



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 2 OF 2011

JOHN KARANI MWENDA.....APPELLANT

VERSUS

JAPHET BUNDI CHABARI.....RESPONDENT

(Being an appeal from the ruling of the Provincial Land Disputes Appeals Tribunal at Embu delivered on 8th November, 2010)

JUDGMENT

In this appeal, the appellant has proffered the following grounds of appeal:

1. *The Chairman erred in law in failing to find that the tribunal had no jurisdiction to hear and determine a dispute involving land registered under Cap 300 Laws of Kenya.*
2. *The Chairman erred in law in failing to find that the dispute herein had been heard through a succession cause and therefore entertaining this suit is tantamount to being Res-judicata.*
3. *The Chairman erred in law in failing to find the respondent had no right in law to claim land from the appellant.*
4. *The Chairman erred in law in deciding the whole case against the weight of the evidence.*

APPELLANT'S SUBMISSIONS

The appellant in his submissions has stated that he wishes to consolidate his four grounds of appeal and submit all of them under paragraph 1 of the Memorandum of Appeal.

The appellant has stated that it is trite law that the defunct Land Disputes Tribunal Act, did not bestow upon the Tribunals Jurisdiction to determine ownership of title to land, especially in situations where the apposite land was registered under the Registered Land Act, Cap 300, Laws of Kenya. The appellant proffers that the jurisdiction of Tribunals formed under the Land Disputes Tribunals Act was limited to hearing disputes relating to boundaries, trespass to land and occupation of land. It was submitted that L.R. No. MWIMBI/C-MAGUTUNI/680 was registered under the Registered Land Act, and, therefore, the Tribunal did not have jurisdiction to deal with it.

The Appellant has also submitted that the land in dispute was transferred to the Appellant through Succession Cause. No. 184 of 1993 at Embu. The Appellant submits that this matter having been heard by a competent Court, the action of the Tribunal to hear it amounted to its bestowing upon itself appellate jurisdiction, which is an abuse of the Court process and Res Judicata.

RESPONDENT'S SUBMISSIONS

The respondent has submitted that he is predicating his opposition on three core grounds as follows:

1. *That the Appeal as filed is premature.*
2. *That the Appeal departs significantly from the complaint raised at the Appeals Committee.*
3. *That Grounds 2, 3, and 4 of the Memorandum of Appeal offend the provisions of Section 8 (8) & (9) of the Land Disputes Tribunals Act, Cap. 303A, Laws of Kenya.*

The Respondent states that the Land Disputes Tribunals (Forms and Procedure) Rules, 1993, at rule 20 provide that upon the pronouncement of a decision the decision shall be forwarded to a Magistrate's Court to be adopted as a judgment of the Court and for a decree to issue.

The Respondent points out that at page 2 of the record of Appeal, it is shown that the award of the Appeal's Committee was adopted as a judgment of the Court on 2.2.2011. He also points out that at page 1 of the record of Appeal it is shown that this appeal was filed on 5.1.2011. The respondent submits that there was no judgment or decree to be appealed against when this appeal was filed. He laconically states that the appeal was founded on no decision at all, and was therefore premature. The respondent argues that allowing the appeal would be tantamount to technically finding that Magistrate's Courts have no role to play in disputes of this nature and thus ousting the intentions of the legislature. The respondent urged the Court, on this ground alone, to find that this appeal is improperly before this Court and dismiss it.

The Respondent submits that it is an established principle of law that a second appeal, like this one, should flow from the points raised at the lower level. He points out that at the Appeal's Committee, the sole complaint raised by the Appellant against the award of the Provincial Tribunal revolved around the issue of inheritance. The respondent states that this appeal raises new grounds of appeal which the Appeals Committee did not have an opportunity to address or make a decision upon. It is submitted that the Appellant slept on his rights during his appeal before the Provincial Appeals Committee and should not be entertained at the High Court, which exclusively has appellate jurisdiction and should not be seen to entertain a new claim.

The Respondent points out that under section 8 (8) and 8(9) of the Land Disputes Tribunal's Act, an appeal to this Court shall only lie on a point of law. He submits that grounds 2, 3 and 4 of the Memorandum of Appeal raise issues that would require the presentation of evidence for this Court to make an informed finding. The respondent argues that this would be contrary to the express provisions of the law. He urges this Court to find that the 3 grounds of Appeal are founded on issues of fact and dismiss the appeal.

DETERMINATION

Appellate jurisdiction in matters emanating from Provincial Land Disputes appeals Tribunals is donated by Section 8(8) and 8(9) of the Land Disputes Tribunals Act. It provides as follows:

“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.

“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 to hearing by the High Court unless a judge of that court has certified that an issue of law (other than customary law) is involved.”

I agree with the Respondent, that an appeal filed on 5.1.2011 almost a month before the adoption by the Court of the award of the Provincial Appeals Committee would be premature and would lack merit. I

have, however, noted from the record of appeal at page 1 that this appeal may have been filed on 28.6.2012. This means that, should this be the case, the appeal was filed around one and half years after the award of the Provincial Appeals Committee was adopted as a judgment of the Senior Resident Magistrate's Court at Maua. This would be veritably against express provisions of the law. Either way, I find that this appeal is improperly before this Court.

I agree with the Respondent that Grounds 2, 3, and 4 of the Memorandum of Appeal raise issues which invite presentation of factual evidence so that the Court can ascertain their veracity. They do not raise points of law. They are contrary to express provisions of the law. I do dismiss them. I also find that the issue of lack of jurisdiction, which subsumes the argument regarding land registered under the Registered Land Act and Res Judicata, should have been properly ventilated during the proceedings of the Provincial Appeals Committee. These are new issues.

Having carefully examined the record of appeal, I find it necessary to pronounce myself on whether this court had jurisdiction to entertain this appeal. In the case of **Samuel Kamau Macharia & Another Versus Kenya Commercial Bank and 2 Others (Petition 2 of 2011)** the Supreme Court to Kenya eruditely and unequivocally pronounced itself as follows:

“A Court's jurisdiction follows from either the Constitution or other written law. It cannot arrogate unto itself jurisdiction exceeding that which is conferred upon it by law”.

It is clear to me that the appellant in this case did not obtain a certificate from a Judge certifying that this application raised only points of law. This is not a mere procedural technicality. It is an express provision of the law. On this issue alone, in addition to the other considerations I have already pronounced myself upon, this appeal merits dismissal. Accordingly, I find that this appeal, in its entirety, lacks merit. In the circumstances, it is dismissed.

Costs are awarded to the Respondent.

Delivered in Open court at Meru this 14th day of January 2015 in the presence of:

Cc. Daniel/Lilian

Murithi for respondent

Muthomi h/b Kimathi Kiara for Appellant

P. M. NJOROGE

JUDGE