



IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL NO. 192 OF 2007

PETER YEGO

MUSA BOIT

MICHAEL KIPRUTO

RICHARD TERNON

JACOB KONGA Suing as officials of

**AINOPTICH BOREHOLE WATER
PROJECT.....APPELLANTS**

VERSUS

PAULINA NEKESA

KODE.....RESPONDENT

JUDGMENT

This is an appeal from the decision of the Rift Valley Land Disputes Appeals Committee, dated 23/10/2007.

A background to this appeal is that Peter Yego, Musa Boit, Michael Kipruto, Richard Ternon and Jacob Konga, suing as officials of Ainoptich Borehole Water Project, were the claimants in Nakuru Land Disputes Tribunal **Case No.4 of 2001, Peter Yego & Others V Pauline Nekesa Kode** (the respondent). On 18/10/02, the Tribunal made an award inter alia, that the respondent, Pauline Nekesa was entitled to have a portion of the land holding the Borehole Water Project because she is the holder of 25 shares in the Company. The Tribunal further ordered the respondent to surrender the title to the Land Registrar for purposes of resurvey and subdivision. The appellant was aggrieved by the Tribunal's award and filed an appeal to the Appeals Committee. The Committee heard the case again and rendered its ruling on 23/10/07 and its decision was that Land Parcel No. 5056 be retained by the appellants while Parcel No. 5057 where the respondent's house stands be retained by the respondent. The appellants are aggrieved by the decision of the Appeals Committee and have preferred this appeal based on the following grounds:-

- 1. THAT the appeals Tribunal erred in law in upholding the decision of the Nakuru Land Disputes Tribunal in Case No. 4 of 2001 when the said decision was not supported by law.**
- 2. THAT the Appeals Tribunal erred in failing to find that there was no counter claim by the Respondent to enable the Land Disputes Tribunal, Nakuru Municipality make a decision in her favour.**

3. **THAT the appeals Tribunal erred in law in failing to find that the Land Disputes Tribunal had no jurisdiction to award a parcel of land to the Respondent.**
4. **THAT the appeals Tribunal erred in law in failing to find that the nature of Dispute before the Land Disputes Tribunal was a dispute relating to ownership and therefore it had no jurisdiction to entertain the same.**
5. **THAT the Appeals Tribunal erred in law in failing to evaluate the evidence tendered between the Land Disputes Tribunal and therefore arrived at wholly erroneous decision which is not supported by evidence.**
6. **THAT the appeals Tribunal erred in law in re-hearing the parties and their witnesses instead of relying on the evidence recorded by the Land Disputes Tribunal and the submissions of the parties and which procedure contravenes the provisions of the Land Disputes Act No.18 of 1990 and therefore renders its decision a nullity in law.**

The appellants pray that decision of the Rift Valley Land Disputes Appeals Tribunal dated 23/10/07 and Nakuru Municipality Land District Tribunal dated 18/10/2002 in case No. 4/2001 be set aside. The grounds of appeal can be summarized into three; that the Appeals Committee erred in re-hearing and evaluating evidence of the witnesses afresh; that it lacked jurisdiction to hear and determine disputes relating to ownership of land.

Mr. Kurgat, counsel for the appellant submitted that both the Land Disputes Tribunal and the Appeals Committee had no jurisdiction to make the awards they purported to make and they acted beyond their mandate which is donated by **Section 3 and Section 8(9)** of the **Land Disputes Tribunal Act**. Counsel made reliance on the decisions of:-

1. **BEATRICE M'MARETE V REPUBLIC & OTHERS CA 259/00;**
2. **KIMANI MURAMBA V WAMBUI GIKWA CA 82/2001; where the court held that the Appeals Committee had no jurisdiction to rehear the evidence of witnesses.**

Mr. Okeke, counsel for the respondent filed written submissions and vehemently opposed the application. He argued that the appeal is incompetent for reasons that some documents are missing from the record of appeal and that some of the points raised on appeal did not feature anywhere in the earlier proceedings before the Tribunal. On the question of jurisdiction Mr. Okeke urged that the Tribunal has jurisdiction to order division of land and it was properly upheld by the Appeals Committee. He distinguished this case from the case of **Kimani Muramba** (supra) where the order sought in the Tribunal was a declaration that the applicant was owner of the land whereas in this case, the order sought was one of division. He observed that the essence of the re-hearing witnesses of the case was not the ratio decidendi of the case.

As regards the issue of the Appeals committee re-hearing the witnesses, Mr. Okeke argued that the Appeals Tribunal is manned by lay people and **Section 8(9)** of the **Land Disputes Tribunal Act** should not be given a strict interpretation; that the section does not rule out parties being reheard. Counsel also distinguished the **Beatrice M'Merete** case where the Tribunal ordered the transfer of the whole parcel of land to another and the court said that parties can not confer jurisdiction by consent or by acquiescence. In **ADERO V. ULINZI SACCO (2202) 1KLR 577**, the party that challenged jurisdiction was sued in the High Court and that having gone to the Tribunal, they cannot turn around to challenge the Tribunal's jurisdiction.

