



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO 153 OF 2010

KIAMBATI S/O MBOGORI.....APPELLANT

VERSUS

RUTH KIENDE.....RESPONDENT

J U D G M E N T

1. This is an appeal against the decision of the Eastern Province Provincial Land Disputes Committee at Embu made on 8/11/2010 in Appeal No. 83 of 2010.

2. The amended Memorandum of Appeal has the following grounds:-

1. ***The Provincial Appeals Committee erred in law in adjudicating over a matter that it had no jurisdiction to adjudicate on. Learned Principal Magistrate erred in Law in adopting the decision (award) of Eastern Province Provincial Lands Dispute Appeal No 83 of 2010 as judgment of the Court which decision was reached by a Tribunal that lacked jurisdiction to make such an award and/or decision.***
2. ***The Provincial Appeals Committee Learned Principal Magistrate erred in law in failing to find that the Eastern Province Provincial Land Disputes Tribunal Committee Appeal No. 83 of 2010 has no power (jurisdiction) to compel, urge or direct the Appellant herein being the registered proprietor of L.R ABOTHUGUCHI/GITHONGO/670 to share it with the Respondent at all and /or in any particular manner.***
3. ***The Learned Principal Magistrate erred in law in adopting as the judgment of Court an award and/or decision of the Eastern Province Provincial Land disputes Tribunal Committee Appeal No. 83 of 2010 without considering the effects of Section 141 (1) of R.L.A which gives exclusive jurisdiction to the Court to order rectification of the register.***
4. ***The Learned Principal Magistrate erred in law in adopting as the judgment of the Court an award and/or decision of the Eastern Province Provincial Land disputes Tribunal Committee Appeal No. 83 of 2010 without considering the effects of Section 27 and 28 of R.L.A.***
5. ***The Learned Principal Magistrate erred in law adopting as the judgment of the Court an award and/or decision of the Eastern Province Provincial Land disputes Tribunal Committee Appeal No. 83 of 2010 which award and/or decision was a nullity ab initio.***

3. Reliant upon the apposite grounds, the appellant prays this Court to set aside the award and/or decision of the Eastern Province Provincial Land Disputes Committee in Appeal No. 28 of 2010 and declare the award and/or decision of the Eastern Provincial Land Disputes Committee in Appeal No. 83 of 2010 as a nullity void and unlawful for lack of jurisdiction on the part of the tribunal. The appellant also prays for costs in this appeal, costs in Provincial Land Disputes Committee in Appeal No. 830 of 2010, costs in the District Land Disputes Tribunal case No. 14 of 2010 and in L.D.T No. 28 of 2010 in the Chief Magistrate's Court at Meru.

4. In his Submissions, the appellant has told the Court that the appellant is the father of the respondent and that the dispute that spawned this appeal relates to Land Parcel No. Abothuguchi/Githongo/570 which is registered in the name of the appellant.

5. The appellant has explained that the respondent took her father, the appellant, before The Meru Central District Tribunal claiming a portion of the disputed land. The appellant says that the respondent's claim was dismissed because the tribunal lacked jurisdiction.

6. The Respondent appealed to the Provincial Appeals Committee which allowed the appeal. The appellant submits that under section 3 of the repealed District Land Disputes Tribunals Act, District Tribunals had jurisdiction over 3 specified claims as follows:-

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 appellant submits that the District Land Disputes Tribunal acted within its jurisdiction to dismiss the respondent's claim.

7. The appellant submits that the Appeals Committee had the mandate to verify the respondent's claim and if it found that the apposite claim fell outside the claims permitted by Section 3 of the Land Disputes Tribunals Act, the Provincial Committee had no other choice but to dismiss such a claim. The appellant laconically asserts that the appeals Committee lacked jurisdiction to decide on the matter and to award 0.50 acres to the respondent to be excised from Parcel No. Abothuguchi/ Githongo/570. The Committee's decision, therefore was ultra vires its jurisdiction.

8. The appellant reiterates that he has appealed under Section 8 on the point relating to lack of jurisdiction on the part of the appeals Committee only. He also says that the Appeals Committee had no jurisdiction to order transfer of land under the defunct Registered Land Act, Cap. 300.

9. The appellant has told the Court that grounds 3,4, and 5 are merely procedural. He therefore only wants grounds 1 and 2 allowed.

