SAMUEL MWANGI MBIIRI…..…….……...……....APPELLANT

VERSUS

ESTHER GACHAMBI MWANGI…….…….RESPONDENT

(From the Judgment of the Provincial Land Disputes Appeals Committee, Central Province in Land Dispute No.Murang'a 44 of 1998)

J U D G M E N T

This is an appeal from the decision of the Provincial Land Disputes Appeals Committee, Central Province in Land Disputes Appeal No.Murang'a 44 of 1998. That decision was in these terms;

"1. The tribunal noted that the Mathioya Tribunal was very truthful in giving the award.

2. We noted there was a discrepancy whereby the appellant attempted to alter the award by Mathioya's Tribunal.

3. Witnesses who produce evidence in support of appellant appeared to have been fed with the information to supply.

4. There is no brace on the plot of the appellant to indicate that his land extends to the other side of the road.

5. 1st witness Mr. Mwangi Maina who appears to be conversant with the reading of the maps pretended to be illiterate thus giving room for suspicion that he had been brought to fool the tribunal. He is said to have been a senior committee member during the lands demarcation.

6. It sounds strange when appellant tells the tribunal that the small portion of his land i.e. 0.2 of an acre was

demarcated first when in fact the bigger parts should have been. In the circumstances the appellant should vacate from the respondents land with immediate effect."

The genesis of this dispute is that the appellant is the registered proprietor of land parcel **No.Loc.14/Kagumoini/609** hereinafter '609' while the respondent's late husband, **James Mwangi Kinyua** was the registered proprietor of land parcel **No.Loc.14/Kagumoini/573** hereinafter '**573'**. The two parcels of land share a common boundary and there is a road of access in their vicinity. Demarcation of both parcels took place at the same time in 1966 and the two families went into occupation immediately. The appellant claims that his land parcel No.609 cuts access the road so that a portion of 0.2 acres lies on the other side of the road while 2.4 acres is on the other side of the road. It is on the said 0.2 acres that he built his homestead and where his children later also established their homesteads. It is also on this portion that he buried his mother and child. He cultivates on the 2.4 acres across the access road. However, the registry index map does not show a brace to join the two portions.

The respondent's husband, **James Mwangi Kinyua**, the registered proprietor of land parcel No.573 also went into occupation of his land with his family in about 1967. The parties continued peacefully in occupation over the years of their respective parcels of land until 1995 or thereabouts when **James Mwangi Kinyua** filed Murang'a RMCC No.374 of 1995 seeking an injunction to restrain the appellant from entering or trespassing into land parcel 573 among other prayers. That suit was apparently terminated for want of jurisdiction.

The respondent's husband died thereafter and she successfully applied for a grant of letters of administration intestate of his estate. Armed with that grant, the respondent moved to Mathioya Division Land Disputes Tribunal claiming that the appellant was trespasser and for his eviction therefore. The tribunal arbitrated on the dispute and filed its award in the principal magistrate's court in Murang'a court on 27th July, 1998.

The award was in the terms that;

> **"The defendant is a trespasser of land parcel NO.Loc.14/Kagumoini/573. Therefore, the court should grant the plaintiff with a permanent injunction restraining the defendant, his agents from entering or trespassing into land Loc.14/Kagumoini/573. Each party should bear its loss to this suit."**

The appellant was dissatisfied with the award and filed an appeal in the Provincial Land Disputes Appeals

Committee, Central Province as required under the Land Disputes Tribunals Act. The appellant's appeal to the committee was however dismissed on 26th May, 1999 in terms of the award set out at the beginning of this judgment. The appellant was dissatisfied again and he lodged this appeal on three grounds listed in the memorandum of appeal to wit;

1. **The committee erred in law in not upholding the appellant's objection to the jurisdiction of the District Land Disputes Tribunal to entertain the respondent's suit to evict the appellant from the suit land which the appellant had occupied as a matter of right from 1966 to the date of filing of the dispute in 1998. As the appellant had in his grounds of appeal specifically raised limitation under S.13 (3) of the Land Disputes Tribunal Act the appeals committee erred in law in upholding the lower tribunal's decision.**

2. **The committee also erred in law in not upholding the appellant's contention that the lower tribunal had no jurisdiction to arbitrate Murang'a RMCC No.374 of 1995 as the same had been withdrawn on 6.5.97 and had not been referred to the tribunal. The tribunal commenced its proceedings on 14.7.98.**

3. **The committee erred in law in taking additional evidence instead of dealing with the evidence offered in the lower tribunal; the committee allowed production of documents (e.g. maps) which were not before the lower tribunal and also ignored the provisions of section 21 of the Registered Land Act Cap.300 regarding the significance of maps."**

On 29th June, 2004, **Okwengu J** certified that the appeal as filed raised issues of law. When the appeal came up for hearing before me, **Mr. Gichuki** and **Mr. Gacheru** both learned counsels for the appellant and respondent respectively agreed to canvass the same by way of written submission.

