



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 3 OF 2014

JAMES GAKONO NGUNGI.....APPELLANT

VERSUS

JANE NJOKI NGUNGI.....1ST RESPONDENT

VERONICA MUTHONI NGUNGI.....2ND RESPONDENT

(BEING AN APPEAL FROM THE AWARD IN CENTRAL PROVINCE LAND DISPUTES TRIBUNAL APPEAL NO. 135 OF 1999 ISSUED ON 13TH OCTOBER 1999)

JUDGMENT

The dispute relating to land parcel No. BARAGWI/KARIRU/128 (the suit land) has been the subject of litigation since 1999.

It all started in April 1999 when **JANE NJOKI NGUNGI** and **VERONICA MUTHONI NGUNGI** (the respondents herein) together with one **MARY WANJIRU MAINA** filed a suit at the Gichugu Land Disputes Tribunal claiming that the appellant (**JAMES GAKONO NGUNGI**) who is their late brother held the suit land in trust for them. It was their case that the suit land was registered in the appellant's name by their **UNJIRU MBARI YA NDUNGO** Clan since he was the only son in the family and women were not permitted to have land registered in their names.

After hearing the parties and their witnesses, the Gichugu Land Disputes Tribunal made the following award:-

“Two acres should go to Jane Njoki Ngungi while the mother Keru Ngungi should have a life interest in the two acres of Jane Njoki. The other 5.12 acres should go to Mr. James Ngungi who is the present proprietor. We request the Court executive to sign the necessary forms for land board”

That award, as was the requirement under **Section 7 of the now repealed Land Disputes Tribunal Act**, was filed at the Senior Resident Magistrate's Court Kerugoya as Case No. 16 of 1999 and placed before **W.N. NJAGI** Senior Resident Magistrate who on 25th June 1999 entered judgment in terms of that award and informed the parties of their right to appeal to the Provincial Land Disputes Tribunal as provided under **Section 8** of the Act.

Aggrieved by the decision of the Gichugu Land Disputes Tribunal, the appellant filed an appeal at the Provincial Land Disputes Appeals Tribunal at Nyeri. After hearing the parties again, the said Tribunal upheld the decision of the Gichugu Land Disputes Tribunal holding that the appellant was registered as

proprietor of the suit land as a trustee for the family. That decision was made on 13th October 1999 and any aggrieved party was given 60 days to file an appeal “***on a point of law to the High Court***”

Once again, the appellant was aggrieved and so he promptly filed High Court Civil Appeal No. 25 of 1999 at Embu dated 12th November 1999. In his memorandum of appeal against the decision of the Provincial Land Disputes Appeal Tribunal and filed by **JOE KATHUNGU** advocate, the award was challenged on the following grounds:-

- 1. The Tribunal erred in law and misdirected itself in proceeding to hear and determine this matter whereas it had no jurisdiction to do so.***
- 2. The Tribunal erred in law and fact in proceeding to award the respondents 2 acres out of land parcel No. BARAGWI/KARIRU/128 against the weight of evidence.***
- 3. The Tribunal erred in law in calling for evidence on appeal.***
- 4. The Tribunal erred in finding that the respondent (sic) holds a portion of parcel of land No. BARAGWI/KARIRU/128 in trust for the respondents.***

That appeal was placed before the late **C.A OMWITSA (COMMISSIONER OF ASSIZE)** then sitting at the High Court Embu on 7th June 2001 who summarily rejected the appeal by ordering as follows:-

“Appeal rejected”

The appellant did not give up and filed Civil Appeal No. 153 of 2005 at the Court of Appeal in Nyeri which in a judgment delivered on 19th November 2010 held that the appellant’s appeal could only have been filed pursuant to ***Section 8 (9) of the now repealed Land Disputes Act*** which allowed an appeal to the High Court from the decision of the Appeals Committee on a point of law and said:-

“It was incumbent upon the Superior Court to consider and determine in accordance with that section whether there was an issue of law involved and if so satisfied, issue a certificate accordingly. But the Superior Court did no such thing and instead, summarily rejected the appeal as stated earlier”

The Court of Appeal thereafter made the following directions:-

“In the result, we allow the appeal with the consequences that the appeal before the High Court shall be reinstated for consideration in accordance with the law. The appellant shall have the costs of the appeal”

On 5th February 2014 **ONG’UDI J.** directed that the appeal be heard by this Court and it was placed before me on 5th November 2014 when counsel agreed to have it disposed of by way of written submissions.

Those submissions were subsequently filed by the firm of **JOE KATHUGU** Advocate for the appellant and **MAGEE Wa MAGEE** Advocate for the respondents.

I have considered the appeal and the submissions by counsel.

In his submissions, counsel for the respondents argues that the appeal is moot because the appellant in his memorandum of appeal merely challenges the award given on 13th October 1999 by the Central Province Land Disputes Appeal Tribunal and has not challenged the judgment of the Kerugoya Senior Resident Magistrate’s Case No. 16 of 1999 which was entered on 25th June 1999 and which was lawful. That argument cannot be correct because once a Land Disputes Tribunal determined a case, the decision arrived at becomes the decision of the Tribunal and not the Court. All that the Court does is to enter judgment in terms of that decision. That is clear from the provisions of ***Section 7 (1) and (2) of the***

repealed Land Disputes Act under which this dispute was determined. That section provides as follows:-

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” - emphasis added

7 (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 enforced in the manner provided for under the Civil Procedure Act”

It is also clear from the provisions of **Section 8 of the repealed Land Disputes Tribunal Act** that any appeal to the Appeals Committee is from the decision of the Tribunal and not that of the magistrate adopting the Tribunal’s award. An aggrieved party can then move to the High Court to appeal against the decision of the Appeals Committee. **Section 8 (9) of the repealed Land Disputes Tribunal Act** then provides 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”

The decision of the Provincial Appeals Committee at Nyeri was made on 13th October 1999 and the appeal to the High Court at Embu was filed on 12th November 1999 well within the statutory period provided in the relevant Act. The appeal also raises points of law on jurisdiction.