10. The appellant has proffered the following two authorities in support of his Submission:- .

a. Meru Misc Civil Application No 177 of 2004- Republic versus Land Disputes Tribunal Meru Central & 2 others.

b. Meru Misc App. No. 186 of 2005 -Andrew Kaburu M'Rinkuri versus Marcella Gakii M'Murungi & Another.

11. The Respondent submits that this being the first appeal, this Court has power to re- evaluate the evidence on record for its determination. He proffers that the case of OLE SAWOYO Versus DAVIE OMWENDA MAOBE-CIVIL APPEAL NO. 297 OF 2009. He says that the appeal exposes one substantive issue being the alleged error of the Learned Principal Magistrate in failing to find that the Provincial Appeals Committee acted beyond its powers in delivering its ruling and adopting it. The Respondent proffers the case of REPUBLIC Versus MACHAKOS DISTRICT LAND DISPUTES TRIBUNAL & OTHERS EXXPORTE MWIKALI MWEKE [2012] e KLR where the Court held as follows:-

“As long as the award of the Tribunal remains in place, the subsequent adoption of it as a Derangement of the Court cannot be legitimately challenged. This is because the role of the Magistrate's Court was merely to adopt the award. See Section 7 of the Act No. 18 of 1990 which provided:-

“7. (1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.

2. The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided under the Civil Procedure Act.”

Having so found the Court dismissed the apposite notice of motion date 19th May, 2009.

12. The respondent has submitted that this Court being seized of a first appeal, it has power to re-evaluate evidence. The respondent's authority in support of this assertion (Sawoyo *Versus* Maobe, Supra) is correct in the right Circumstances, but the circumstances of this suit are different. I find that there was need to make Submissions with regard to the failure of the Magistrate to find that the District Tribunal lacked Jurisdiction and to refuse to pronounce the award made by the District Tribunal. This was not necessary as the Amended Memorandum of Appeal had removed any issue concerning the apposite Magistrate from the appeal .

13. I need to restate my position unequivocally with regard to the case of OLE SAWOYO VERSUS DAVID OMWENDA MOEBE, CIVIL APPEAL NO. 297 of 2009- COURT OF APPEAL AT KISII. Among other things the Court said: -

“This being a first appeal we have the duty to reconsider both matters of fact and law. On facts, we are duty bound to analyse the evidence afresh and arrive at our own conclusion but must bear in mind that the trial Court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same”.

14. The case of Sawayo *Versus* Maebe (op.cit) binds this Court in proper circumstances. It dealt with a first appeal from the High Court. In this case, I am dealing with an appeal from the decision of the Provincial Appeals Committee. Sections 8 (8) (9) (10) of the Land Disputes Tribunals Act say as follows:-

“Section 8(8)-The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any Court” Section 8(9): “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:

PROVIDED that no appeal shall be admitted by the High Court unless a Judge of the Court has certified that an issue of law (other than customary law) is involved”.

8 (10): ***“ A question of customary law shall for all purposes under this Act be deemed to be a question of fact”.***

15. It is clear from the apposite provisions of Section 8 of the Land Disputes Act, that this Court lacks Jurisdiction to analyse and re-evaluate issues of fact. The authority of Sawayo Versus Maobe proffered to this Court in support of the respondent's assertion that this being a first appeal this Court has jurisdiction to consider issues of fact is not relevant in this case at all.

16. The respondent submits that the Provincial Appeals Committee had powers to arbitrate upon the matter before it as it concerned division, boundaries, occupation and working on the disputed land . She has also told the Court that the appeals Committee had not ordered the appellant to transfer title to his family land he holds in trust for the respondent. She says that Order No 1 was relevant to her Submissions. It says: (1) ” The Objector M’Kiambati M’ Mbogori has done something good to his daughter Kiende (claimant) by giving her a piece of land to work on. He has also built a semi permanent house on the land for her, a Kitchen and a pit latrine”.

17. The respondent Submits that the appellant had misled the tribunal as the appellant's claim was not true as he had not given the respondent any of those things contained in order 1 of the Tribunal's Award. The respondent explains that that is why she appealed to the Appeals Committee. She stresses that the Appeals Committee ordered the appellant to give and not to transfer land to the Respondent. He says that the Appeals Committee ruled as follows:-

“The Appeals Committee has ordered Kiambati Mbogori to [give] Ruth Kiende 50 points from Land No. Abothuguchi/ Githongo/670. “The land will be surveyed from the road to the river according to the map. Kiambati Mbogori will be in the middle i.e between Kiende and Kinoti”.

