



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL APPEAL NO. 54 OF 2006

JAMES WARIUWA GACHANJA & 3 OTHERS.....APPELLANT

VERSUS

LEAH KASYOKA MWILU RESPONDENT

(An Appeal from the Judgment of HON. KIMUTAI K.T. - RM sitting at WANGURU in ARBITRATION CASE NO. 16 OF 2005 delivered on 27TH OCTOBER 2005).

J U D G M E N T

This appeal arises from an arbitration suit that was filed at Wanguru Resident Magistrate's Court as No.16/05. The matter was referred to the Land Dispute Tribunal which filed an Award that was adopted as a Judgment of the Court on 27/10/2005 at Wang'uru Court. As can be seen from the proceedings the subject of the Arbitration was between;

Leah Kasyoka Mwilu.....Plaintiff

Versus

Mwende NjiriDefendant

The appeal before me is between;

James Wariuwa Gachanja & 3 others Appellants

Versus

Leah Kasyoka Mwilu Respondent

The award by the Tribunal was that **Mwende** was to give **Leah Kasyoka** one acre out of the two acres given to her by Njiine brother of Kaara.

The Appellants successfully applied for stay of execution of the Judgment and decree of the Wanguru Court. The Appellants raised several grounds of appeal which are as follows;

1. ***The learned Magistrate erred in law and in fact in adopting the award of Mwea Division dated 3/5/2005 as Judgment of Court.***
2. ***The learned Magistrate erred in law and in fact in failing to find that the Appellants were registered owners of the parcel No.Gichugu/Settlement/Scheme/1627.***

3. *The learned Magistrate erred in law and in fact in failing to find that it was contrary the principles of natural justice to adopt the award as Judgment of the Court where the decision adversely affected persons who were not made parties to the proceedings.*
4. *The learned Magistrate erred in law and in fact in in giving an order to the effect that the Executive Officer of Wanguru Court do execute the documents to cause sub-division and transfer of parcel No.Gichugu/Settlement/ Scheme/1627.*
5. *The learned Magistrate erred in law and in fact in failing to find that the remedy the Respondent had against the Defendant in Arbitration Case No.16/2005 was to sue for compensation.*
6. *The learned Magistrate erred in law and in fact in failing to find the matter was res-judicata having been determined in Nyeri CMCC NO.62 OF 2000*
7. *The learned Magistrate erred in law and in fact in failing to find that the Tribunal had no jurisdiction to determine issue of ownership more so where the land is registered under Registered Land Act Cap.300.*

Both Counsels agreed to dispose of the appeal by way of written submissions. They did file the said submissions. As a 1st appeal Court this Court has a duty to re-evaluate the evidence, consider it and arrive at its own conclusion. The Court of Appeal in the case of *KAMAU –V- MUNGAI & ANOTHER [2006]1 KLR 150* stated thus;

1. *This being a first appeal, it was the duty of the Court of Appeal to reevaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making the allowance for that.*
2. *A Court on Appeal will not normally interfere with a finding of facts by the trial Court whether a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”.*

I have considered the submissions by both Counsels and the grounds of appeal. I have equally studied the evidence on record. What is coming out clearly from the record of the proceedings at the Tribunal is that **“No specific parcel of land was referred to”**.

The evidence of the witnesses and the award do not specify any parcel of land for their intended action. **The award states:**

1. Leah Kasyoka & Mwende Njiri are both co-wives of Kaara Njaarui.
2. Both of them were married at Kitui District by Kaara before he died.
3. After the death of Kaara Njaarui both women came to live with Njine Njaarui
4. Njine Njaarui the brother to Kaara became very kind and gave both women 2 acres of land.
5. The title deed of 2 acres was issued in the name of Mwende because she is the one who paid money for the process.
6. Mwende had to sub-divide this land later and give Kasyoka her share of one acre.
7. Witnesses who are family members said that Mwende has to give Kasyoka one acre hence they were given one acre each by Njine Njaarui.
8. This tribunal find no reason why Mwende should not surrender one acre to Kasyoka.

