



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 72 OF 2004

MGANDI DUME MGANDI.....APPELLANT

VERSUS

CHARO KIRAO RANDU.....RESPONDENT

JUDGMENT

The present appeal is directed against the decision of the Coast Province Provincial Appeal Committee in case Number 34 of 2000. The dispute between the appellant and the respondent began before the district Land tribunal in land case No. 12 of 1998. That case was filed by the appellant against the respondent. The decision of the district land tribunal was in favour of the appellant. The appellant filed the matter before the District Land Tribunal seeking that the tribunal would request the respondent and his family to move out of the subject land. The District Tribunal in short stated in its award:

“the panel of elders therefore are in the same mind, that the Randu family vacate the premises and abandon the shamba immediately after this judgment”.

The respondent filed an appeal before the Provincial Appeals Committee in the case No. 34 of 2000. The Appeals committee in their award found as follows:

- “1. The appellant (the respondent in this present appeal) had established his case.***
- 2. The respondent (the appellant in this present appeal) had failed.***
- 3. The respondent to pay costs.***
- 4. The respondent must stop trespassing.”***

The appellant in this appeal being aggrieved by that award filed four grounds of appeal. In grounds 1 – 3 the appellant has faulted the award of the Provincial Appeals committee for shifting the burden of proof; for overturning the district land dispute tribunal’s decision without giving reasons and for the appeals committee being improperly constituted. The respondent in his written submissions has faulted those grounds on the basis that they do not raise points of law as required under the act; on the ground that they have no merit and on the ground that the appeals committee tribunal was properly constituted as per the law. On the whole, the respondent submitted that the appellants appeal does not raise point of law meriting the orders that he seeks.

The jurisdiction of the land dispute tribunals is set out in section 3 (1) of the Land Dispute Tribunal

Act. That section shows the limit within which the tribunal should operate. The section provides the tribunal's jurisdiction as follows:

- (a) ***the division of, or the determination of boundaries to land, including land held in common;***
- (b) ***a claim to occupy or work land; or***
- (c) ***trespass to land."***

In order to determine whether the appeals committee proceeded as provided under that section, it is important to look at the proceedings before that committee. The respondent in this appeal, stated what his claim was in those proceedings. It is important to consider part of his evidence in determining whether the appeals committee was faithful to the jurisdiction donated under the above section. He stated:

"My name is Charo Kirao Randu of Kwale Ruruma Location in Kilifi. I know the defendant (the appellant in this appeal). I sued the defendant due to his claim that the shamba belongs to the defendant whereas that shamba belongs to my grandfather Randu."

It is clear from that evidence that the respondent wanted the appeals committee to determine ownership of the suit land. It should be noted that even though what the appeals committee was dealing with was an appeal, they proceeded to receive fresh evidence and indeed quite extensive evidence in this matter. It is after receiving that evidence that they reached the decision reproduced above whereby they found that the respondent had established his case. In case one doubts that the appeals committee determined ownership of the suit property, such doubts will be quelled by the ruling made by the resident magistrate in Kaloleni magistrate's court when the appeals committee decision was confirmed. This is what the learned magistrate had to say:

"Judgment was entered in terms of the elders award under section 7 of the Land Dispute Tribunal Act on 9th December 1998 in favour of the plaintiff Mugandi Dume Mgandi. Subsequently, the defendant filed an appeal being appeal no. 24 before the appeals committee and judgment was entered in that court as per section 8 (8) of the Land Dispute Tribunal Act 1990, the decision of the Appeals Committee shall be final on issue of fact and if the respondent is aggrieved, he can proceed to the High court by invoking section 8(9) of the Land Dispute Tribunal Act 1990. As of now the land belongs to the appellant (Charo Kirao)." (underlining mine)

It will be seen that the appeals committee by their decision which was adopted and confirmed by the magistrate's court made a finding on the ownership of the subject land. In making that decision the tribunal exceeded their jurisdiction. Their jurisdiction as stated before was limited to determination of boundary disputes, claim to occupy land, and trespass to land. The appeals committee's decision undoubtedly was *ultra vires* to section 3(1) of the Act. The excess exercise of jurisdiction by the land dispute tribunal has been the subject of many court decisions. One of such decisions is the case **JIDRAPH NYORO KANG'ETHE VS SILAS KANG'ETHE NYORO** where the court had this to say:

"The jurisdiction of the Tribunal to deal with land registered under the Registered Land Act (cap. 300) is found in section 159 of that Act. That jurisdiction is limited by Section 3(1) of LDT Act No. 18 of 1990 which provides for cases which may be heard and determined by the Tribunal.

