



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 75 of 2009

MAURISIO NG'ANG'A KAIHU..... APPELLANT

VERSUS

JOYCE WAMBUI NG'ANG'A..... RESPONDENT

JUDGMENT

The appellant was the plaintiff in the suit he initiated against the respondent who was the defendant in the Senior Resident Magistrate's court at Muranga. The appellant's claim was for the respondent to be ordered to remove a caution she had placed on land parcel Loc. 8/Ndikwe/82 hereinafter referred to as the suit premises claiming: Licensee's interest.

The respondent denied the appellant's claim stating that the appellant had married in 1963 and settled her on the suit premises and since then she had resided therein. That though the appellant had several parcels of land he had transferred some of his 2nd wife and her children leaving the respondent and her children with any land registered in their names.

On 14th October, 2003 when the case was scheduled for hearing, parties agreed that the same be referred to arbitration. Accordingly an order was made in these terms:- "..... Case referred to District Land Tribunal for its arbitration" . Eventually the dispute was heard and determined by Kiharu Land Disputes Tribunal. The award was duly filed in court and read to the parties on 11th March, 2005 it was in these terms: "..... After listening to both parties and witnesses of the defendant, we have come to the conclusion that Maurisio Nzanja Kaihu was legally married to Joyce Wambui in the 1963 and upto this time Joyce stays in the estate of Maurisio..... It is our opinion that Joyce Wambui is entitled to get a share in land parcel No. 8/Ndikwe/82 where her house stands and where she has developed ever since she got married. When Joyce gets her share she should remove the caution so that Maurisio can carry on with his intentions....."

Aggrieved by the award, the appellant moved by way of appeal to the Provincial Land Disputes Appeal Committee, Central Province rendered its verdict in these terms:-

"After carefully listening to both pastors the elders decided as follows:- (a) it is our opinion that Joyce Wambui is entitled to get two acres in land parcel No. 8/Ndikwe/82 where her house stands and where she has developed over she got married....." Undeterred by this set back, the next stop was this court by way of 2nd and perhaps last appeal. Through Messrs Waiganjo Gichuki & CO Advocates the appellant complained through a memorandum of appeal dated 2nd July, 2009 that:-

- "1. The appeals committee erred in law in not finding that the Murang'a Land Disputes Tribunal sitting at Kiharu lacked jurisdiction to award two (2) acres out of the appellant's land parcel No. Loc. 8/Ndikwe/82 for the following reasons:-
 - (a) it had no powers under section 3(1) of the Land Disputes Tribunals Act to deal with title to land.
 - (b) the matter that had been referred to the Tribunal by the Senior Principal Magistrate's court at Muranga

was Civil Case No. 162 of 2003 in which the subject matter was removal of a caution lodged by the respondent against the appellant's title over land parcel No. Loc. 8/Ndikwe/82 and there was no counterclaim for land by the respondent: the Committee should therefore have found that the Tribunal was guilty of misconduct and ought to have accepted the appellant's appeal and quashed the Tribunal's decision.

- (c) the respondent cannot use the Land Dispute Tribunals Act to force the appellant to distribute his property during his life time.
2. The Provincial Committee erred in law in not accepting the appellant's complaint that the Tribunal erred in not dealing with the matter of the caution lodged by the respondent and instead dealt with title to land to the extent of ordering the appellant to transfer two acres of his land to the respondent.
 3. The Provincial Committee erred in law in taking new evidence from two unnamed witnesses without recording it and without giving the parties a chance to examine the witnesses: this is disclosed at page 2 of their judgment.
 4. The Provincial Committee erred in law in misinterpreting the evidence before the tribunal and thereby arrived at an unjust and illegal decision."

When the appeal came up for hearing before me on 23rd November, 2009 parties agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully considered together with authorities cited.

As already stated the appellant's initial claim was for the removal of the caution that the respondent has registered on the suit premises. Instead of the tribunal limiting itself to what the appellant had asked for, it went beyond its mandate when it ordered that the respondent be given 2 acres, out of the suit premises as a condition precedent to her removal of the caution. Indeed I even doubt whether the tribunals established under the land disputes tribunals act has jurisdiction over matters of registration and removal of cautions. It is also instructive that the order referring the dispute to the tribunal was made without any input from the appellant. Further it is not lost on me that the respondent had not counterclaimed for a portion of the suit premises in the suit filed that gave rise to the arbitration. Therefore the tribunal had no basis to render the award that it issued.

