



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C.A NO 30 OF 2014

FORMERLY EMBU H.C.C.C 68 OF 2008

CHARLES NDWIGA KIURA.....APPELLANT

VERSUS

NANCY WANGIRI NYAGA.....RESPONDENT

JUDGEMENT

INTRODUCTION

Charles Ndwiga Kiura, the appellant appeals against the ruling of the Eastern Province Appeals Committee which awarded part of his land parcel number Ngandori/Kirigi/4793 to his sister, Nancy Wangiri Nyaga. According to him, he was not a party to the proceedings in the Embu District Land Disputes Tribunal and is therefore a stranger.

The respondent has opposed the appeal. According to her, the Appeals Committee came to the correct decision. The case for each of the parties is briefly set out below.

The Case for the Appellant

The appellant has listed 3 grounds of appeal and they are as follows:

1. That the Appeals Committee erred in law in referring the case back to the Embu District Tribunal to rehear and determine the suit, yet the Committee had come to the conclusion that the suit land Number Ngandori/Kirigi/4793 belongs to one Njeru Kiura who is not a party to the suit.
2. That the Appeal Committee erred in law in failing to realize that the District Tribunal does not have jurisdiction to determine the suit herein as it relates to title to land.
3. The Appeals Committee erred in law when it failed to realize that even if the District Tribunal had dealt with the correct parcel of land, their decision would have been null and void as they had ordered for the sub-division and transfer of the land to various people which was clearly outside their jurisdiction.

I will first consider the 2nd ground of appeal which relates to the jurisdiction of both the Appeals Committee and the District Land Disputes Tribunals. According to counsel for the appellant, both tribunals had no jurisdiction to entertain the matter in dispute. The argument of counsel is that both tribunals are not allowed by law to adjudicate on issues touching on title to land. He went further to argue that the Appeals Committee did not even have jurisdiction to entertain the appeal.

Furthermore, he argued that the Appeals Committee did not have jurisdiction to remit the case to the District Land Disputes Tribunal for a rehearing. It should be noted here that he cited Section 3 of the now repealed Land Disputes Tribunal Act Number 18 of 1990. The jurisdiction of the Land Disputes Tribunal is set out in Section 3 (1) of that Act which in terms states 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.**

The appellant's first ground of appeal is that the Appeals Committee erred in law by referring the case back to the Embu District Tribunal to rehear and determine the suit. He says that the sending back of this case to the Embu District Tribunal was not proper because the appellant was not a party to the original suit and land reference number Ngandori/Kirigi/4793 belonged to him. Counsel for the appellant further submitted that the Appeals Committee did not have jurisdiction to refer the case back to the District Land Disputes Tribunal. I will consider this ground of appeal along with ground number 3 of his memorandum of appeal. The two grounds are closely related.

According to the counsel for the appellant, the Appeals Committee erred in law in sending the case back to the District Land Disputes Tribunal. He submitted that even if the parcel of land was a proper one to be decided upon by the said subordinate tribunal, the decision of that subordinate tribunal would be null and void. According to him, that subordinate tribunal did not have the jurisdiction to subdivide the land in dispute.

For these reasons, he urged this court to allow the appeal with costs to the appellant.

The Case for Nancy Wangiri Nyaga, the Respondent

The respondent is a divorced mother of six children living on what used to be her late father's land. She appeared in person and made submissions to the court. According to her, the suit land belonged to his father. By necessary implication she was submitting that the suit land did not belong to his brother, the appellant. It was her submission that when her father died, the suit land was left to his brother as a trustee on behalf of the respondent and other members of her family as beneficiaries. When the court pointed to her that the suit land reference number Ngandori/Kirigi/4793 belonged to the appellant and not their father, she responded by stating that whoever assisted her to file the case before the Embu District Land Disputes Tribunal made a mistake by not indicating the correct land parcel number. The correct land parcel number was Ngandori/Kirigi/2065 which was in the name of their father Kiura Ngaithia. Their deceased father was the registered owner of land parcel number Ngandori/Kirigi/2065 which was 8 acres in size.