In ground one, the appellant faults Mathioya Division Land Disputes Tribunal for lack of jurisdiction to entertain the dispute in view of the provisions of the Limitation of Actions Act and Section 13 (3) of the Land Disputes Tribunals Act. This is an issue the appellant had raised in the Mathioya Divisional Land Disputes Tribunal by stating that he had gone into occupation of the disputed portion on

10.1.1966. In his own words he stated;

> **"The portion measures 0.2 acres……..The said dispute started in 1995. From 10/1/1966 to date, I have been staying on the disputed portion. I therefore pray the court to dismiss the suit and the plaintiff to pay me the cost incurred."**

The respondent did not counter or challenge this evidence. If anything his evidence lends credence to the appellant's contention aforesaid. She testified that **"in 1995 the defendant was told to move to move out. He was sued before the court of law by my husband…."** When asked by the tribunal when she noticed that the appellant had occupied a portion of her land. She categorically stated that it was in 1995. It is important to note that when the appellant and his witnesses gave their evidence on the length of occupation, they were not challenged on this particular aspect. All the evidence points to occupation of the premises by the appellant since the time of land consolidation. It would appear therefore that the appellant's occupation of the disputed portion started in 10th January, 1966. The respondent's husband filed Murang'a RM.CC. No.374 of 1995 for among other things, a declaration that the appellant was a trespasser. This is the case that was terminated on 6th May, 1997 for want of jurisdiction. In his statement of defence in that suit, at paragraphs 3 and 4, the appellant herein, who was the defendant, had specifically raised the issue of limitation. As correctly observed by **Mr. Gichuki** in his submission the issue of limitation has been alive to both parties since 1995.

Section 13(3) of the Land Disputes Tribunals Act provides that:-

> **"For the avoidance of doubt it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to limitation of actions……."**

And Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya provides as follows:-

> **"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

Clearly therefore if the appellant has been occupation of his portion of land since 1966, the respondent could not have sued him to recover that portion either in 1995 in the Senior Principal Magistrates Court at Murang'a (*the suit that was subsequently terminated*.) or in the Mathioya Divisional and Disputes Tribunal in 1995 as well for the simple reason that limitation aforesaid had set it. A suit for trespass is nothing but an attempt to recover land. Such suit must of necessity be brought before the expiry of 12

years. In the circumstances of this case the two suits were brought in 1995. The appellant had been in occupation of the portion since 1966, a period in excess of 29 years. The Provincial Land Disputes Appeals Committee did not consider this ground of appeal at all. The failure to do so constituted an error of law also which renders the decision of the committee untenable and a nullity. Dealing with same issue in the case of **John Kamau Kiruga VS The Chairman Kigumo Divisional and Disputes Tribunal, Emukule J** stated;

> **"…There is a second and good reason why the decision of Kigumo Land Disputes Tribunal should be quashed – the application by the interested party was made to the tribunal some sixteen (16) years ago after the events complained of took place. The Land Disputes Tribunal is forbidden from entertaining any complaint even those it has power to under section 3(1) of the Land Disputes Tribunal Act allows, where the time for brining such proceedings is barred under the law relating to Limitation of actions….The tribunal had therefore no jurisdiction to entertain the application by the interested party…….Having brought his claim…well after the Limitation period both under contract, and recovery of land, the decision of the Kigumo Land Disputes Tribunal cannot of course sand…."**

Though this is a decision of a court with co-ordinate jurisdiction and therefore not binding on me, I am however of the view that it sets out the correct position in law; and I adopt the same for purposes of this appeal. I note also that though the issue was raised as ground one in the memorandum of appeal as well as in the appellants written submissions, the respondent did not as much as comment on it in her written submissions. Infact it appears that she deliberately chose to give the issue a wide berth perhaps in the knowledge that she had no response to it. This ground is sufficient to dispose off this appeal. The upshot of the above is that I allow the appeal and set aside the decision of the Provincial Land Disputes Appeals Committee, Central Province in appeal number 44 of 1998 delivered on 26th May, 1999 and substitute it thereof with an order setting aside the award of Mathioya Division Land Disputes Tribunal for want of competence and or jurisdiction. I make no order as to costs.

Dated at Nyeri this 22nd March, 2010.

M.S.A. MAKHANDIA
JUDGE

Delivered on 22nd day of March, 2010,

By:

J.K. SERGON
JUDGE