These are cases of a civil nature involving a dispute as to:-

- (a) ***the division of, or the determination of boundaries to land, including land held in common;***
- (b) ***A claim to occupy or work on land; or***

(c) *Trespass to land.*”

“These are the only matters which the Tribunal has power to deal with. Act No. 18 of 1990 does not confer upon the Tribunal to interfere with the interest of a registered proprietor whose title is protected by Sections 27 and 28 of Cap 300.

In Republic vs. Olololunga Land Disputes Tribunal ex parte Isaiah Kiplangat Cheluget (Nairobi H.C. Misc. Case No. 926 of 1999) Aganyanya J. faced with a similar situation stated:-

“Yet under the Land Disputes Act – No. 18 of 1990 the functions of the Tribunal are limited to the division of, or the determination of boundaries to land including land held in common; a claim to occupy or work on land or trespass to land. (See section 3 of the Act.....(w)hat the Tribunal in the case subject to this application engaged itself in, would end up with the rectification of the Register but in the circumstances prevailing herein, this would go against the spirit of section 143 (1) of the Registered Land Act – Chapter 300[W]hen the (Land Disputes) Act gives members of the Tribunal power to decide on the division or occupation of land it is not saying that the Tribunal should encroach on land registered in individual’s name and begin dividing it for the benefit and occupation of third parties(T)he Tribunal has no jurisdiction to change the position of a registered land.....”

“More recently, in Gibson Sengete Matoto vs. Eastern Province Land Disputes Committee & Others (Nairobi Misc. C.A. 331 of 2003), Ibrahim, J. held that the Makeni District Land Tribunal Appeals Committee had no jurisdiction to hear and determine questions of ownership and title to land registered under the RLA, and that the Committee, in doing so, acted ultra vires the statute and the entire proceedings became a nullity once it pronounced on the question of ownership of title.”

The respondent to this appeal has argued that the appellant failed to raise points of law to this appeal. The appellant in ground 5 of his appeal stated that the appeals committee contravened the act by hearing the appeal afresh. I would state that the appeals committee contravened the act not only by hearing the matter afresh without considering the proceedings of the district land dispute tribunal but also contravened the act by acting in excess of its jurisdiction. Once the tribunal did so it gave this court the power to invoke section 65 (2) of the now repealed Constitution of Kenya. That was the Constitution that was applicable when the appeals committee reached their decision. They reached their decision on 22nd May, 2002. The new constitution was promulgated on 27th August, 2010. Section 65 (2) of the repealed Constitution provides as follows:

“The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.”

This court will invoke the supervisory power donated by that section to declare the decision of the appeals committee as null and void for having been reached in excess of its jurisdiction. As much as the appellant in this appeal will succeed in his appeal, because of that contravention, there is no cross appeal by the respondent against the decision of the District Land Dispute Tribunal. In my reading of the decision of the district land dispute tribunal in case No. 12 of 1998 I find that the district land tribunal did not exceed its jurisdiction in it’s decision. The District Land Dispute Tribunal ordered **Charo Kirao** and his family to vacate the subject property. They did not make a finding that the land belonged to **Mgandi Dume Mgandi** the appellant herein. The judgment of the court is as follows:

- 1. The decision of the Coast Province Appeals Committee in case number 34 of 2000 is hereby set aside.*
- 2. The appellant is awarded costs of this appeal.*

DATED and DELIVERED at MOMBASA this 15th day of March, 2012.

MARY KASANGO

JUDGE