



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 143 of 2003

NZAKA JOHN NZAKA.....APPELLANT

-VERSUS-

ABDALLA CHOGO MZINGO.....RESPONDENT

(being an appeal from the decision of the Provincial Land Appeals Committee in Appeal No. 14 of 1997 entered as a decision of the Resident Magistrate's Court by District Magistrate Mr. K. Bidali on 3rd September, 2003 at Kaloleni Law Courts)

JUDGMENT

This is an appeal from the decision of the Provincial Appeals Committee which was subsequently adopted and entered by the Resident Magistrate's Court. The grounds of appeal are (in summary) as follows:

- (i) the Provincial Appeals Committee erred in law in allowing the respondent's appeal, which did not conform to the provisions governing such appeals as set out in the Land Disputes Tribunals Act, s.10(1) and the Rules thereunder;*
- (ii) the Provincial Appeals Committee erred in law, in failing to conduct its proceedings in accordance with the Lands Disputes Tribunals Act, in relation to service of pleadings on an appeal brought before that Committee;*
- (iii) the Provincial Appeals Committee erred in law in failing to give due consideration to service upon the appellant of copy of the respondent's claim – thus disabling the appellant in the making of a proper defence;*
- (iv) the Provincial Appeals Committee erred in law in holding that the respondent was entitled to proceeds from the sale of a portion of the land in dispute – and this amounts to special damages not specifically pleaded nor prayed for by the respondent.*

On the foregoing grounds, the appellant asked, firstly, that the appeal be allowed with costs; and secondly, that the decision of the Provincial Appeals Committee be set aside, and substituted with an order referring the case to the same Appeals Committee for retrial.

Mr. Gunga, learned counsel for the appellant, submitted that the proceedings before the Provincial Land Appeals Committee were ***“a nullity by virtue of having been conducted in contravention of the Land***

Disputes Tribunals Act”; that under s.8(1) of the said Act, an aggrieved party is at liberty to lodge an appeal to the Appeals Committee; that the relevant procedural rule requires that ***“any such appeal be made in the standard form”***; counsel contended that ***“this very vital procedural aspect was not complied with and thus rendered the appeal to the Provincial Committee defective.”***

The next point in counsel’s submission was service; he cited s.3(4) of the Land Disputes Tribunal Act, which provides:

“Every claim shall be served on the other party, or where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summons shall thereafter apply.”

Counsel submitted that the respondent had not effected proper service of his appeal papers; and so the appellant herein was denied the opportunity to prepare in his defence; ***“the present appellant was prejudiced and thus the proceedings were a nullity.”***

Counsel next submitted that the Provincial Appeals Committee had no jurisdiction to make orders on proceeds: for it had not been moved to grant prayers on proceeds of sale of land. Counsel urged that s.3(1) of the Land Disputes Tribunal Act “does not confer the Tribunal/Appeals Committee with power to make the orders they made in their Ruling...”

Counsel submitted that the Appeals Committee is ***“bound by law to make findings on issues of fact”***, but in the Ruling, the Committee ***“fails to point out the issues for determination”***; the Committee ***“did not make any considered findings on the factual issues.”***

Learned counsel, ***Mrs. Omondi*** for the respondent, contested the propriety of the instant appeal, on the basis of the terms of s.8(9) of the Land Disputes Tribunals Act, 1990 (Act No. 18 of 1990) [now repealed]; this provides as follows:

“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.”

Counsel submitted that the 60 days for lodgment of an appeal, as from ***20th December, 2002*** expired on ***20th June, 2003***, but the instant appeal was filed on ***11th September, 2003***; there had been no application for filing an appeal out of time – ***“and in any case, the said Section 8(9) of the Land Disputes Tribunals Act has no provision for such appeals filed out of time and does not provide for extensions and no such extension was applied for....”***

Counsel urged that the instant appeal was filed out of time, and should be struck out. Counsel further submitted that while the appellant was appealing against the Provincial Appeals Committee case No. 14 of 1997, the record of appeal does not contain a copy of the appeal lodged before that Committee; and the effect of failure to enclose a copy of the appeal lodged before the Provincial Appeals Tribunal, is that this Court “has been denied a chance to confirm whether the appeal lodged was proper and merited.” Counsel submitted that the respondent’s appeal lodged before the Provincial Appeals Tribunal was proper in every respect; the appeal ***“was properly filed using the standard Form 1 of the Third Schedule.”***

Counsel contested the appellant’s claim that the respondent’s earlier appeal had not been duly served; for ***“both parties attended the hearing of the said appeal; they [both] testified and called witnesses at the hearing of the Tribunal, and the record of appeal [pp.4-24] is clear on attendances.”***

On the appellant’s contention that the Provincial Appeals Committee erred by ordering the payment of special damages, learned counsel submitted that no order for payment of special damages was made; the relevant statement of the Appeals Committee thus reads:

“It is also ordered that the respondent is restrained from interfering and taking any action at the land in dispute [henceforth], [and from] selling [the] piece of land...to refund the money so far collected and to pay costs....”

Counsel submitted that the reference in the Appeals Committee’s Ruling to refund of money collected was not an award of special damages; and that ***“the Tribunal was within its mandate to make a finding on restitution”***, for s.3(7) and (8) of the Land Disputes Tribunals Act [and the said s.3 is concerned with ***limitation of jurisdiction***] thus provide:

“(7) The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party’s witnesses.

“(8) The Tribunal shall give reasons for its decision, which shall contain a summary of the issues and the determination thereof, and which shall be dated and signed by each member of the Tribunal.”

Counsel urged that it was within the powers of the Appeals Committee to make such an award, save that execution of the same would be by the Court; ***“the main award of the Tribunal was the finding on the parcel of land and was within the [Appeal Committee’s] jurisdiction.”***

From the record of appeal, it is clear to this Court that the Provincial Land Appeals Committee which entered a decision in favour of the respondent herein, was exercising normal powers by virtue of the Land Disputes Tribunals Act, 1990; it is equally clear that the Appeals Committee duly took evidence, and heard witnesses from both sides; it is thus not in doubt, that service of hearing notice had been duly effected, and that no party was occasioned injustice with regard to mode of service.

As already noted, the Land Disputes Tribunals Act laid an obligation upon the Tribunal members to give their decision on the basis of evidence, and required them to give reasons for the decision. From the record of appeal, this Court has no doubts that, indeed, those requirements were complied with: and this leads to the conclusion that the main part of the Ruling rendered by the Appeals Committee was entirely proper on the merits.

Once the ***substance of the case*** is thus resolved, it follows that the issues raised in the instant appeal, such as the appeal not conforming to procedural requirements, or the Provincial Appeals Committee straying into a question such as refunds of monies collected, become secondary, and bear the plain form of technicality.

Considering that this is an old matter going back to 1997, and in view of the fact that it is in respect of ***land interests*** that had in substance been settled by the Provincial Land Appeals Committee, this Court takes judicial notice that such a vital economic-cum-social dispute, as a matter of public interest, calls for finality in the resolution.

A basic obligation is reposed in this Court by Article 159(2)(d) of the **Constitution of Kenya, 2010**:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

.....

(d) justice shall be administered without undue regard to procedural technicalities...”

On that basis, I hold that the instant appeal has no merits; **I hereby dismiss the same, with costs to the respondent.**

Decree accordingly.

SIGNED at **NAIROBI**

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 4th day of November, 2011.

H.M. OKWENGU
JUDGE