The tribunals have no powers to deal with title to land. The suit premises were registered in the name of the appellant. To order that a portion thereof should be transferred and registered in the name of the respondent, the tribunals were essentially with the life of the appellant with regard to the suit premises. In any case that was not the issue before them. This court has on numerous occasions ruled that the jurisdiction of the tribunals established pursuant to the provision of the land disputes tribunals act is only as set out in section 3(1) thereof. See for instance Muriu Njano NYR HCCA No. 30 of 2003 (UR) and Gichobi Kithae V Kibuko Githae & 3 others (2005) Eklr. In the first case, this court observed "..... The dispute before the tribunal did not relate to boundaries claim to occupy or work land, nor trespass." It was a claim to ownership. Taking into account the provision of section 3 of the act aforesaid and what was before the tribunal and I hence to the appeals committee, I am of the view that both the tribunal and appeals committee went beyond their jurisdiction when it purported to award a parcel of land registered under registered land act the respondent. In my view, the tribunal acted in excess of jurisdiction" The same situation obtains here! The appellant's claim was for the removal of the caution. Much as the tribunals have no jurisdiction to entertain matters pertaining to cautions that was what was referred to them. They should have limited their award to the removal or otherwise of the caution. They should not have exceeded as they did their mandate on the reference by ordering the subdivision of the suit premises.

In the case of Gichohi Kithae (supra), Okwengu I observed "..... A reasonable construction of the dispute would be that it related to title to the land and possibly whether same was held by the registered proprietor in trust in the award the land disputes tribunal concluded that the two parcels of land should be combined and then subdivided into 6 portionsthe clan did not relate to a determination of boundaries to land such as would have justified the intervention by the tribunal..... The appeals committee also erred in failing to find that the tribunal had no jurisdiction to entertain the disputes. First, because no claim had been presented to it, and secondly, because the dispute did not relate to matters prescribed in section 3(1) of the Land Disputes Tribunal Act i.e.

- (a) The subdivision of, or the determination of

boundaries to land,

(b) A claim to occupy or work land

(c) Trespass to land”

The court of appeal too has had occasion to deal with this issue in the case of M'Marete V Republic & 3 others (2004) eKLR. It held, “..... We have already set out at the commencement of this judgment the final decision of the tribunal. It was to the effect that the panel of elders awarded the parcels of land Nos. Nyaki/Mutathakari/1680 and 1681 to the claimant (Beatrice) who is the appellant before us. These pieces of land were registered under Registered Land Act..... Awarding land to the claimant meant she acquired an interest in it by virtue of that award. In order to put that ruling into effect, the appellant would have to effect it by rectifying or canceling the titles. The issue is whether the tribunal had jurisdiction to do so..... In our view, the dispute before the tribunal did not relate to boundaries, clan to occupy or work land, but a claim to ownership. Taking into account the provision of section 3 of the act and what was before the tribunal, we are of the view that the tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the tribunal acted in excess of its jurisdiction” The same situation obtains here.

On the basis of the foregoing, I am satisfied that the tribunal had no jurisdiction to reach the decision it reached and the Provincial Land Disputes Appeals Committee erred in not upholding the appellant's contention that the tribunal's decision was unlawful. The matter referred to the tribunal by the court had been removal of caution, and once it went outside that field, everything it did became unlawful. This is sufficient to dispose off this appeal. Accordingly I allow this appeal and set aside the decision of the Provincial Land Disputes Appeals Committee, Central province is appeal number 4 Muranga 4 of 2005 dated 27th May, 2009 and substitute thereof with an order setting aside the award of Kiharu Land Disputes Tribunal, the same having been made without jurisdiction. As parties involved are husband and wife, I shall make no orders as to costs. Those shall be the orders of this court in this appeal.

Dated at Nyeri this 22nd day of March 2010.

M.S.A. MAKHANDIA
JUDGE

Delivered on 22nd day of March, 2010,
By:

J.K. SERGON
JUDGE