



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL APPEAL NO.84 OF 2011

FLASIA MUMBI MAINA.....APPELLANT

VERSUS

MUTHONI MWEHA.....RESPONDENT

RULING

On the 12th of November 2004, Flasia Mumbi Maina (*hereinafter referred to as the appellant*) filed a claim at the Mweiga Land Disputes Tribunal against her sister in law Muthoni Mweha (*hereinafter referred to as the respondent*). The appellant's claim was that in 1974 December while settled in the rural home at Mukurwe-ini with her husband, she balloted for a society plot no Mugunda/Karemeno/Block 1/134 which she finally bought in 1987 when she acquired shares in Kieni East. She took possession of the land and settled in therein, she fenced her shamba and hired a worker to look after some goats which she had bought. At the material time she had constructed a house on the farmland. The respondent who is her sister in law was married elsewhere but later separated with her husband, a situation that made the appellant to accommodate the respondent to her plot of land in Mugunda to settle. At that time the appellant's husband was working with Kenya Railway at Nairobi. When the appellant's husband came home, she told him that she had taken his sister to their land in Mugunda an act that made him to buy cows and took them to the farmland for upkeep by his sister.

In the year 2002 they heard that the respondent had brought some people to settle on their. She went there with her husband and told them to move out of land, for in the first place the land had been given to the respondent to enable her make a living. She wanted to take back the land and farm but the chief told her first to wait as the respondent had claimed that the land was hers and therefore she filed a claim in the Tribunal to seek for a remedy. They had cased before the elders and the respondent was told by her husband to go to their rural home so she can inherit her father's land in Mukurwe-ini. In August 2004, the appellant went to the sub-chief and told him to call the respondent to state her claim. The respondent was called but did not turn up for the summon so the chief sent her to the office of District Officer, Mweiga.

The respondent's response at the Tribunal was that she had nothing to pay to the appellant for the disputed land belonged to her brother who was the husband of the appellant. After separation with her husband, the appellant's husband went to their home and asked her whether she was in need of a shamba and which she agreed. She gave him Ksh 1,500/= in the presence of their mother and her brother. The appellants husband gave her one share of four acres and his son Wambugu the other share of four acres. After staying in the land for 13 years, she started developing it and constructed a water tank. Her brother hired a mason to construct the tank. On 3rd September 2003 the appellant went with her husband, her son and a brother to the respondent and told her to move out of the land Mugunda/Karemeno/Block 1/134. The

appellant's husband was the spokesman in the meeting and her wish was to be given her share of that land Mugunda/Karemeno/Block 1/134.

After hearing the award the Tribunal found that the Land parcel Mugunda/Karemeno/Block 1/134 was under the name of Maina Mweha who was the husband of the plaintiff in this case and that the defendant Muthoni Mweha is a sister to Maina Mweha. In 1967 Maina Mweha bought two shares each equal to four acres at Kieni East Society. Each share was costing Kshs.1,500/= and was paid for by Maina's parents on behalf of her sister Muthoni Mweha the respondent. The two shares were registered under one name of Maina Mweha who was later to transfer one share of four acres to the appellant and that the respondent who resides in this disputed land for 27 years had developed the same by clearing and cultivating the land, construction of a living house and other farm structures, construction of a permanent water tank and undertaking connection of water from water project within the area.

The award was that Mr. Maina Mweha to sub-divide the parcel of land No.Mugunda/Karemeno/Block 1/134 into two unequal portions of 5 acres and 3 acres and to transfer the 3 acres to the defendant Muthoni Mweha and retain the 5 acres and the court was to sign all the relevant documents concerning the disputed land on behalf of the plaintiff and defendant.

The matter was referred to the appeals committee in Nyeri Provincial Land Appeal Committees claim No.Nyeri 17/2004 by Flasia Mumbi Maina against Muthoni Mweha.