I have considered all the rival arguments. The appellant is challenging both the decisions of the Tribunal and the Appeals Committee. A decision of the Committee can only be challenged on a pure point of law. **Section 8(9)** of the **Land Disputes Tribunal Act** provides as follows:-

“8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.”

The court will first deal with the objections raised by the respondent as to the incompetence of the appeal. In the proceedings before the Tribunal, the plaintiffs are indicated as Ainoptich Borehole Committee whose officials were named as Peter Yego, Musa Boit, Michael Kipruto, Richard Ternon and Jacob Konga while the Defendant was Pauline Nekesa Kode. They are the same parties in this appeal. Before the Appeals Committee, the appellant was Ainoptich Borehole Water Project. It is evident from the proceedings that the appeal arose out of the decision of the Nakuru Land Disputes Tribunal 4 of 2001 and it is over the same subject matter L.R. MITIMINGI/MBARUK BLOCK 3/4123. The appeal cannot be disregarded for joinder or non-joinder of parties. The court must look at the substance and do justice to the parties. As pointed out by Mr. Okeke, the members of the Tribunal and Committee are laymen and the court does not expect them to comply with strict rules of interpretation or compliance with the rules of procedure or evidence.

Is the claim before the Land Disputes Tribunal discernible? As observed above, the proceedings before the Tribunal and Appeals Committee does not follow strict rules of procedure. Section 3(2)-(6) provide the procedure for lodging a claim before the Tribunal and even though the statement of claim is not indicated in the record of appeal, the claim can be gleaned from the proceedings and ruling of the Tribunal dated 18/10/02.

The decision of the Tribunal reads as follows:-

“It is our decision that Pauline Nekesa Kode is entitled to have a portion of the land holding the borehole water project because she is a holder of 25 shares in the company.

...the water tank reservoir is 2.5 acres and is enough and subdividable into two equal portions so that Ainoptich Borehole Water Project retains the portion which holds cattle water trap, water tank and the borehole. The other portion from the houses downwards to the valley be allocated to Pauline Nekesa Kode.

Therefore the original title of the whole plot in the name of Pauline Nekesa Kode be surrendered to the Land Registrar’s office after the re-survey and re-subdivision of the plot ...”

From the above ruling, the Tribunal actually hived off and allocated land to the respondent, Pauline Nekesa. It was not a mere subdivision. It involved re-survey, subdivision of the land and allocation of the land. **Section 3(1) of the Land Disputes Tribunal Act 18 of 1990** provides for the Tribunal’s jurisdiction as follows:-

“(1) Subject to this Act, all 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 land; or**
- (c) trespass to land,**

shall be heard and determined by a Tribunal established under section 4.”

In my view, the dispute before the Tribunal did not just relate to division of land. It was not land held in common nor did it relate to boundaries. It related to ownership of the land in question and the Tribunal lacked jurisdiction to make the award it purported to. I find that the Tribunal acted in excess or without jurisdiction.

The fact that the Tribunal acted in excess of its jurisdiction becomes more clearer with the decision of the Appeals Committee when it held; **“We hereby rule that parcel No. 5056 from the Borehole and power house which is connected to the other segment of LR No. 5056 holding water trap and water tank be retained by AINOPTICH BOREHOLE WATER PROJECT while LR No. 5057 where the houses of the respondent stands be held and retained by Pauline Nekesa Kode.”**

The above award which confirmed the award of the Land Disputes Tribunal specifically determined the ownership of the 2 parcels of land. That was contrary to the Committee’s mandate under **Section 8(9)** as read with **Section 3(1)** of the **Land Disputes Tribunal Act**.

Section 8(7) provides as follows:-

“After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision; Provided that the committee may in its discretion permit the party appealing to reply to the other party’s submission if that submission contains any new matter not previously introduced at the hearing or on appeal.”

When the Appeals Committee called evidence and re-heard the witnesses, it usurped its mandate under the above provision. **Section 8(7)** contemplates the filing of submissions and hearing parties on them. I do agree with the observations of J. Kimaru in **KIMANI MURUMBA** case (supra) that the Appeals Committee lacked jurisdiction to rehear and re-evaluate the evidence.

From the foregoing, I am satisfied that both the Tribunal and Appeals Committee exceeded their jurisdiction under the **Land Disputes Tribunal Act**. The appeal succeeds and the decisions dated 8/10/2002 and 23/10/2007 are hereby set aside. In respect to costs, Mr. Okeke urged this court to penalise the appellants who went to the Tribunal and Appeals Committee instead of moving the ordinary courts for redress. In that regard, I do exercise my discretion and order the appellant to pay the costs of this appeal. It is so ordered.

DATED and DELIVERED this 30th day of September, 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Nasimiyu holding brief for Mr. Kurgat for the appellants.

Mr. Okeke for the respondents.

Kennedy - Court Clerk.