



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 448 OF 2008**

**OBADIAH THUMBI WAMBARI. .... 1<sup>ST</sup> APPELLANT**

**BENSON KAGUONGO WAMBARI. .... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**JAMES MUNGAI NGOTHO. (*On behalf of***

***Himself and Bridges & Access Roads.....*RESPONDENT**

***(From the Findings and Award of Nyeri Provincial Land Appeal committee dated 23<sup>rd</sup> July, 2008).***

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

This appeal arises from the decision and award of the Nyeri Provincial Land appeals committee dated 23<sup>rd</sup> July, 2008. It concerns Land References No. 1274, 1275, 1276 and 1277 which belong to Obadiah Thumbi Wambari, Joseph Nganga Wambari and Benson Kaguongo Wambari.

The dispute started with a claim being filed by one James Mungai Ngotho at Githunguri Land Disputes Tribunal against the registered owners of the above mentioned parcels of land. The claim number was given as LND/16/20/66/2002. He claimed, on behalf of a body called Bridges & Access Road Project, a road that passed through and across the abovementioned parcels of land, stating that the said road was a public road for use by members of public for social and economic reasons. He asserted that the road, which at the time did not physically and visually exist on the pieces of land, actually existed in the survey map of the area.

On the other-hand and in their defence, the Appellants stated that the road indeed existed in the survey maps of the area but that it is the owners of the said pieces of land who only recently, in 1991, introduced the road for their private use and for better and easy access to their pieces of land, all of which originally belonged to their deceased father.

The records of the Githunguri Land Disputes Tribunal indicates that the parties adduced evidence and were cross-examined by the opposing party or parties, probably on 18<sup>th</sup> March 2006. In its findings, the Tribunal found that the complainants were members of the public who have a registered project (Bridges and Access Roads Project). The objectors were the registered owners of Land Parcels No. L.R. Githunguri/Kanjai/1274, 1275, 1276 and 1277, whose land the claimed road crossed. That the present registered owners inherited the pieces of land with the road being shown to exist on the relevant survey map. The Tribunal then proceeded to award the road to the claimant for public use and ordered the District Surveyor to visit the lands and establish the road on the ground. This ward was signed by David N Mwangi as Chairman, Anne Ngure and Kagiri Kimwere as members of the Tribunal and was dated the

10<sup>th</sup> May, 2006.

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

1. ***That the composition of Githunguri Land Disputes Tribunal was incompetently constituted for having only two elders instead of a minimum three.***
2. ***That one of the two members deserted in the middle of hearing and was replaced by another - a lady, and yet the Award was shown as signed by three elders.***
3. ***That the tribunal was under legal obligation to order for fresh hearing when a new elder joined in place of the one who had left.***
4. ***That the Tribunal took into account extraneous matters not being part of evidence, by saying that members from objectors family did not object to the road being opened to the public, without calling them as witnesses.***
5. ***That visitation to the road was done in the absence of objectors without notice to them by Tribunal.***
6. ***That the Tribunal should have considered compensation to objectors if it took away their road land.***
7. ***That the Tribunal failed to serve one of the objectors – Benson Kaguongo who never knew and/or attended the hearing.***
8. ***That the Tribunal erred in allowing the Claimant James Mungai Ngotho to raise questions and appear as an objector/Defendant.***
9. ***That a member of the Tribunal Anne Mugure, joined for only one last day of reading the award but was not a member from the start and yet she signed the award.***
10. ***That a purported member of the Tribunal shown as Kagiri Kimwere, was never a member and never sat during the hearing.***

The record of the Nyeri Provincial Land Appeals Committee, does not show the day of hearing of the appeal but the Award shows that it was dated 23<sup>rd</sup> July 2008. The handwritten original records of the proceedings are found in the committees file which fortunately, forms part of this court's record. It is signed only by the Chairman while the two other embers have not signed the record and the Decision of the appeals Committee. The typed copy, however, appears to be purportedly properly signed by two members and the Chairman.

