



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Civil Appeal 2 of 2004**

NCURUBI MBERIA ..... APPELLANT

VERSUS

GEOFFREY MUGAMBI JOHN ..... RESPONDENT

*(An appeal from the whole judgment of LDT Case No. 174 of 2004 at Appeal's Committee Embu)*

**JUDGMENT**

At this very initial stage of this judgment, I find that it is in the interest of justice that I consider an issue raised by the respondent in his submissions. That submission is in respect of Section 8(9) of the Land Dispute Tribunal Act. That Section after setting the period within which an appeal can be filed from the Provincial Appeals Committee further provides:-

***“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.”***

That section requires a judge before admitting for hearing an appeal from the appeals committee that a judge should certify that issues of law are involved in the appeal. I have perused the proceedings of this file and I am unable to trace any record of the appeal being admitted for hearing by a judge. On 16<sup>th</sup> July 2009 it was recorded by the judge as follows:-

***“Counsel to fix a hearing date of the appeal for one day in Meru.....”***

The record as said before does not show that the appeal was admitted for hearing. The fact that their parties have now submitted in writing in respect of this appeal before the appeal is admitted for hearing is not prejudicial in my view. There will be no prejudice suffered by either party if at this point in time I make a finding that the appeal does raise point of law and I do admit the appeal for hearing. In that regard, I am supported by the case of Solomon M'Irura Mathiu Vs. Stanley M'Ikingu M'Ikiara Civil Appeal No. 52 of 2003 where Justice Ouko had this to say:-

***“First, it is noted that the appeal proceeded before a certificate under the proviso to section 8(9) of the Land Disputes Tribunals Act (the Act) was issued, to the effect that the appeal involves a point of law. That omission is not, in my view, fatal, as indeed the seven (7) grounds raised in this appeal deal mainly with the issue of jurisdiction. Learned counsel for the appellant has submitted that both the Tribunal and the Appeal Committee lacked jurisdiction to entertain the dispute. He relied on section 3 of the Act and the Registered Land Act. He also relied on three decisions of the High Court.”***

The grounds of appeal in this case do show clearly that this appeal is predicated on issues of law. I therefore hereby certify this appeal does raise issues of law. I also hereby formally admit this appeal for hearing. Parties by consent on 8<sup>th</sup> February 2010 agreed to hear this appeal by way of written submissions. The background of this matter is that the appellant sued the respondent in Meru Chief Magistrate Court in CMCC No. 436 of 1993. The appellant by that action sought a declaration that the respondent was a trespasser over the appellant's parcel of land number *Nyaki/Thuura/996*. The appellant also sought that the respondent would permanently be enjoined together with his family stopping him from interfering with the appellant's said land. Judgment was entered in favour of the appellant on 28<sup>th</sup>

April 1997. The respondent applied to set aside that ex parte judgment. By a ruling dated 1<sup>st</sup> February 1997, the court dismissed the application. That case is not the subject of this appeal but it is cited by the appellant because the appellant has argued that a subsequent land tribunal matter was filed subsequent to that action. The land tribunal matter is the one which is the subject of this appeal. The tribunal matter touched on the ownership of the appellant's property. The appellant therefore has argued in this appeal that the land tribunal matter was *res judicata*. After being unsuccessful in setting aside the judgment in CMCC No. 436 of 1993 the respondent filed a claim before the Meru Central Land District Tribunal. Before that Tribunal, he sought for a declaration that he was entitled to have part of the appellant's land (suit property) awarded to him. The district land tribunal in their award ordered the respondent to vacate the suit property. They noted in their ruling that there was a previous suit between the parties. They did not mention the case number they were referring to but it can be presumed that they were referring to CMCC No. 436 of 1993. The respondent appealed against that judgment to the Eastern Province Land Dispute Appeals Committee. In their ruling, the appellants committee decided that the respondent was entitled to one acre of the suit property and that the appellant was to retain 1 ½ acres. It is that decision which is the subject of this appeal. The grounds of appeal deal with two areas. One of the areas is that the land tribunal matter was *res judicata* since there was a determination in CMCC No. 436 of 1993 touching on the same subject matter. *Res judicata* is a term used to refer to a determination by a judicial tribunal which cannot be the subject of a fresh litigation. Such determination should only be challenged in an appeal. *Res judicata* refers to matters of law and fact. A case in point is **Ganatra Vs. Ganatra** Case No. 57 of 1992. The court held in that case as follows:-