The Court adopted this Award as a Judgment, without asking for full particulars of the land. This was an error by the Court.

The Appellants herein have presented the Court with a copy of the title deed showing they are the registered proprietors. They were registered on 8/2/2005, whereas the Judgment of the Court was made on 27/10/05 i.e. long after the Appellants had been registered as proprietors. It is a clear indication that even as the Tribunal made the award and the Court made the Judgment, none of them took time to confirm who the registered owner of the land they were dealing with was. It’s not even indicated at what point one Mwende was registered as the owner of the land. Had the Court and the Tribunal considered this serious issue the Appellants being the registered owners would have been asked to appear and be heard. The orders made are affecting people who were not parties in the arbitration. This is contrary to

the rules of natural justice. Secondly the jurisdiction of the Land Dispute Tribunal was well known not to include issues of determining title to land and/or transfer of interest in land registered under the repealed Registered Land Act. Therefore what the Tribunal in the Arbitration case did was to interfere with title of a registered land owner. (**REF: HANNAH WANGUI THEBU –V- THEU –V- JOELNGUGI MAGU HCA NO.86/99 NAIROBI**).

The said mandate of the Land Dispute Tribunal was stated in Section 3(1) of the Land Disputes Tribunal Act No.18 of 1990 (now repealed) which included;

- a. The division of, or determination of boundaries to land, including land held in common
- b. A claim to occupy or work on land or
- c. Tress to land.

Its therefore clear that the Tribunal exceeded its jurisdiction. As was held in the case of **DR. N.K. NG'OK –V- JUSTICE MOIJO OLE KEIWA & 5 OTHERS NAIROBI CIVIL APPEAL NO. 60/1997** the Court of Appeal held as follows;

“Section 23(1) of the Registration of Titles Act gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. Infact the Act is meant to give sanctity of title, otherwise the whole process of registration of property in Kenya would be placed in jeopardy”.

The decision of the tribunal was therefore an interference with the title of the Appellants herein yet they were not parties to the Arbitration suit before Wanguru Court.

Thirdly it's true the decree being appealed against does not form part of the record. The original record has a copy of the said decree issued on the 18th April 2006 which copy I have accessed. In the circumstances I find that to strike out the appeal when the said decree is available and can be seen by the Court is putting a lot of emphasis on a technicality.

Fourthly the Appellants were not parties in the Arbitration but these are registered proprietors of the land to be interfered with by virtue of the decree complained of. I agree with Justice Khaminwa Joyce in her Ruling of 6/3/2007 in this matter when she said;

“Any Tribunal and any ordinary Court must refrain from making orders before the production of the abstract of title. And therefore they breached the basic law of natural justice ‘Audi alteran partem’ hear the other side also”. A person who is about to be divested of his property particularly land is a parson interested in the proceedings and must be heard before the decision to take away his property is made”.

There is no way such a decision which infringes on the rights of other persons who are not parties to the suit can be left to stand. And as I said earlier it is the decree which mentions the parcel number of the land otherwise the decision of the tribunal does not make mention of anything.

After evaluating the evidence on record I do find that the Tribunal did not have jurisdiction to deal with the land matters it dealt with.

And finally the decision it made would result in interference with the title of persons who were not parties to the suit. And these persons were not given any opportunity to be heard. All the other orders were premised on a decision that was null and void. They too cannot be left to stand. I therefore find that the appeal succeeds on all grounds save for ground 6 as no evidence was laid on that.

The result is that the appeal is allowed and the Judgment of the learned trial Magistrate and all

consequential orders plus the Award of the Tribunal in Arbitration case No. D26D/VOLIV/325 GSS NO.1627 are set aside. In its place shall be an order dismissing the claim by the Respondent. Costs to the Appellants.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 20TH DAY OF FEBRUARY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Njoroge for Appellant

Mr. Kathungu for E. Njiru for Respondent

Njue – C/c