18. On account of her Submissions, the respondent asserts that this appeal lacks merit in law and facts and urges this Court to dismiss it and the decision of the Appeals Committee be upheld. She also prays for costs.

19. I have carefully examined the pleadings, Submission and the authorities proffered by the parties in support of their respective propositions. I am of the opinion that it would help this Court if before determination of this appeal, it examines the awards made both at the District Tribunal's Level and at the Provincial Committee's level.

20. The decision of the District Tribunal dated 8th September, 2010 reads as follows:

1. The Objector M'Kiambati M'MBogori has done something good to his daughter (Kiende) claimant by by giving her a piece of land to work on. He has also built a Semi-Permanent house on the land for her, a Kitchen and a pit latrine. There is also piped water near this same house. The daughter of the Claimant is also being educated by the Objector, M'Kiambati who is grandfather to the Claimant's daughter.

2. Therefore, this case where the Claimant wants a title deed to the portion of land she is occupying is summarily dismissed.

3. Any party not satisfied with this ruling has 30 days to appeal in the Provincial Land Disputes Tribunal at Embu from the date of the ruling of this case.

21. *The findings and Ruling of the Provincial Committee were: -*

- 1. That the Appellant and Defendant are Daughter and father.***
- 2. That earlier Njuri Ncheke elders had heard the dispute and ruled that Kiende and Kinoti to leave their father's house and each of them to put his/her own house, of which Kinoti has already done, i.e build his own because he was already shown a place to build.***
- 3. That Kiende was not shown proper site to build a house.***
- 4. That there was a meeting with the Six sisters and brother (Kinoti) which (sic) they agreed on the inheritance of their father's property.***
- 5. Meru Central District Tribunal has erred to understand that the appellant has to get a share from her father's (respondent) land.***

“RULING

- Appeal accepted.***
- Meru Central District Tribunal Ruling dismissed.***
- This appeal Committee has ordered KIAMBATI MBOGORI to give RUTH KIENDE 50 points from land No. Abothuguchi/Kithongo/670.***
- The land will be surveyed from the road to the river according to the Map. Kiambati Mbogori will be in the middle i.e between Kiende and Kinoti.”***

22. It is clear that the issue of jurisdiction of the District Tribunal and the Appeals Committee did not feature anywhere in their proceedings. The District Tribunal in its order No.2 merely said:'

"Therefore, this case where the Plaintiff wants a Title Deed to the portion of land she is occupying is summarily dismissed."

23. The Provincial Appeals Committee made a finding that the District Tribunal had made an error in finding that Kiambati Mbogori, the appellant herein had given a share of land to his daughter, the respondent. This was the principal reason the Appeals Committee set aside the decision made by the District Tribunal. The question of jurisdiction never featured at all in the proceedings of the Appeals Committee.

24. I now turn to the authorities proffered by the appellant to buttress his propositions in this matter. The first one is Meru Misc Civil Application No. 177 of 2004- Republic versus Land Disputes Tribunal Meru Central & 2 others. In this case the Court held that in view of the provisions of Section 159 of the Registered Land Act, the apposite tribunal lacked jurisdiction to arbitrate over a parcel of land whose title was registered. The second case was Meru Misc Application No. 186 of 2005-Andrew Kaburu M. Rinkuri versus Marcell Gakii M' Murungi & Another. In this suit the Court referred to the case of Jotham Amunavi *Versus* The Chairman Sabatia Division Land Disputes Tribunal & Another(Civil Appeal No. 256 of 2002) which *inter alia* held:

"...By Section 159 of the RLA such a dispute can only be tried by the High Court or by the Resident Magistrate's Court in cases where such courts have jurisdiction".

25. In the event the Court held that the tribunal had no jurisdiction to issue the orders it had issued in tribunal case No. 25 of 2005.

26. I wish at this point to debunk the hackneyed judicial mantra that the defunct Tribunals and Appellate Committees did not have the power to arbitrate over titled land.