Counsel for the respondents has also submitted that the appellant ought to have moved to quash the judgment by an order of certiorari. The appellant decided to pursue his right of appeal and it was certainly within his right to do so.

This appeal will be determined on grounds 1 and 4 which question the jurisdiction of the Central Province Land Disputes Tribunal to determine this dispute. Grounds 2 and 3 deal with issues of evidence which the **repealed Land Disputes Tribunal Act** did not permit the High Court to consider.

Counsel for the respondent has submitted that the Gichugu Land Disputes Tribunal had the jurisdiction to determine the dispute because the issue was in relation to the right to occupy the suit land which was held in common. It is not disputed that the suit land is registered in the names of the appellant. It is also clear from the record that the respondents’ claim was based on trust. In her evidence before the Gichugu Land Disputes Tribunal, JANE NJOKI (the 1st respondent) said:-

“I have filed this case for the tribunal to determine our settlement as during the demarcation, the land in question was registered in the name of our step brother as women were not registered with the land. The accused brother was given this land to hold for the family of Ngungi who was dead during the demarcation”

The Gichugu Land Disputes Tribunal left no doubt in its findings that it was dealing with a claim of trust. It said in its summary thus:-

“From evidence from both parties, it was true that the father of both parties was a polygamist who had two wives and had only one son in the family.

During the demarcation time, women were not eligible to registration of lands because they had no identity cards. So the members of Unjiru Mbari ya Ndungo registered the land in the name of the only son to hold for both mothers and members of the family”. emphasis added

The respondents may have had a good claim against the appellant in trust. The evidence seems to suggest as much. Unfortunately, however, they filed their claim in the wrong forum as it had no jurisdiction to make the orders that it did and neither did the Appeals Committee have the jurisdiction to up-hold that decision. The jurisdiction of the Land Disputes Tribunal was provided under **Section 3 (1) of the**

repealed Land Disputes Tribunal Act as follows:-

“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”

Clearly, the dispute between the parties in the Gichugu Land Disputes Tribunal did not fall within the ambit of **Section 3 (1) of the repealed Land Disputes Tribunal Act**. The respondents wanted a share of the suit land given to them because the appellant held it in trust on their behalf. That is why JANE NJOKI the 1st respondent said:-

“I pray the Court to give my mother her share in the land so that my mother can stay with her family”

The Gichugu Land Disputes Tribunal agreed with the respondents and ordered that the suit land be divided as indicated above. The decision was up-held on appeal to the Provincial Appeals Committee. That decision was arrived at without jurisdiction because a Land Disputes Tribunal established under the **repealed Land Disputes Tribunal Act** had no jurisdiction to hear and determine a case revolving on a claim of trust.

Similarly, the suit land was registered. It has long been established that a Tribunal exercising its jurisdiction under the **repealed Land Disputes Tribunal Act** had no jurisdiction to determine a dispute concerning ownership of registered land. In the case of **JOSEPH MALAKWEN LELEI and ANOTHER VS RIFT VALLY LAND DISPUTES APPEALS COMMITTEE and 3 OTHERS C.A CIVIL APPAL No. 82 of 2006 (ELDORET)**, the Tribunal determined a dispute that involved both trust and registered land as is the position in this dispute. The Court of Appeal stated as follows after citing **Section 3 (1) of the repealed Land Disputes Tribunal Act:-**

“Evidently, the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a trust in favour of a party, which in essence was the basis of the 3rd respondent’s claim”

See also the case of **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 of 2002 (KISUMU)** where the Court of Appeal held that such a Tribunal has no jurisdiction over registered land. By dint of **Section 159 of the Registered Land Act** now repealed and which was the law then in force, only the High Court could make the orders that the Gichugu Land Disputes Tribunal proceeded to make by ordering the Executive officer of the Court to facilitate the sub-division of registered land. It follows therefore that whatever decision the Gichugu Land Disputes Tribunal arrived at and which was up-held by the Central Province Land Disputes Appeals Committee was a nullity and this Court must declare it so because, as was held in the case of **MACFOY VS UNITED AFRICA CO. LTD 1961 3 ALL E.R 1169**, where a Tribunal or Court arrogates to itself jurisdiction which it does not have, all its proceedings and decisions arising therefrom are all null and void.

For the foregoing reasons therefore, the appellant’s appeal is meritorious. I allow it with the result that the decision of the Gichugu Land Disputes Tribunal as up-held by the Central Province Appeals Committee in its award dated 13th October 1999 are hereby set aside. As the parties are a family, each shall meet their own costs of this appeal.

B.N. OLAO

JUDGE

19TH AUGUST, 2016

Judgment dated, delivered and signed in open Court this 19th day of August, 2016

Ms Kiragu for Respondents present

Mr. Mwangi for Mr. Kathungu for the Appellant present

B.N. OLAO

JUDGE

19TH AUGUST, 2016