REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

MILIMANI LAW COURTS

Civil Appeal 65 of 2002

MUTAHI KAMAU ..... APPELLANT

VERSUS

RICCANDA WANJIRU MUTAHI ..... RESPONDENT

(Appeal from the Ruling of the Chief Magistrate's Court at Nyeri in Award No. 49 of 2002 dated 20th March 2003 by C. D. Nyamweya – SRM)

J U D G M E N T

The respondent initiated these proceedings against the appellant who is her father in Kieni East Land Disputes tribunal seeking that "**as a daughter I claim my piece of land after subdivision like the rest of the children."** The appellant's curt response was that "**I shall not be forced to sub-divide my land until when I shall make my own decision. I want her and her children to vacate my land and to go back to their father."** The tribunal having listened carefully to the dispute returned the following verdict;

"**The Tribunal rules that since the defendant Mutahi Kamau has been living with his daughter Riccada Wanjiru in his land for the last 35 years shows that, he accepted and received her with both hands when she ran away from her husband (sic). Therefore the defendant Mutahi Kamau should surrender to claimant Riccada Wanjiru Mutahi the one acre of land she has been living in for these years since she has nowhere else to settle with her children. The defendant Mutahi Kamau is ordered to pay the costs of this suit."**

The appellant was aggrieved by the award. Accordingly and as required by Land District Tribunals Act, he preferred an appeal to the Provincial Land Disputes Appeals Committee, Central Province. The Committee deliberated on the appeal and rendered the following verdict:

"**The Provincial Appeals Committee upholds the decision of Naromoru Land Disputes Tribunal in toto to the effect that Riccada Wanjiru should be given one (1) acre from land No. 108 preferably where she has built her house. However, no cost of the suit should be paid by the father to the daughter Riccada Wanjiru as ordered by the Tribunal in question."**

This decision again did not please the appellant. He therefore lodged the instant appeal to this court citing the following grounds.

"**1. That the Provincial Land Appeals Committee**

erred in law and in fact in failing to appreciate that the dispute between the Appellant related to title to land and consequently outside the jurisdiction and ambit of the Land Disputes Tribunal Act (No. 18 of 1990).

2. That the Provincial Land Disputes Committee erred in fact and in law in failing to appreciate that the dispute which related to title to land was outside the jurisdiction of the land Disputes Tribunal Act.

3.That the Provincial Land Appeals Committee erred in fact and in law in distributing the land of the appellant in his lifetime to his children.

4. That the findings by the Provincial Land Appeals Committee were against the law and the same was a nullity.

5.That the Provincial Land Appeals Committee erred in law and in fact in ordering the Executive Officer of Nyeri Principal Magistrate's Court to sign documents to facilitate transfer of one acre of Kimahuri/Island Farm/108 without any application."

Having filed the appeal the appellant sought and obtained a certificate from **Juma J** (as he then was) that the appeal raised the following as issues of law:

"**1. Whether the tribunal could order the appellant**

to distribute out (sic) his land in his lifetime.

2. Whether the Tribunal went contrary to the Registered Land Act Cap 300 of the Laws of Kenya.

3.Whether the entire proceedings were a nullity.

4. Whether or not the omission by the Respondent to file a statement of claim before the Land Disputes Tribunal rendered the proceedings before the tribunal null and void in view of the express provisions of Section 3(2) of Land Disputes Tribunal Act No. 18 of 1990.

5.Whether or not the failure to serve the Appellant with a statement of claim as required under Section 3(4) of the Land Disputes Tribunal Act 18 of 1990 rendered the proceedings and the resultant award a nullity.

6. Whether the tribunal acted outside its jurisdiction in entertaining a claim based on title to land having regard to the provisions of Section 3(1) of the Land Disputes Act limiting jurisdiction thereof."

Section 3(1) of the Land Disputes Tribunals Act confers jurisdiction on tribunals set up under the said act to matters that can be canvassed before them. That jurisdiction is not open ended. It is limited to:-

3. (1) .....

a. The division of, or the determination of

Boundaries to land, including land held in common;

(b) A claim to occupy or work land; or

b. Trespass to land,

As can be gathered from the foregoing the tribunal's jurisdiction is indeed limited. It cannot for instance deal with matters pertaining to title to land or subdivision of land in the lifetime of the owner. Yet that is what the respondent precisely sought in her claim before both tribunals.

It is trite law that jurisdiction is everything. In the event that a court or tribunal has no jurisdiction to entertain a matter before it and proceeds to do so the whole judgment and order resulting therefrom however precisely certain and technically correct is a mere nullity and not only voidable; is void and has no effect either as estoppel or otherwise and may not only be set aside at anytime by the court in which it is rendered but shall be declared void by every court in which itmay be presented. It matters not that the parties may have consented to the jurisdiction. In other words jurisdiction cannot be conferred on a court or tribunal by consent of parties and any waiver on the part cannot make up for the lack of or defect in jurisdiction. That being so the point of jurisdiction may therefore be properly be taken up at any stage of the proceedings including an appeal as correctly submitted by Mr. Gathiga Mwangi, learned counsel for the appellant. It matters not therefore that the issue was not raised during the initial trial. See **Said Bin Seif v/s Sheriff Mohamed Shatry 1940 19(1) KLR 9 at 10**. It also matters not as in the circumstances of this case that the appellant submitted himself to the jurisdiction of the tribunal. The respondent dragged him into the tribunal by lodging her claim against him therein. It could not have been wise for the appellant therefore not to respond and or even defend himself.

