



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 165 OF 2000**

**GRACE MWIHAKI GIKINU.....APPELLANT**

**VERSUS**

**WALTER MUCHERU KABERERE.....1<sup>ST</sup> RESPONDENT**

**CECILIA WAITHIRA KABERERE.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

The appeal arises from the decision and award of Nyeri Provincial Land Appeal Committee dated 10<sup>th</sup> February 2000. The dispute concerns land known as Githunguri/Githiga/1024 which is registered in the name of the Appellant. The land borders Githunguri/Githiga/212 which belongs to the objectors/Respondent. It is alleged that the land in dispute was originally part of a parcel known as Githunguri/Githiga/216 which belonged to the late Wanganga Muchai, the deceased, who also owned L.R. No. Githunguri/Githiga/837. It is also alleged that soon after demarcation, James Kaberere Kahuhu who is the husband to the 2<sup>nd</sup> Respondent and father to the 1<sup>st</sup> Respondent moved the boundary which led to the lodging of the complaint by the Appellant. The Objector/Respondents denied occupying any portion of the disputed land.

The record before court shows that the parties adduced evidence and the witnesses were cross-examined. The Githunguri Land Disputes Tribunal concluded that the disputed portion belongs to the claimant and the objectors should compensate her with another portion of the land equivalent to the disputed portion.

The Appellant being aggrieved by this decision, appealed to the Nyeri Provincial Land Appeal Committee. Among the grounds of complaints of appeal were the following summarized grounds:-

- 1. That there was an irregularity on the procedure, one of the elders Joseph Kamau Kiburu signed the judgment while he did not listen to the case while Muhoro Njoroje who sat and listened to the case never signed the judgment.***
- 2. The Respondent, Grace Mwhaki Gikuni, lied that the Registrar visited the land in dispute.***
- 3. That Land parcel no. Githunguri/Gathiga/1024 did not emerge from Githunguri/Gathiga/216. The land was only partitioned into two portions 836 and 837.***

The record shows that the appeal was heard on 6<sup>th</sup> October, 1999. Both parties presented their case before the Land Appeal Committee. Before giving its final decision, the Lands Appeals Tribunal sought to ascertain the actual acreage pertaining to Githunguri/Gathiga/1024 and Githunguri/Gathiga/212 from the District Land Registrar Kiambu. The Lands Appeals Tribunal ordered the Senior Principle Magistrate

Law Court in Kiambu, to sign the necessary documents to facilitate the enforcement of surveying the land Githunguri/Gathiga/1024 with a view to confirm the acreage. The Land Appeal Tribunal also ordered that the dispute on the boundaries be addressed to Director of Survey and Chief Land Registrar, respectively.

The Appellant was also aggrieved with the decision of the Provincial Land Tribunal and raised the following complaints:-

- 1. That the provincial tribunal erred in law and in fact in not considering the finding of the tribunal or elders at Kiambu.**
- 2. That the provincial tribunal erred in law and in fact in not considering the evidence of the district surveyor who calculated the disputed portion before amendment and after amendment.**
- 3. That, the provincial tribunal erred in law and fact in hearing the appeal in the absence of the Appellant.**
- 4. That, the award was not based on facts on record but hearsay evidence.**
- 5. That the provincial tribunal erred in law and fact in basing the award on assumption and not a reality.**
- 6. That, the provincial Tribunal award is ambiguous and uncertain and the same cannot be clearly understood.**
- 7. That, the award never determined the dispute as required by law.**
- 8. That the tribunal erred in law and in fact in depriving the Appellant a portion of her land measuring 2.42 acres whilst evidence pointed to the fact that it was hers.**
- 9. The decision of tribunal is contrary and at variance with the evidence adduced.**

The parties agreed to prosecute the appeal by way of written submissions. The Appellant argued ground 4, 5, and 9 together; then ground 1, 3, 5, 6, 7 and 8.

On ground 4, 5 and 9, the Appellant submitted that Land parcel no. Githunguri/Githiga/1024 with an approximate acreage of 2.92 Ha is different on the ground as some part of the land approximate 2.42 acres had been irregularly axed from Githunguri/Githiga/212 and added to it. The original map from Survey of Kenya 1958 map sheet 149 shows the final acreage of the parcels. She submitted that the map confirms that the original parcel Githunguri/Githiga/212 is 13.9 acres. Parcel Githunguri/Githiga/ 836 were combined with Githunguri/Githiga/ 219 which produced Githunguri/Githiga/889 with approximately area 4.32 Ha. In 1978 parcel No. Githunguri/Githiga/889 was subdivided under mutation no. Mut/3/157 and the following parcels produced:

- 1) Githunguri/Githiga/1024
- 2) Githunguri/Githiga/1025
- 3) Githunguri/Githiga/1026

In 1979 the new owner of parcel Githunguri/Githiga 1024 and Githunguri/Githiga/837 exchanged the land parcels and retained their number as indicated in the green card. The Appellant submitted that parcel no. Githunguri/Githiga 212 has no relationship with the parcel in dispute Githunguri/Githiga 1024. The Appellant also stated that when she moved to the parcel of land, she sought the services of a surveyor from Kiambu County who found that that the road was the boundary between parcel 212 and 1024 which at that time was blocked by the owner of Githunguri/Githiga 212. The Appellant complained that the

Appeal committee ignored the fact that the road which separated the two parcels was blocked by the owner of Githunguri/Githiga 212.

