



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**ENVIRONMENT AND LAND COURT**

**MISC. APPLICATION NO. 293 OF 2013**

**FELIX MUGAMBI M'IMAITA.....APPLICANT /APPELLANT**

**VERSUS**

**LUCY WANJIRU GACHAI.....RESPONDENT**

*(Being an appeal from the ruling of the Kieni Land Disputes Tribunals LDT no. 7 of 2010 as adopted by the Chief Magistrates Court Nyeri By C.M Wekesa R.M)*

**JUDGMENT**

1. This appeal is brought by the appellant following a long protracted dispute between him and the respondent challenging the award of the Kieni Land Disputes Tribunal No.7 of 2010 as adopted by **Hon. C.M Wekesa R.M** on **30<sup>th</sup> September, 2011**. The dispute between the parties herein relates to a boundary dispute between the appellant's parcel **LR. No. Gakawa/Kahurura /Block 111/ Mwachwiri/ 368** and the respondent's parcel **LR. No. Gakawa/ Kahurura/Block 111/ Mwachwiri/367**.

2. The dispute was first referred to the District Land Registrar in 2007, who then advised the parties to file it before the Kieni East Land Disputes Tribunal. Their claim was heard by the tribunal and a decision rendered on **19<sup>th</sup> July, 2011** in case No 7 of 2010 that the dispute was time barred as 12 years had lapsed by the time the boundary dispute was being raised. The tribunal ordered the parties to maintain the status quo and the award was adopted by Nyeri Chief Magistrate's Court on **30th September, 2011**.

3. The appellant dissatisfied with this ruling, filed an appeal before the Nyeri Central Provincial Land Appeals Committee, on five grounds:

**1. The District Tribunal erred in holding that the claim was time barred while the appellant only assumed ownership of the disputed land parcel number Gakawa/Kahurura/Block III/Mwachwiri/368 on 18th April, 2001 which is less than 11 years ago.**

**2. The District Tribunal erred in failing to find that before 18th April, 2001 the suit land belonged to the land buying company and the appellant had no capacity to file any claim over the land before it was transferred to him.**

**3. The District Tribunal erred in failing that the boundary dispute was first filed in 2007 before the Land Registrar who later advised them to go to the Tribunal which they did yet**

went ahead to find that the claim was time barred which are contradictory finds.

**4. The District Tribunal erred in not involving qualified and licensed surveyors to determine whether the respondent had encroached on the appellant's suit land and make recommendations on re-surveying, re-fixing and re-marking the correct common boundary.**

**5. The District Tribunal erred in not being guided by substantive justice between the parties and using inapplicable legal technicalities to deny the appellant a just and substantive determination of his dispute.**

4. The appellant urged the appeals committee to order that;

**a) The award/decision/determination of the Kieni East District Land Disputes Tribunal dated 19/7/2011 in L.D.T case No.7 of 2010 as read in court on 30/9/2011 vide Nyeri CMC L.DT Award No.25 of 2011 be set aside.**

**b) The District Surveyor and the District Land Registrar in charge of the area be ordered to visit the suit land to re-survey, re-fix and re-mark the correct common boundary between the appellant suit land parcel No. Gakawa/Kahurura/Block III/Mwichwiri/368 and the respondent's land parcel No. Gakawa/Kahurura/Block III/Mwichwiri/367 with both parties sharing the survey fees.**

**c) Costs of this appeal and those of District Tribunal below be awarded to the appellant.**

5. Before the appeal could be heard and determined, the Land Disputes Tribunal Act was repealed by the Environment and Land court Act in 2012.

6. On **31st October, 2013** the Appellant filed the current miscellaneous application vide a notice of motion together with the memorandum of appeal filed before the appeals committee, seeking that this court transfers and determines that appeal.

7. The court on **24<sup>th</sup> January, 2014** after perusing the memorandum of appeal found it had jurisdiction to entertain the appeal that had been filed before the appeals tribunal and gave directions that the appeal be heard orally.

8. Further directions were taken on **7<sup>th</sup> May, 2014** that the memorandum of appeal be deemed to be properly filed before the court, that the appellant before the tribunal be deemed to be the appellant in the current appeal and the respondent be taken to be the respondent in this appeal. The appellant was granted leave to file his record of appeal within 21 days which was filed on **12<sup>th</sup> June, 2014** and admitted on **7<sup>th</sup> May, 2014**.

9. On **11<sup>th</sup> July, 2014** the directions earlier given on 24<sup>th</sup> January 2014 to hear the appeal orally, appear to have been vacated because the court directed the parties to file written submissions to the appeal. On **24<sup>th</sup> September, 2014** the appellant finally filed his submissions and the respondent did likewise on **24<sup>th</sup> November, 2014**.

10. The Appellant submitted that he only acquired a legal right to his land in 2001 when the land was registered in his name, therefore when he first filed the dispute before the District Land Registrar in 2007 he was within the 12 years period allowing him to bring his claim and his appeal should therefore be allowed.

12. The respondent submitted that the appeal was time barred, filed out of time, without leave of the court and the cause of action was time barred. Furthermore, the determination of the tribunal was delivered on 19th July, 2011 and adopted as judgment of the court on 30th September, 2011 therefore, the appeal filed before the appeals committee on **25<sup>th</sup> October, 2011** was outside the 30 days provided for in **Section 7**

of the Land Dispute Tribunal's Act.