The initial tribunal ordered for the excisement of one acre of land from land parcel No. **Kimahuri/Island Farm/108** (the suit premises) and the same to be awarded to the Respondent. The committee further ordered the Executive Officer of Nyeri Principal Magistrate's Court to sign documents to facilitate the transfer of one acre out of the suit premises to the Respondent. The import of all the foregoing then was that the committee was actually adjudicating on the ownership and entitlement or lack of it of the respondent to the suit premises.

In the case of **Jane Wangari Kairu & Another v/s Jane Wachuka Kariuki**, **Nyeri HCCA No. 12 of 2003**, where a tribunal had ordered the Appellant to surrender an acre of the suit land this court observed:-

"**If the decision of the Tribunal is implemented it would amount to subdivision of the suit premises into two parcels of land and opening a register in respect of each subdivision and thereafter the transfer of the subdivision of one acre to the Respondent. In that case the tribunal would in effect have dealt with a claim relating to the title land."**

Quoting with approval **Justice Khamoni's** ruling in **Wamwea v/s Catholic Diocese of Murang'a Registered Trustees 2003 KLR 389** the court again observed:-

"**Disputes over title to land are not within the jurisdiction of the Tribunal of land Disputes Appeals Committee. It can also be said that Disputes over contracts are not under that jurisdiction"**

I also had occasion to rule on the same issue in the case of **Virginia Wanjiru Kiiru v/s Prisca Waruguru Kiiru, Nyeri HCCA No. 128 of 2002** (UR). I stated what I understood to be the law thus:-

"**The dispute between the Appellant and Respondent had nothing to do with trespass, boundaries or a claim to occupy and or work land. What the Appellant was asking the Respondent to do is give her inheritance whilst the Respondent was alive. The Tribunal has no such jurisdiction."**

The same situation obtains here! It cannot be counternanced. The 2 tribunals had no jurisdiction to deal with matters pertaining to title to land and its proceedings, awards and orders ensuing therefrom are therefore a nullity.

Now what is the fate of the Tribunals order to subdivide the appellant's land in her lifetime? As correctly submitted by **Mr. Mwangi**, it is a trite law that a person's estate is not available for distribution before his

or her death. In **Marigi v/s Marigi & Anor LLR 403 CAK** quoted with approval and applied in the case of **Virginia Wanjiru Kiiru (supra)** the Court of Appeal had this to say:-

"**It is however noteworthy that the law of succession does not recognise the rights of wives and children over their husbands or father's Estate as the case may be. Those rights accrue after death. Otherwise rights remain inchoate are not legally enforceable in any court of law or otherwise. Wherever they accrue the estate is shared either according to the personal laws of the deceased in case of Agricultural Land (as in case here) or as provided in relevant provisions of the law of Succession Act."**

The appellant as the registered owner of the suit premises is still alive. His property is not yet available for such distribution among his children except if he personally on his own free will decides to do so. He may not be urged, directed or ordered to do so against his will. Indeed he specifically stated so in his opening statement before Kieni East Land Disputes tribunal. Yet despite this emphatic statement by the appellant and which was correct in law, the tribunal still went ahead and ordered him to subdivide his suit premises and give an acre thereof in what amounts to inheritance to his daughter, the respondent. The respondent did not stake her claim to a portion of the suit premises because it was family land to which she was entitled to inherit. Neither did she claim customary law trust. This land was in any event not family land.

Under the Registered Land Act the rights of a registered proprietor of the land are absolute and indefeasible and only subject to rights and encumbrances noted in the register or overriding interests which are set out under Section 30 of the said Act.

In the case of **Charles Muchemi Kariuki v/s Moses Gathirimu Kimani, Nyeri HCCC No. 64 of 1999** (UR) it was observed that:-

"**To carry out the orders of the Tribunal Committee would result to the rectification of the register which goes against the spirit of Section 143 of Registered Land Act when conditions laid down in that section for such an order to be made were not shown to exist."**

The respondent has raised the issue that according to the appellant's memorandum of appeal, he has appealed against the decision of the Provincial land Disputes Appeals Committee dated 28th February 2007. From the record however there is no award that was made on that date. I think this splitting hairs unnecessarily. Parties are aware of the award that is the subject of this appeal. It is included in the record of appeal. To my mind it was a mere typographical error which did not occasion the respondent any prejudice.

The upshot of all that I have been saying is that the appeal has merits. Accordingly it is allowed. The awards of Kieni East Land Disputes Tribunal and Provincial Land Disputes Appeals Committee , Central Province made on 26th June 2001 and 7th March 2002 respectively are hereby set aside. As the dispute involves a daughter and father, I will make no order as to costs.

Dated and delivered at Nyeri this 30th day of June 2009

M. S. A. MAKHANDIA

JUDGE