



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**MISC. CIVIL APPLICATION NO. 70 OF 2000**

**CHARLES MWANGI CHOMBA.....APPELLANT**

**VERSUS**

**CHOMBA NG'ANG'A (Substituted by  
PRISCA NJOKI CHOMBA).....RESPONDENT**

**JUDGMENT**

This judgment is the outcome of the appeal of **Charles Mwangi Chomba** (Appellant), against the decision of the Provincial Land Disputes Appeals Committee vide Central Province Appeal case No. Maragua 82 of 1999. The brief history of this appeal may be summarized as follows: In the year 1986, Chomba Ng'ang'a, the respondent herein, caused his parcel of land known as **L.R. LOC. 6/MUTHITHI/373** to be transferred to his son, the appellant. The evidence on record shows that the Respondent in company of the Appellant, appeared before the Kigumo Divisional Land Control Board where the duo successfully obtained consent for the transaction. In the year 1999, the Respondent sought to reverse his decision by filing a complaint before the Maragua Land Disputes Tribunal vide Land Dispute Tribunal Case No. 68 of 1999. He applied to the Tribunal to order the Appellant to re-transfer to him 4 acres out of the 10 acres comprised in **L.R. LOC. 6/MUTHITHI/373**. He told the Tribunal that he wanted to give 1 and 3 acres to Ruth Kabura Chomba and Prisca Njoki Chomba respectively. As expected, the Appellant opposed the Respondent's claim. The complaint was heard and judgment was given in favour of the Respondent. The Appellant appealed to the Provincial Land Disputes Appeals Committee. The appeal was heard and dismissed on 17<sup>th</sup> February 2000. The Appellant was dissatisfied further, hence this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum of Appeal:

- 1. The committee erred in law in embarking to hear the appeal without firstly noting that the subject matter of the appeal and the whole dispute involved ownership to registered land parcel Loc. 6/MUTHITHI/373 and the committee has no jurisdiction to determine ownership of registered land.**
- 2. The committee erred in law in its procedure of hearing the appeal in that the procedure requires appellant to state his case by way of submission but not to call evidence and witnesses. The committee elected to require both the appellant and the respondent to call evidence and witness. This was then re-hearing o the case and NOT hearing of the appeal.**

3. ***The committee erred in law by proceeding on the basis that there was a cross-appeal by the respondent in that the committee in its findings awarded to the respondent 1.0 acres more than he had been awarded by the Maragua Tribunal, which acreage the respondent had not asked for.***
4. ***The committee erred in law in purporting to award the appellant his own land.***
5. ***The committee erred in law in making orders which had not been prayed for by any of the litigants especially the order of joint ownership of the land. In other words the award gives land to persons who had not laid claim to the land parcel Loc. 6/MUTHITHI/373.***

When the appeal came up for hearing, learned counsels from both sides recorded a consent order with the approval of this court to have the appeal determined by written submissions. I have considered the rival submissions. It is important to point out at this stage that on 23<sup>rd</sup> June 2001, Chomba Ng'ang'a, the Respondent herein, passed away. He was substituted by his wife Prisca Njoki Chomba who was joined to this Appeal on 27<sup>th</sup> December 2001. I have carefully perused the submissions of the Respondent. It is clear that the Respondent has raised two preliminary points of law which I think should be disposed of first before considering the merits or otherwise of the appeal. First, it is the submission of the Respondent that there is no competent appeal before this court. It is said that the Appellant did not pay court fees for the appeal hence it should be treated as though it was never filed. It was pointed out that on 14<sup>th</sup> April 2000 the Appellant only paid for the Motion dated 10<sup>th</sup> April 2000, Bundle Order and the Supporting Affidavit. Unfortunately, the Appellant's counsel did not respond to this preliminary issue in his submissions. I have carefully looked at the record and it is clear that the Memorandum of Appeal dated 10<sup>th</sup> April 2000, was presented to Court and date stamped 14<sup>th</sup> April 2000. It would appear from the record that the Memorandum of Appeal was contemporaneously filed with the Notice of Motion date 10<sup>th</sup> April 2000. The Court staff who issued the acknowledgment receipt No. 166961 appears to have assessed the court fees at Ksh.2025. The Aforesaid figure is arrived at as follows:

App	-	1500.
Bundle	-	300
Order	-	150
S/Aff	-	75

It would appear the court fees for the Memorandum of Appeal was not assessed hence, the same was not paid. In the Motion dated 10<sup>th</sup> April 2000 the Applicant (appellant) had sought for two main prayers:

- (i) An order certifying that the appeal raises points of law under S. 9 of the Land Disputes Tribunals Act No. 18 of 1990.
- (ii) The Memorandum of Appeal to be deemed as duly filed.

