REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 156 OF 2001

GATIAINI PRIMARY SCHOOL……...…….APPELLANT

VERSUS

A.I.P.C.A ……RESPONDENT

JUDGMENT

This appeal arises from a decree made on 19th June, 2000 by the Resident Magistrate at Thika following a decision by Kigumo Division Land Disputes Tribunal.

The decree which is in this record directed that the court uses any means it deems fit to separate the church and the Primary School who were the plaintiff and defendant respectively. The school was also ordered to buy 0.1 of an acre of land for the church and construct for them so that the dispute can be solved once and for all.

The church building was to be left for the school to be used as a Social Hall. The appellant was aggrieved by the said decree and filed the present appeal.

In the Memorandum of Appeal the appellant states as follows;

1. **The learned Resident Magistrate erred in law and in fact entertaining a matter which was legally defective,**

2. **The learned Resident Magistrate erred in law and in fact in ordering execution which may never see the light of the day as it is manifestly impracticable,**

3. **The learned Resident Magistrate failed to appreciate the law applicable to the matter she was dealing with thereby reaching an erroneous conclusion in law and there was no proper application for execution before the court,**

4. **The learned Resident Magistrate erred in law and in fact in not dismissing the suit**

and the entire application presented by persons without any legal capacity.

On those grounds the appellant prays that the appeal be allowed with costs to the appellant. Both learned counsel agreed to address the appeal by way of written submissions.

I have read the submissions and believe the same address conclusively the matters in dispute. It has become a common practice, even where the proceedings before the Land Disputes Tribunal were void *ab initio,* the courtshave endorsed and or adopted the same as judgments of the court and thereby setting the execution process in motion.

The said practice has caused untold injustice to parties who have been disadvantaged and or prejudiced by orders which under normal circumstance should never have seen the light of the day.

I say so because of what I have noted in these particular proceedings. I agree that under normal circumstances the decision of the Land Dispute Tribunal should have been taken through the appellant system provided under the Land Disputes Tribunal Act, and at the same time, observe that courts have repeatedly held that once the award has been adopted as a judgment of the court, then the appellant system to be used is the one prescribed for ordinary judgments.

Opinions vary in respect of the two positions presented by law. In the present case however, I observe with respect that, the proceedings before the Kigumo Land Disputes Tribunal were void *ab initio.* I say so because the composition of the tribunal was not complete because only three members addressed the dispute.

The parties also came, not through their respective trustees and or boards but in their general names, if one would say so. A school is run by a Board of Governors, while a church is run by Trustees. To use the names of the school and the church as in this case was not only irregular but null and void.

There is also the question of jurisdiction. The tribunal was addressing a dispute arising from registered land. That tribunal had no jurisdiction under Section 3(1) of the Land Disputes Tribunal which confers jurisdiction and prescribes the powers of the tribunal. That in itself renders the proceedings null and void.

The decision itself is also not capable of being executed. This is because the court is being asked to play the role of a Surveyor and Land Registrar which role is not within its province. The courts are not supposed to act in vain. And to ask the court to perform those duties would be stretching the same beyond its jurisdiction.

With respect therefore, this appeal must be allowed. The proceedings of the Land Dispute Tribunal and the decree issued by the learned Resident Magistrate are hereby set aside with costs to the appellant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 27th day of July, 2010.

A. MBOGHOLI MSAGHA

JUDGE