***“For res judicata to be established, three conditions have to be fulfilled. Firstly, that there was a former suit or proceedings in which the same parties as in the subsequent suit or proceedings litigated. Secondly, that the matter in issue in the latter suit must have been directly and substantially in issue in the former suit. Thirdly, that a court competent to try the suit had heard and finally decided the matters in controversy between the parties in the former suit.”***

Indeed Section 7 of the Civil Procedure Act provides that where a suit has been finally decided by a court it shall not be the subject of a subsequent suit on the same subject matter between the parties litigating under the same title. This was clearly stated in the case **Pop – In (Kenya) Ltd & 3 others Vs. Habib Bank AG Zurich**. The holding of that case was in the following terms:-

***“The plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.”***

The judgment in CMCC No. 436 of 1993 was to the effect that the respondent was a trespasser and the court ordered for his eviction from the suit property. That judgment to date is on record because it has not been appealed against. The respondent in response to the appellant's argument that the tribunal matter was *res judicata* has sought to argue that the magistrate court has no jurisdiction to entertain the cause in view of the Land Dispute Tribunal Act which came into force on 1<sup>st</sup> July 1993 by legal notice number 91. It is clear from the provisions of that Act that the magistrate court has no jurisdiction to hear matters relating to land touching on issues of use of land boundary dispute and trespass. See Section 3 (1). My response to the argument raised by the respondent is that when CMCC 436 of 1996 was heard by the magistrate in 1997, the respondent did not raise the issue of jurisdiction. That judgment in CMCC No. 436 of 1996 has not been appealed against nor set aside. For that purpose it remains on record and it rendered the tribunal matter to be *res judicata*. The second issue raised by the appellant in the appeal was whether the appeals committee had jurisdiction to entertain a matter touching on the appellant's title to the suit property. I must say that the Land Dispute Tribunals even though their jurisdiction is well set out in section 3 (1) of

the Land Dispute Act, they have exasperated the High Court by trending in areas that goes beyond their jurisdiction. That exasperation is well captured in the case of Republic Vs. Msambweni land Disputes Tribunal and others ex parte Sogno [2007] 2 EA.

***“The Land Disputes Tribunals should know that being creatures of statute they can only do what the statute, that is the Land Disputes Tribunal Act number 180 of 1990 authorizes them to do. They have no powers to deal with matters of title to land. They have no powers to revoke any title and have one issued to somebody else as they purported to do in this case. They also have no powers to re-visit disputes that have been determined.***

***The Land Disputes Tribunals should also know that they have no powers or jurisdiction to entertain claims that are time barred. Section 13(3) of the Land Disputes Tribunal Act forbids them from entertaining “proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court.” In this case the ex parte applicant’s husband was issued with a title deed in 1979. Under the Limitation of Actions Act, claims for any interest in land must be made before the expiration of 12 years. The interested party’s claim made to the Msambweni Land Disputes Tribunal last year was therefore time barred and should not have been entertained.***

***The Land Disputes Tribunals usually do not give any or adequate notice to the people against whom the claims are made. They should know that that is an abuse of their authority and their decisions will always be overturned.”***  
(Underlining mine).

I need not say more than what is stated in that case. I only wish to state that the Appeals Committee was wrong and had no legal basis of ordering the respondent to be awarded one acre of the suit property which in effect would result in cancellation of the appellant’s title. The appeal does succeed and I make the following orders:-

- 1. The decision by Eastern Province Land Dispute Appeals Committee sitting at Embu Appeal Number 174 of 2002 is hereby set aside. That decision is substituted with an order dismissing that appeal.***
- 2. The appellant is awarded costs of this appeal.***

Dated and delivered at Meru this 21<sup>st</sup> day of May 2010.

**MARY KASANGO**  
**JUDGE**