



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 66 of 2008

KANOTHI GITHINJI.....APPELLANT

VERSUS

WACHIRA GITHINJI.....1ST RESPONDENT

GITAHU GITHINJI.....2ND RESPONDENT

*(Being appeal from the Provincial Land Disputes Committee Central Province
Claim No. 10 of 2004 delivered on 16th July 2008)*

JUDGMENT

This judgment is the offshoot of an appeal against the decision of the Provincial Land Disputes Appeals committee, Central Province vide claim No. 10 of 2004 delivered on 16th July 2008. The background of this appeal is short and straightforward. **WACHIRA GITHINJI** and **GITAHU WACHIRA**, the 1st and 2nd Respondents herein, filed **CIVIL SUIT NO. 87 OF 1983** before the Nyeri Resident Magistrate's Court against **KANOTHI GITHINJI**, the Appellant herein, whereby they claimed that the Appellant was registered as the proprietor of the parcel of land known as **L.R. NO. KIRIMUKUYU/GACHUIRO/250** in trust for them. The case was heard and dismissed. The Respondents being aggrieved, filed **NYERI H.C.C.A. NO. 2 OF 1984** to challenge the decision on appeal. The aforesaid appeal was dismissed for want of prosecution on 16th July 2006 under *Order XLI rule 31 (2)* of the Civil Procedure rules. It would appear while the appeal was pending before this court, the respondents filed a complaint before the Mathira Land Disputes Tribunal vide **MLDT/28/99** in which they applied for the parcel of land known as **KIRIMUKUYU/GACHUIRO/356** to be subdivided into three equal portions so that the Respondents are given 2/3 whereas the Appellant would be given 1/3 of the land. The Mathira Land Disputes Tribunal found the complaint in favour of the Respondents. In essence, the Land Disputes Tribunal ordered for the suit land to be shared equally between the three protagonists. The Appellant herein was unhappy with the Tribunal's decision, hence he preferred an appeal to the Provincial Land Disputes Appeal's Committee, Central Province vide claim No. 10 of 2004. The Appellant's appeal was dismissed by the Provincial Land Disputes Appeals committee on 16th July 2008. The Appellant, again, was aggrieved hence this appeal.

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

1. ***THAT the committee erred in law in entertaining a matter outside their jurisdiction.***

2. ***THAT the tribunal erred in law in trying to solve a dispute which was strictly based on trust thus acting ultravires its powers.***
3. ***THAT the tribunal erred in law in dealing with a dispute that revolves around title to land, which is beyond the jurisdiction of the tribunal.***
4. ***THAT the tribunal erred in law in entertaining a matter that was res-judicata the same having been adjudicated by the High Court in Nyeri Civil Appeal No. 2 of 1984.***
5. ***THAT the tribunal erred in law and fact in refusing to admit the appellants evidence and documents in evidence to exhibit that the matter had earlier been heard by the High Court.***
6. ***THAT tribunal erred in law in basing its award on the principal of the respondents having acquired a portion of land parcel No. KIRIMUKUYU/GACHUIRO/256 by adverse possession which orders are a preserve of the High Court.***
7. ***THAT the grounds cited above make the proceedings before the tribunal a nullity.***

When the appeal came up for hearing, the parties were directed to file written submissions which they did. I have considered those written submissions. One preliminary issue has been raised by the Respondents against the Appeal. It is the Respondents' view that the appeal was unprocedurally admitted to hearing before the Court satisfying itself that there are in existence points of law in the appeal. Mr. Muthigani, learned advocate for the Appellant, did not address his mind to this contention. I have perused the record and it is clear that on 27th July 2009, this Court directed the Appellant to prepare and file a certificate indicating that the appeal raises points of law within seven (7) days. The record shows that the learned advocate filed that certificate on 30th July 2009. The honourable judge admitted the appeal to hearing on 9th September 2009. It is obvious that the Respondents' Preliminary Objection lacks merit in view of the above sequence of events. At the time of admitting the appeal to hearing, there was already on record a certificate showing that the appeal has raised points of law.

On appeal it is argued that the proceedings before the Mathira Land Disputes Tribunal were *resjudicata*. The respondents did not address this issue in their submissions. It is apparent from the record that the Respondents had filed a civil suit before Nyeri Resident Magistrate's Court vide **NYERI R.M.C.C.C. NO. 87 OF 1983**. That suit was heard and dismissed. The Respondents herein appealed to the High Court vide **NYERI H.C.C.A. NO. 2 OF 1984**. The aforesaid appeal was dismissed for want of prosecution on 6th July 2006. The Respondents did appeal against the dismissal order. They did even disclose that fact when they went to file their complaint before the Land Disputes Tribunal. I agree with the submissions of Appellant that the complaint before the Mathira Land Disputes Tribunal was *resjudicata* hence it was incompetent.

The second issue argued on appeal is that the Tribunal did not have jurisdiction to hear and determine a dispute relating to title. The decision of the Mathira Land disputes Tribunal was to the effect that **L.R. NO. KIRIMUKUYU/GACHUIRO/256** should be subdivided into three equal portions. In essence the title will be closed upon sub-division. That decision will obviously affect title to land. The tribunal

acted outside its mandate defined under *Section 3 (1)* of the Land Disputes Tribunal Act No. 18 of 1990.

In the end and on the basis of the above grounds, the appeal is allowed. The consequential order is that the Provincial Land Dispute's Appeals committee's decision is set aside and is substituted with an order setting aside the decision of the Mathira Land Disputes Tribunal's award. The Appellant is awarded costs of the appeal and those of the Tribunal.

Dated and delivered at Nyeri this 21st day of May 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kingori for the Respondent and Mr. Macharia holding brief Muthigani for Applicant.