When the Motion came up for interpartes hearing before Justice (retired) J.V.O. Juma on 11<sup>th</sup> July 2001, the Honourable judge gave the certificate as prayed in prayer (i) above and went ahead to admit the appeal to hearing, presumably as prayed in prayer (ii) above. The record also indicates that the Respondent had sought for this appeal to be struck out vide the summons dated 25<sup>th</sup> May 2005. The application was heard and determined by Lady Justice Okwengu. In her ruling delivered on 25<sup>th</sup> April 2006, Lady Justice Okwengu stated in part as follows:

***“It is evident from the Memorandum of Appeal which was annexed to the Notice of Motion filed on 14<sup>th</sup> April 2000 that this matter arose from a decision of the Provincial Land Disputes Appeals Committee. The orders sought in the notice of motion show an effort to comply with the above quoted sections by seeking certification from the Judge that the intended appeal raises issue of law. The problem that has arisen is that the application was brought before any substantive appeal***

**was filed. Indeed the applicant appreciated this and therefore sought an additional order that “the Memorandum of appeal annexed herein be deemed as filed.”**

**The matter was dealt with by Hon. Juma J., on 11<sup>th</sup> July 2001 who not only certified the “appeal” as raising issues of law but also admitted the “appeal” to hearing. Although the Hon. Judge did not specifically deal with the prayer to have the memorandum of appeal deemed as filed by implication he did so by having the appeal admitted to hearing. The Respondent ought to have moved the court.....”**

It is obvious from what I have shown herein-above that the Preliminary Objection cannot be sustained. The issue has been argued and determined by this court. It cannot be re-argued again. What is apparent is that the Appellant will be required to pay for the Memorandum of Appeal. The failure to pay for the court fees for the Memorandum of Appeal is not fatal in the circumstances of this case. The appeal has already been deemed as duly filed and admitted to hearing by the Court and what remains is the Deputy Registrar to demand for payment of the fees from the Appellant. I overrule the first preliminary point of law.

The second preliminary point of law raised in the Respondent’s written submissions is to the effect that the appeal does not meet the threshold set under *Section 9* of the Land Disputes Tribunals Act No. 18 of 1990. It is said that the Tribunal determined claim based on a customary trust, hence this court erred when it certified that the appeal raised points of law. The record shows that the Appellant applied vide the Motion dated 10<sup>th</sup> April 2000 for the appeal to be certified to raise points of law. There is evidence to show that the deceased respondent (i.e. Chomba Ng’ang’a, deceased) filed the replying affidavit he swore on 19<sup>th</sup> September 2000 to oppose the Motion. In paragraphs 5 and 6 of the aforesaid affidavit he deponed as follows:

**“5. That I am advised by my counsel on record the appeal can only appeal to this honourable court on points of law and this appeal contains no such points of law.**

**6. That what I created when I gave the appellant the land herein was a customary trust.”**

The above averments were presented before the Honourable Mr. Justice (retired) J.V.O. Juma. The honourable judge considered the same and returned a verdict which is to the effect that the appeal raised points of law. There is no evidence to show that the Respondent has appealed nor applied for the orders to be set aside by an order of review. It is not therefore open for the Respondent to raise similar issues. The matter is *res-judicata*. Even if the Respondent had sought for the certificate to be set aside, I do not think she would have succeeded because, on the face of the Memorandum of Appeal, there is a ground questioning the jurisdiction of the Land Disputes Tribunal to hear and determine disputes relating to title to land. That ground alone raises a pure point of law. Again, the second preliminary point of law must be rejected, which I hereby order.

Having disposed of the preliminary points of law, let me now consider the merits of the appeal. The main ground argued by the Appellant is that the Land Disputes Tribunal lacked jurisdiction to hear and determine a dispute relating to title to land. In order to determine this issue, it is important to examine the decision of the Land Disputes Tribunal. I have already outlined the history behind this appeal. The evidence on record shows that the Respondent transferred the land in dispute to the Appellant when at the verge of death. The Appellant was the only son. When the Respondent got well, it would appear he requested the Appellant to retransfer the land to him. The Respondent told the Tribunal he changed his mind and decided to get back the land when the Appellant abused his sister and threatened to evict the entire family. The Maragua Land Disputes Tribunal gave judgment in favour of the Respondent which was in the following terms:

(i) The Appellant ordered to transfer to the Respondent a portion measuring 4 acres to be excised from No. Loc. 6/Muthithi/373.

(ii) The Executive Officer of the Murang'a Resident Magistrate's Court was authorized to execute the necessary documents to effect the transfer.

The Appellant was dissatisfied hence he preferred an appeal to the Central Province Land Disputes' Appeals Committee. The Appeals Committee decided to alter the Land Disputes' Tribunal's decision in the following manner:

- (i) Charles Chomba (Appellant) was to retain 5 acres.
- (ii) Chomba Nganga (deceased – Respondent) and wife to get 4 acres.
- (iii) Ruth Kabura – to get 1 acre.

In a nutshell, the decisions of both the Land Disputes Tribunal and the Appeals Committee would lead to title to the parcel of land known as **LOC. 6/MUTHITHI/373** to be closed upon subdivision. The Appellant's proprietary interest will have been interfered with. The Land Disputes Tribunal jurisdiction is limited to the following under *Section 3* of the Land Disputes Tribunals Act No. 18 of 1990:

- (i) Division or determination of boundaries.
- (ii) A claim to occupy or work on land or
- (iii) Trespass to land.

It is obvious that the Land Disputes Tribunal had no jurisdiction to hear and determine a dispute in respect of title to land. On this ground alone, the appeal must succeed. Consequently the decision of the Central Province Land Disputes Appeals Committee and that of the Maragua Land Disputes Tribunal are quashed and set aside.

Since the dispute involves members of the same family, I direct that each of them meets his or her own costs.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of February 2011.***

**J. K. SERGON**

**JUDGE**

In open Court in the presence of Mr. Ng'ang'a holding brief Karweru for Respondent. No appearance Kamiro for the Applicants.