstanding.

8. The Plaintiff has sought three (3) principal reliefs. The first one is a declaration that the suit

property was the subject of a first registration under the Registered Land Act, Cap 300 Laws of Kenya (now repealed). From the extract of the register for the suit property (Green card) that was produced by the plaintiff in evidence as Pexh.3, the register for the suit property was opened on 17th March, 1969 and the first registered proprietor was one, Isaya Nyagaka who was registered as the proprietor thereof on the same date. According to the plaintiff, he acquired the suit property from the said Isaya Nyagaka who was his father. According to the said extract of the register, the plaintiff was registered as the second proprietor of the suit property on 2nd June, 1981. From the foregoing, it is clear that the Plaintiff's title to the suit property did not arise from first registration. It is the Plaintiff's father's title that resulted from a first registration. Land does not become the subject of first registration as the relief sought by the plaintiff suggests. It is the title held that arise from first or subsequent registration. Land is registered once but the holder of its title may change from time to time and under the Registered Land Act, cap. 300 Laws of Kenya each new title holder gets registered as proprietor and obtains new title. The titles which are obtained subsequent to the first registration cannot be termed as "titles obtained on first registration". The interpretation that I have given here for the meaning of "first registration" is in accord with the provisions of section 14 (d) of the Registered Land Act, Cap.300 Laws of Kenya (now repealed). In this particular case, it is the Plaintiff's father who held a title obtained on first registration. The Plaintiff's title that was acquired from his father through a transfer that was effected in consideration of KShs.2, 000.00 cannot be said to have been obtained on a first registration. Due to the foregoing, I am unable to grant prayer (a) in the plaint. The second relief sought by the plaintiff is a declaration that the decision of the tribunal that revoked the Plaintiff's title was null and void. There is no doubt that the tribunal did not have jurisdiction to revoke the Plaintiff's title to the suit property. The jurisdiction of the tribunal was limited under section 3(1) of the Land Disputes Tribunal's Act, No. 18 of 1990 (now repealed) to disputes relating to the subdivision of, or the determination of boundaries to land, and claim to occupy or work land or trespass to land. The tribunal did not have jurisdiction to determine disputes over title to land. The tribunal did not therefore have jurisdiction to determine the dispute that the defendant had with plaintiff which concerned title and/or ownership of the suit property. The authorities cited by the Plaintiff are very clear on this issue. As I have already stated above, this suit was filed primarily to challenge the decision of the tribunal. The defendant is only a necessary party to the proceedings. Although, I have found herein above that the decision of the tribunal was arrived at without jurisdiction, I am hesitant to grant an order declaring it null and void in this case in which the tribunal has not been made a party. I am of the view that such declaration would equally be a nullity as it would have been made in breach of the rules of natural justice. The other difficulty that I have with making this declaration is that the decision of the tribunal has already adopted by the Chief Magistrates court as a judgment of that court. A declaration that the tribunal's decision is null and void without making a similar order against the judgment and decree of the Chief Magistrate's court would leave the Chief Magistrate's court judgment and decree standing and executable. The declaration made by this court would therefore embarrass the Chief Magistrate's court and create conflict and confusion in the administration of justice. The Plaintiff's prayer for a declaration that was directed at the tribunal's decision should also have included the decision of the Chief Magistrate's court. As the Court of Appeal had observed in the case that I have cited above, the decision of the tribunal became merged in the judgment of the Chief Magistrate's court. This court cannot therefore purport to nullify the same singly. Since a declaratory relief is discretionary, I am for the reasons given above not inclined to declare the tribunal's decision herein a nullity. The other relief sought by the Plaintiff is, an order directing the land registrar to expunge any documents that may have been executed for the purpose of revoking the plaintiff's title to the suit property and for transferring the same to the defendant pursuant to the said decision of the tribunal. The Plaintiff in the same prayer has also sought an order directing the land registrar to expunge any registration of the suit property in favour of the defendant and the eviction of the defendant from the suit property. This prayer is inconsistent with the evidence that was adduced by the Plaintiff in court. The Plaintiff in his evidence testified that the title to the suit property has not changed even after the said decision by the tribunal. According to the Plaintiff, he has remained the registered owner of the suit property even after the tribunal's decision aforesaid. The extract of the register for the suit property and the certificate of official search were produced by the plaintiff to confirm this fact. Furthermore, if the Plaintiff's title was to be revoked and the

suit property transferred to the defendant, the same was to be done not pursuant to the tribunal's decision but in execution of the judgment and decree of the Chief Magistrate's court at Kisii in Misc. Case No. 55 of 2008 aforesaid. As I have stated above, the judgment and decree issued in that case is not challenged in this suit. This court is unable therefore to direct the land registrar to interfere with what may have been done pursuant to a judgment and decree issued by a court of law which has not been varied or set aside. Furthermore, the court cannot order the land registrar to expunge documents whose particulars have not been furnished and registrations whose existence are not certain. The Plaintiff should have furnished the court with the latest Certificate of Official Search and extract of the register for the suit property. The Certificate of Official Search with respect to the title of the suit property that was produced in evidence by the Plaintiff reflected the position of the title of the suit property as at 3rd May, 2004. That was before the decision of the tribunal was made on 16th April, 2008. The extract of the register that was produced in evidence by the Plaintiff on the other hand was undated. There may be a possibility that the decree of the Chief Magistrate's court that arose from the decision of the tribunal has already been executed. This is the more reason why this court cannot grant orders at large.

9. Due to the foregoing, it is my finding that the Plaintiff's suit is incompetent. The same is hereby struck out with no order as to costs.

Dated and delivered at Kisii this 14th day of November, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Ochoki h/brief for Nyambati for the Plaintiff

No appearance for the Defendant

Mobisa Court Clerk

S. OKONG'O,

JUDGE.