The Appellant also submitted that the Appeal committee did not take into account the proceedings, findings and ruling of the District Land Dispute Tribunal. She stated that the committee considered irrelevant and extraneous matters especially the Chief Land Registrars letter dated 29<sup>th</sup> April 1983. The Appellant argued that the issue before the Chief Land Registrar was the closed road and not the boundary dispute.

The Appellant submitted that she was never heard before the Appeal Tribunal. She states that she was not in court on 10<sup>th</sup> February as alleged by the statement. The record did not also show how the tribunal went ahead to deliver the ruling on the same day. She stated that the tribunal ought to have considered the age of the Appellant and the fact that she was not only old but illiterate and needed close guidance. The Appellant further submitted that the Land Dispute Tribunal did not solve the dispute but created even more confusion. She stated that the tribunal in their ruling alleged that the sketch map by the surveyor did not solve the problem yet the surveyor visited the disputed land and did the survey while the appeal tribunal did not. The tribunal only stated that the issue of the boundary should be clarified but did not state who should clarify.

The Respondent also submitted that the disputed portion could not be part of the Appellant's land, L.R. Githunguri/Githiga 1024. They stated that the disputed parcel is part of parcel No. Githunguri/Githiga 212 and not 1024. They explained that parcel No. Githunguri/Githiga 212 was originally owned by the late James Kaberere Kahuhu.

The Respondent also submitted that the Appellant claim was time barred. Title No. Githunguri/Githiga 212 was issued on 15<sup>th</sup> January 1958. They stated that Section 3(3) of the Land Dispute Tribunal Act forbids Land Dispute Tribunal from entertaining disputes that are time barred. The Respondent further submitted that all parties were present during the hearing and made statements.

I have carefully perused the record including the Tribunal Proceedings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal all of which I have carefully considered taking into account all the documents.

What comes out of the record of the Githunguri Land Disputes Tribunal sitting at Githiga Chief's Camp on 30<sup>th</sup> day, 1999 is, that there was a land dispute between the owner of L.R. No. Githunguri/Githiga/1024 and the owner of L.R. no. Githunguri/Githiga/212. The claimant Grace Mwihaki Gikinu, who was owner of L.R No. Githunguri/Githiga/212 claimed that a piece of land measuring 2.42 acres was axed from L.R. No. Githunguri/Githiga/212 and was included and became part of parcel L.R. No. Githunguri/Githiga/1024. She wanted the piece of land released and ceded back by the Order of the Tribunal to become part of L.R. Githunguri/Githiga/212. At the time of the dispute, L.R. No. Githunguri/Githiga/1024 measured 7.3 acres on the ground while L.R No. Githunguri/Githiga/212, measured 13.82 acres.

The Githunguri Land Dispute Tribunal after hearing and considering the evidence adduced before it, decided, inter alia, as follows: -

**i) That the Tribunal Elders... are satisfied beyond any doubt that the disputed portion (2.42 acres) belongs to the claimant.**

**ii) .....**

**iii) That, therefore, the Objectors should compensate the claimant with another portion of the land equivalent to the disputed portion of 2.42 acres.**

When the objectors, Walter Mucheru Kaberere and Cecilia Waithera Kaberere appealed to the Central

Provincial Appeals Committee at Nyeri, the latter effectively confirmed the decision of Githunguri Land Disputes Tribunal. The Committee endorsed the view that L.R. No. Githunguri/Githiga/1024 should be reduced by an area of 2.42 acres to measure at 5.30 acres.

In the meantime, the Committee relied upon a recommendation of the Kiambu District Surveyor's Letter Ref. ACS/KBU/GIT/VI/141 stating effectively that L.R. Githunguri/Githiga/1024 should be resurveyed and be reduced by acreage of 2.42 acres. That is what led to this appeal to this court filed by the Objector, Grace Mwihaki Gikinu.

There is no doubt that the two parcels do indeed exist on the ground and presently and for many years past, must have a physical common boundary between them. If this court understands properly, it is the physical boundary on the ground that the Central Provincial Appeals Committee was seeking to refix in accordance with the Kiambu District Surveyors recommendation on his earlier referred to letter. This decision of the Provincial Appeals Committee clearly was not consonant with the decision of the Githunguri Land Disputes Tribunal which had merely recommended that the Objector compensates the Claimant with 2.42 acres elsewhere.

Secondly, the District Surveyor's opinion in his above cited letter, was his personal opinion whose origin is not known or explained in evidence that was laid before the Provincial Appeals Committee. Furthermore, the District Surveyor had not been called as a witness where the origin of his opinion would have been explained or cross-examined upon and properly tested to remove doubt, prejudice or influence that might lead to injustice or unfairness if the District Surveyor's opinion was not right or was unfairly influenced.

Thirdly, although not raised in these proceedings, it is most probable that the decision of determining ownership of a portion of land measuring 2.42 acres either way, was clearly determining a beneficial interest in land which should have been outside the jurisdiction of both Tribunals. Indeed considering that issue alone, this suit should be a matter to be heard and determined by a competent court or Tribunal with jurisdiction and not the two Tribunals.

In the result, I find this suit was a non-starter from the beginning on the basis of jurisdiction.

I accordingly, find that this appeal, on the basis of jurisdiction, must and is hereby allowed. The suit with relevant issues should, if necessary, be filed in a court of competent jurisdiction in which the costs of this appeal should be laid or joined. Orders accordingly.

Dated and delivered at Nairobi this 25th day of May, 2015.

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**D A ONYANCHA**

**JUDGE**