27. Section 159 of the Registered Land Act states as follows:-

" Civil suits and proceedings relating to the title to land or to the title, a lease or charge, registered under this Act, or to any interest in the land, lease or charge , being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court, and where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court or, where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunals Act in accordance with that Act".

28. It is clear to me that District Tribunals and Appeals Committees, in accordance with the provisions of Section 159 of the Registered Land Act had power and jurisdiction to adjudicate over titled land. This explains why in places like the former Mwanga District where all land was titled, District Tribunals were established.

29. Section 3 (1) of the Land Disputes Tribunals Act reads as follows:-

3(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.

30. This is a matter involving a daughter and a father. The daughter is a single mother. The Provincial Committee has found as a fact that the father has failed to give his daughter land to occupy and work on. This being a matter involving close family members. I find that the Appeals Committee had powers to issue orders allowing the Appellant to occupy and work on the land they awarded her. Indeed, I find that

the Appeals Committee had power to order division of the subject land so that the appellant could get land to occupy and work on.

31. Section 8(8) decrees that the decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any Court. Section 8 (9) allows either party to appeal from the decision of the Appeals to the High Court on a point of Law within sixty days from the date of the decision complained of.

32. In accordance with the law, issues of fact were conclusively determined by the Appeals Committee. It found that the Respondent had not given the Appellant Land to occupy and work on. For this reason, the Appeals Committee dismissed the ruling of the District Land Disputes Tribunal. I opine that I am not allowed to open up issues of fact.

33. Grounds 1 and 2 of the Memorandum of Appeal would have amounted to pure points of law. However, as I have already intimated, I have found that the Provincial Appeals Committee had Jurisdiction to set aside and appropriately substitute the award of the District Land Dispute Tribunal. I disagree with the Respondent that the Appeal Committee had ordered the transfer of part of the respondent's land to the appellant. The Appeals Committee said: **“ The land will be surveyed from the road to the river according to the map. Kiambati Mbogori will be in the middle i.e between Kiende and Kinoti”**.

34. I am constrained to say something about apparent gender discrimination in this matter. The respondent has without much ado given land to his son Kinoti. In the case of his unmarried daughter, she had to fight for her right through litigation.

35. Paragraphs 9 and 10 of her affidavit sworn on 7th day of February, 2011 are telling. Paragraph 9 states: “ That I do not live on the suit land, since I was chased away by the applicant and his son who assaulted me and I did report at Kariene Police Station (see annexed copy is a copy of Assault report and Chief's Summons to Kinoti marked “RK1” and “RK2” respectively) and I was forced to move to live with well wishers with my daughter who is in form three and she has never been assisted by the applicant as alleged. Paragraph 10 states: That the applicant is using my daughter to solicit for funds from unsuspecting sympathizers and should not continue to use my HIV status and vulnerability of my daughter to form their selfish gain”.

36. As I have already pointed out, issues of fact have already been considered and conclusively determined by the Appeals Committee in accordance with the apposite Provisions of the Land Disputes Tribunals Act . Article 27 of the Constitution of Kenya outlaws inequality and discrimination before the law. Article 27(1) (2) and (3) has the following provisions:-

27(1)-Every person is equal before the law and has the right to equal protection ad equal benefits of the law.

27(2)- Equity includes the full and equal enjoyment of all rights and fundamental freedoms.

27(3)-Women and Men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”.

37. *The Constitution of Kenya 2010 requires this Court to ensure that the Appellant, Ruth Kiende, though a woman who may have suffered discrimination due to anachronistic and antiquated social tendencies, enjoys equal treatment commensurate with that enjoyed by her only brother, Kinoti.*

38. *From the foregoing, having found that the Appeals Committee acted within its jurisdiction when it dismissed the Ruling of the District Land Disputes Tribunal, I dismiss this Appeal and uphold the decision of the Appeals Committee which spawned this Appeal.*

39. **I now turn to the issue of costs. Not to soothe the ataristic , antiquated and gender**

discrimination nuanced male egos, but to promote harmony in the family since this suit and its antecedents involves a father and a daughter, even though it is the normal thing for costs to follow events, I order that parties bear their own costs.

40. It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 20TH DAY OF APRIL, 2016 IN THE PRESENCE OF:-

CC: Daniel/Lilian

Edwin Kimathi h/b Miss Mwangi for the Appellant

M. Kariuki for the Respondent

P.M. NJOROGE

JUDGE