Following the death of their father, a succession cause was filed in the court of the Senior Resident Magistrate in Embu being cause number 66 of 1993. The outcome of that succession cause was that the appellant was given a share of his father's land.

During the succession proceedings, she never lodged any claim in court or objected to subdivision of his father's land. As a result, she never got a share. She attempted to do so by filing a case before the Embu District Land Disputes Tribunal. She should have objected to the subdivision of his father's land at the right time so that the succession court would have considered her objection and claim in those succession proceedings. It is this omission on her part that has given rise to these proceedings.

The Applicable Law:

In the light of the findings by both tribunals and the submissions of the parties, the issues of law that arise therefrom are in relation to the jurisdiction of those tribunals. This issue of jurisdiction is central to the determination of the appeal. According to the Tanzanian High Court case of *Desai V. Warsama (1967) E.A 351*, a court cannot confer jurisdiction upon itself as jurisdiction must be conferred by an Act of Parliament. The court went further to hold that a judgement of a court that is not possessed of jurisdiction is a nullity. The principles set out in that case are good law. The provisions of *Land Disputes Tribunal Act of 1990 in Section 3 (1) (a), (b) and (c)* referred to above clearly show that the jurisdiction of both tribunals does not extend to determine issues of title to land. The jurisdiction of both tribunals is to determine the division of or the determination of boundaries to land, a claim to occupy or work on land and trespass to land. The issue of land ownership in relation to matters of title to the land are explicitly excluded from their jurisdiction.

The Issues for Determination:

In view of the submissions of the parties and findings of the tribunals, the following are the issues for determination:

1. Whether or not the two tribunals had jurisdiction to adjudicate over land parcel number Ngandori/Kirigi/4793.
2. Who should pay the costs of this appeal.

Evaluation of the Evidentiary Findings and the Law:

It is clear from what I have said in the foregoing paragraphs that the Embu District Land Disputes Tribunal did not have jurisdiction to entertain the dispute following the claim lodged by the respondent. According to that tribunal, it had purported to subdivide the parcel of land of the appellant into 4 parcels of land each measuring half an acre. In doing so, they had interfered with the title of the appellant's land reference number Ngandori/Kirigi/4793. It did not have the jurisdiction to do so. There is no statute that gave it the authority to do so. The purported subdivision of the land of the appellant was therefore null and void.

The Eastern Province Appeals Committee to which the appellant lodged an appeal had jurisdiction to entertain the appeal because in terms of Section 8 of the Land Disputes Tribunals Act, appeals lay to that body from the decisions of the District Land Disputes Tribunal. It could have made a ruling either allowing the appeal for lack of jurisdiction in the District Land Disputes Tribunal or it could have sent it back with a direction that the case can be dismissed on account of lack of jurisdiction.

In the circumstances, of this particular case, both tribunals erred in law by assuming jurisdiction which was not conferred upon them by an act of Parliament. It therefore follows that their decisions were null and void.

Verdict and Disposal Order:

Having considered the issue of jurisdiction in relation to the findings of both tribunals, I find that the appeal should be allowed. The order of the Provincial Appeals Committee is hereby set aside. The only issue that remains is that of costs. In terms of Section 27 Civil Procedure Act, a successful party should be awarded costs. I take into account that the appellant is the elder brother of the respondent. I also take into account that this litigation has been in the courts since 2007. In the end, I make no orders to costs because the case involves very close family members.

The appeal is hereby allowed and the order of the Eastern Province Appeals Committee dated 11th June, 2008 is hereby set aside with no order as to costs.

Recommendation:

This case shows the need of assigning a legal adviser to tribunals that are manned by lay persons. It

is not proper to authorize lay men to decide on matters that touch on the law without giving them a person to explain to them what that law is all about and what they are required to do in terms of that law. I take note that military courts (Courts Martial) are run by Senior Military Officers as members of the court and a legal adviser referred to as a Judge Advocate is assigned to them for guidance and advice in matters of law throughout the proceedings. A similar approach should have been adopted for these Land Disputes Tribunals.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **21st** day of **JANUARY 2015**

In the presence of

Mr Kathungu for the appellant and the respondent in person.

Court clerk Mr. Muriithi.

J.M. BWONWONGA

JUDGE