In their appeal to this court the Appellants raised the following complaints, also in summary: -

1. ***The committee erred in law and acted against rules of natural justice in hearing the Appeal in the absence of the 2<sup>nd</sup> Appellant without having served him with notice.***
2. ***The Githunguri Land Disputes Tribunal and the Nyeri Provincial Lands Appeals Committee lacked jurisdiction to hear the suit.***
3. ***The Appeals Committee erred in law in failing to give Appellants opportunity to ventilate their appeal.***
4. ***The Tribunals acted against the weight of evidence.***

5. *The Appeals Committee lacked jurisdiction to award costs of Ksh.15,690/-.*
6. *The Appeals Committee's Chairman had a personal interest and should not have chaired the committee.*
7. *The Respondent/Claimant had no legal capacity to file and prosecute the claim on behalf of the Bridges and Access Roads Project.*

I have carefully perused the material before me. In the first ground of appeal the Appeals Committee noted that Benson Kaguongo Wambari was absent. It said nothing as to whether or not the Tribunal had served him for the relevant attendance. The Appellants state that Benson Kaguongo Wambari had not been served and the Committees record does not disprove it. In these circumstances, this court will accept that there was no service. The Committee accordingly acted against the rule that a party has a right to be heard in his defence. More so, in a land issue. Its decision cannot, therefore, be allowed to bind Benson Kaguongo Wambari. It is void as against him.

The second ground of appeal is that the Tribunal and the Appeals Committee lacked jurisdiction to adjudicate matters of public interest. In my view, the jurisdiction of the Tribunal and Appellate Committee is clearly defined under Section 3(1) of the Lands Disputes Act, Act 18 of 1990. It is to adjudicate matters concerning.

- i. *Division of or determination of boundaries to land including land held in common.*
- ii. *Claims in relation to occupation of land or working on land.*
- iii. *Trespass to land.*

In my view, the claim to the right of use of public roads is not within the matters placed under the jurisdiction of the Tribunals as tabulated above. Disputes concerning public roads and roads of access appear to fall within a Board established under Section 3(2) of the Public Roads and Roads of Access Act, Cap 399 of the Laws of Kenya. Section 2 of the said Act defines a public road as “**any road which the public had a right to use before the prescribed time therein**”.

Section 9 thereof describes the officer who can establish such roads and the power and manner of doing it. It is my finding, accordingly, that neither the Githunguri Land Disputes Tribunal nor the Nyeri Provincial Lands Appeals Committee had jurisdiction to declare or establish the public right of usage or ownership of the road crossing the pieces of lands under discussion. Accordingly, I find that under both Acts the Tribunals lacked jurisdiction.

Following upon the conclusions above, I find that neither Tribunal had power to order Appellants to bear the costs.

As to whether or not the Appellant Obadiah Thumbi Wambari, was denied opportunity to ventilate his appeal, the record speaks for itself. After recording the parties present, the committee went straight to record “**Observations**” ... followed by the “**Award**”. There is no record that he said anything; otherwise it would have been recorded. In the circumstances, this court accepts that Appellant was, against the rules of natural justice, denied the right to be heard before his appeal was determined. This is a good ground for setting aside the second appeal proceedings.

This court observes in addition that the Land Appeals Committee failed to consider almost all the grounds of appeal of the Appellants which were before it. It is difficult to understand whether or not the Committee properly perused the evidence and grounds of appeal from the lower tribunal before deciding. It was incumbent upon it to do so. In the circumstances, the Committee's decision cannot be said to have been based on the evidence adduced before the lower tribunal.

Indeed, James Mungai Ngotho did not as well show and prove locus stand to bring the claim. He did not

prove either, what Bridges and Access Roads Project was and whether it had the power to sue or be sued. He did not show whether he was a mere member of public or a properly elected or selected official of the Project. He did not file authority given to him to sue on behalf of anybody including the **“Project”**.

The result is that this appeal has merit.

It is allowed as this court sets aside the proceedings in the Nyeri Provincial Lands Tribunal and Githunguri Land Disputes Tribunal and strikes out and dismisses the original claim by the Respondent herein. Costs are to the Appellant, Obadiah Thumbi Wambari. Orders accordingly.

Dated and delivered at Nairobi this 12<sup>th</sup> March 2012.

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**D A ONYANCHA**

**JUDGE**