13. I shall now proceed to consider each of the grounds of appeal. Before I do so, I just wish to rehash the principle governing the duty of an appeal court on a first appeal. The appeal court has got a solemn duty to re-evaluate the evidence before the trial court or in this case, the tribunal and make its own decision. This age-old principle was reiterated by the court in **Bemugisa & others –vs- Tibebuga** (2004) 2 EA 17, where the court held inter- alia;

**”...the legal obligation of a first appellate court to re-appraise evidence is founded on common law rather than in the rules of procedure. It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact and law, giving due allowance for the fact that it has nether seen nor heard witnesses.’**

14. This principle has variously been followed by our own High Court on many occasions while resolving appeals emanating from the Magistrates courts. see the case of **Amalgamated Saw Mills Ltd v Tabitha Wanjiku** (2006)eKLR and **Japheth Ifedha v Colindale Security Company Ltd** (2005)

15. And now to the grounds of appeal: On the first, second and third grounds, I find that the tribunal in their finding considered that the parties had lived peacefully together for over 20 years during which time they had accepted the boundaries as correct without any party filing a claim. Further each of them had extensively developed their respective parcels by erecting permanent buildings and fences. Although there is no document on record showing when the original survey was done, the parties are in agreement that the boundaries were fixed a long time ago before the appellant was issued with his titles in 1998 and 2001 and that they had been given and taken possession of their respective parcels by the land buying company in 1980.

16. The appellant states that the tribunal did not consider that time started running after he was issued with a title deed because before then, the land was registered in the name of the land buying company. In determining this ground, I wish to be guided by **Section 9(1)** of the Limitation of Actions Act which provides;

**“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or that discontinuance”**

17. From the above provision of the Law, I find that time started running when each party took possession of their respective portions after survey and after the land buying company had made each person aware that they were entitled to their respective portions which they occupied even before issuance of title and not after the parties were issued with their title deeds. Although there is no document on record on exactly when demarcation took place, the parties are in agreement that each was handed over their parcel in 1980, took possession and had been in occupation since then. In my view, the appellant was dispossessed of the portion he was claiming in 1980 when possession took place. Further, nowhere in the appellant's statement has he expressed doubt of his entitlement to the portion he had occupied after being settled on his respective portion in 1980 to justify his reason for not having filed this claim before being issued with his title deeds. Whichever the case, it still took him over six years after being issued with the last tile to file his claim. For the above reasons I find that this ground fails.

18. On the fourth ground that the District Tribunal erred in not involving qualified and licensed surveyors to determine whether the respondent had encroached on the appellant's suit land and make recommendations on re-surveying, re-fixing and re-marking the correct common boundary, I find that this ground succeeds. I say this because the tribunal visited the suit parcels in the presence of the parties but did not invite the Land Registrar and the Government surveyor to accompany them or visit the site separately to determine the boundaries and file a report on their findings. The members of the tribunal are not experts on issues of survey and could not have reached an informed decision without the participation of the Land Registrar and the Government surveyor.

19. On the fifth and last ground that the District Tribunal erred in not being guided by substantive justice between the parties and using inapplicable legal technicalities to deny the appellant a just and substantive determination of his dispute, I find that this ground fails. Other than failure to involve the Land Registrar and the Government surveyor, the two parties were heard and even a site visit was done. Further more, the issue of limitation of time cannot be deemed to be a mere technicality.

20. Having considered the grounds of appeal as filed by the appellant , I must now consider whether this appeal is time barred as submitted by the respondent.

21. The appellant argues that time started running from the date of adoption of the decision by the Chief Magistrates court on **30<sup>th</sup> September, 2011**. I disagree. **Section 8** of the repealed *Land Disputes Tribunals Act* provides,

**"8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated"**

22. The appellant in the instant case did not file his appeal within the 30 days. He waited until the award was adopted by the Magistrates court and had become a judgement of the court. The appellant should have filed his appeal to the provincial appeals committee latest by the 18<sup>th</sup> August , 2011. The appellant having filed his appeal on 25th October, 2011 was clearly out of time.

23. Further, once the award by the tribunal was adopted by the Magistrate's court, it ceased to exist as a separate decision for the purposes of appeal to the appeals committee. I agree with the views expressed in one of the cases relied on by the counsel for the respondent, **Bernard Ngetha Vs Samuel Karobia Muriuki** (2014)eKLR where the court in approving the finding in the case of **R.V Chairman Land Dispute Tribunal, Kirinyaga District & Another Exparte Kariuki** (2005) 2 KLR 10, held that once a decision of the tribunal is adopted by the court it ceases to exist separately.

24. On the issue of whether the appeal was filed out of time, I find and hold that the appellant was out of time when he filed his appeal before the provincial appeals committee. By that time, the award by the tribunal had already been adopted as judgment of the court and it had been subsumed in the said judgment and no longer existed separately.

25. For the reasons given, I find that this appeal must fail and I consequently dismiss it as it lacks merit. Each party to bear their own costs.

**Dated, signed and delivered at Nyeri this 25<sup>th</sup> day of February, 2015**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Kimunya holding brief for Mr. Mwangi for the respondent

Mr. Mwenda Mwarania for the appellant/applicant

Lydia – Court Assistant