The appeals committee heard parties and decided that the land has a title No.Mugunda Karemeno/block 1/143 in the name of Maina Mweha and the land was to belong to Maina Mweha's wife Flasia Mumbi Maina .Muthoni Mweha was to vacate the land and to settle on her land parcel No.Mugunda/Karemeno Block.1/228. The award was filed in the chief Magistrates Court for adoption in Nyeri CMCC Award No.9 of 2008. The award of the Tribunal was adopted as a judgment of the Chief Magistrate's court on the 30/7/2008 but with an error on the description of the land parcel as Karemeno/Block 1/143.The claimant applicant filed an application before the Chief Magistrate's Court for review, alteration, variation and or setting aside the orders made on 8/7/2009 with respect to the notice of motion dated 23/10/2008 and to remit the award of the Appeals Committee Central Province and/or the Provincial Lands Tribunal Case No.17 of 2004 (Nyeri) for rectification and or correction of the description of the disputed land. The Honourable court held that it lacked jurisdiction to review the said orders and dismissed the application.

The appellant obtained leave to appeal against this decision hence filed this appeal based on the grounds that the learned trial magistrate erred in law and in fact in finding that the court had no jurisdiction to review the orders made therein on 8.7.2009 whilst there was a clear and manifest error apparent on the face of record as to mis -description of the land being arbitrated upon by the Appeals Committee, Central Province (Central Provincial Land Dispute Appeals Tribunal) and that the learned trial Magistrate erred in law and infact in peremptorily stating that the court lacked jurisdiction to review the said orders to pave way for the appellant to evict the respondent from the land which was awarded to her by the said committee/tribunal, which arbitration award was adopted as a judgment of the court on 30.7.2008. Lastly, that the learned trial Magistrate erred in law and in fact in not addressing her mind to the appellant's right to property in the said land as enshrined in the Constitution of the Republic of Kenya and/or enjoy the fruits of her judgment by effectuating the decree.

This court finds that it is a fact that the Provincial Appeals' Committee made a typographical error when it referred to the land in dispute as Karemeno/Block 1/143 instead of Karemeno/Block 1/134. The Tribunal corrected the error on the 29/9/2010 more than one month after the decision of the Honourable Magistrate and therefore the correction did not assist the appellant.

The *gravamen* of the appellant submissions as articulated by Mr. Muthoni was that the court had the powers to correct the error that was made by the Appeals' Committee in its decision by referring to a different parcel of land. Parties were litigating in respect of parcel of land No.Karemeno/Block 1/134 but in its final decision the appeals committee referred to the parcel of land as Karemeno/block 1/143.

Miss Ndegwa for the respondent submitted that the appeal lacks merit as the Magistrates Court lacked jurisdiction to review the award of the Provincial Appeals Committee as the appellant should have moved to the High Court as the Magistrate could not correct the mistake but could only send it back to the elders. She also submitted that the appellant lacked the capacity to commence the matter at the tribunal as she lacked letters of administration. Moreover, the dispute was in respect of purchased parcel of land. This court has carefully analysed the appeal, to appellants submissions, respondents submissions, and find that the issue before it is whether there was an **apparent error on the face of record** and whether the magistrate had **jurisdiction to correct** the error which has created a lot of injustice to the parties.

Article 159 of the constitution provides that inter alia that *justice shall be administered without undue regard to procedural technicalities and that the purpose and principles of this Constitution shall be protected and promoted.*

The import of the Article is that this court is guided in the manner it exercises judicial authority by the constitution. In exercising this authority I am guided by the principle that justice should be administered without undue regard to procedural technicalities and that the purpose and principles of the constitution should be protected and promoted. This court finds that the magistrate fell into error in holding that she had no jurisdiction to correct the error made by the appeals committee and in finding that the error could only be corrected by the appeals committee as she had inherent jurisdiction to correct the error when the matter was brought before her for the review the decision of the court. Moreover, the award had been adopted by the court and became a court order and therefore placing it with the jurisdiction of the court. The argument that the court could not correct the error but could only return the decision to the Tribunal is based on a procedural technicality that can be disregarded.

Section 3A of the Civil Procedure Act provides that nothing in the Act can limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The court finds that the magistrate ought to have applied her inherent jurisdiction to review or correct the mistake.

This court further finds that the court should have looked at the overriding objective of the law which could have enabled it to correct the error that was in the award. The overriding objective of law is to do justice to the parties and not to do injustice and had it been properly applied by the Honorable magistrate, she could have corrected the error in the adopted award.

I am inclined to allow the appeal and I do so with costs to the appellant. The order made on the 9/8/2010 is set aside the application dated 5/7/2010 is allowed with costs in the lower court to be paid to the appellant.

Dated, signed and delivered on 24th day of February 2014.

A. OMBWAYO

JUDGE