



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

HCA 227 OF 2013

JADIEL KIRONGO MITHIANO.....APPELLANT

VERSUS

JULIUS GATOBU M'ITHIANO.....RESPONDENT

J U D G E M E N T

(Being an appeal from award in LDT NO. 11 of 2008 pronounced in court on 3.3.08)

In the Memorandum herein filed at the Provincial Land disputes Appeals Committee, the Appellant has proffered the following grounds of appeal:

- 1. The District Land Disputes Tribunal elders erred in their decision in fact, in law and customary practices, by not having regard of the fact that L. R. No. Nyaki/Mulathankari/54 is the only ancestral land in this matter that falls for customary disposal and transmission under Kimeru customary law.***
- 2. The elders erred by not exhaustively considering my witnesses' submissions and by not comprehensively taking into account my documentary evidence supporting that I bought the parcel of the L.R. No. Nyaki/Thuura 1658 and that neither my late father M'Ithiano M'Kairanya nor any other family or clan member had anything to do with this transaction to claim an interest.***
- 3. The elders erred in taking a biased view by relying heavily on the unsupported and unconfirmed verbal evidence of the seller M'Amathi M'Itimitu in disregard of his likely subsequent change of mind for reason better known to himself, with the aim to distort the facts and thereby prejudicing my case.***
- 4. The elders erred in entertaining the evidence of the claimant 1st witness M'Kiungu M'Iniu whose averments do not prove beyond reasonable doubt that I and not my late father bought land parcel No. LR Nyaki/Thuura/1658.***

For these reasons he has prayed that the Provincial land Disputes Appeals Committee sets aside the LDT decision and consider referring the dispute for Arbitration to Mulanthankari and Thuura Clan elders so that they could determine ownership of Land Parcel Numbers Nyaki/Mulankari/54 and Nyaki/Mulanthankari/1658.

Ordinarily, appeals would come to this Court to challenge decisions of the Provincial Appeals

Committee. In this case, the Land Disputes Tribunals Act was repealed before it could be heard. This is why this suit has been brought to this Court in a rather unorthodox manner. Ideally, the appeal should have been to challenge the Provincial Committee's decision. The directions issued by the Hon. Chief Justice dated 25.7.2014 are not pellucid in this regard. However, Direction 13 thereof states:

“Appeals from the Magistrates Courts and Tribunals in the foregoing paragraphs 6 to 12 shall lie in the Environment and Land Court pursuant to Section 13 (4) of the Environment and Land Court Act.”

As the award by the LDT had been pronounced in open Court, by the magistrate's Court, I find that direction 13 of the Directions clothes me with jurisdiction to handle this appeal. However, unlike in the case of an appeal from the decision of the Provincial Appeals Committee, I am entitled to handle both issues of law and fact.

I have carefully read the record of proceedings by the Land Disputes Tribunal in LDT No. 11 of 2008. I find that the appellant fully participated in the proceedings.

The findings of the Land Disputes Tribunal were in the following terms:

FINDINGS

1. *The two suit lands in question:-*

(a) *Nyaki Mulanthankari/54 and*

(b) *Nyaki/Thuura/1658 was (sic) a family property, but registered under Jediel Kirongo M'Ithiano to share to (sic) his brother.*

2. *Any costs incurred to be met by the claimant, Julius Gatobu M'Ithiano*

AWARD

1. *We rule that the two parcels of land:-*

(a) *Nyaki Mulathankari No. 54 and*

(b) *Nyaki Thuura No. 1658, be shared between:-*

i. *Jediel Kirongo M'Ithiano – ID No.16102910*

ii. *Julius Gatobu M'Ithiano – ID No. 7768196*

Since it was the will of their late father.

2. *Any cost incurred to be met by the claimant, Julius Gatobu M'Ithiano.*

I find that I have the jurisdiction pronounced by Section 3 of the Land Disputes Tribunals Act as this matter relates to a claim to occupy or work land brought to court by Julius Gatobu M'Ithiano against his elder brother, Jediel, Kirongo M'Ithiano.

When I heard this matter, the Appellant readily agreed that the two parcels of land in dispute had belonged to their father. He, however, claimed that his father had requested both sons to pursue cases involving parcel No. Nyaki/Mulanthankari/54 but his brother did not take part in the suits. He also claimed that he used the sum of Kshs.4000/= to take his father to hospital. He told the Court that his father said that if his brother, Gatobu, the respondent, refunded him part of the costs which totaled to Kshs.58,000/=, then he would share the parcel of land with him.

Regarding parcel No. Nyaki/Thuura/1658, he merely claimed that he had bought the land himself. He, however, told the court that he had buried his father on this parcel of land. To me, the burial of his father on this parcel of land supports the respondent's assertion that it was family land.

The respondent stated that he was claiming his share of his father's land which had been registered in the name of the Appellant, his brother, to hold his share in trust for him. He claimed that after they buried his father on parcel No. Nyaki/Thuura/1658, his brother had agreed that both of them would share the family lands. However, his brother later reneged on this understanding.

I have considered the submissions of the parties very carefully. I find that the Appellant has not successfully supported any of the grounds contained in his Memorandum of Appeal in a manner that impeaches the decision of the Land Disputes Tribunal. In his ground 1 in support of the appeal, he has admitted that parcel No. Nyaki/Mulankari/54 is ancestral land. Regarding parcel No. Nyaki/Thuura/1658 where the father of both the appellant and the respondent is buried, I find that it is family land.

In the circumstances, I dismiss the appeal. As this is a dispute involving 2 brothers, I am inclined not to award any costs.

It is so ordered.

Delivered in Open Court At Meru this 17th day of November 2014 in the presence of:

Cc Daniel

Parties not in Court

P. M. NJOROGE

JUDGE