REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 78 OF 2002

FRANCIS MURIITHI GITATA……..……..APPELLANT

VERSUS

MARGARET WANJIKU KUNG'U……..…….RESPONDENT

(Being an appeal against the decision of the Provincial Land Disputes Appeals Committee,

Central Province, No.136 of 1999 dated 21st March, 2002)

J U D G M E N T

This is an appeal from the decision of the Provincial Land Disputes Appeals Committee, Central Province dated 21st March, 2002. By that award, the Provincial Land Disputes Appeals Committee decided that;

"…..**The appellant if not satisfied with what he was told by the Magistrate, then he should challenge the court Nyeri (sic) but at the same time this panel upholds the ruling by Nyeri Tribunal of 28th May, 1999 signed on 7th March, 2000 that the land Thegenge/Kihora/41 be subdivided into portions of 1 acre for Margaret Wanjiku Kung'u and the remaining portion to go to Francis Mureithi Gitata. The aggrieved may appeal in a court of law within 30 days. The Executive Officer of the court and the surveyor are requested to facilitate the transactions…."**

In essence, the Provincial Land Disputes Appeals Committee, Central Province was upholding the decision of the Tetu Land Disputes Tribunal which was to the effect that;

"…..**The disputed land Thegenge/Kihora/**

41 be sub-divided into portions of 1 acre for the plaintiff and the remaining portion to be taken over by the defendant Francis Muriithi….."

The brief background of his appeal is that **Margaret Wanjiku Kung'u,** hereinafter referred to as "*the respondent"* sued **Francis Muriithi Gitata**, hereinafter referred to as "*the appellant"* in the Tetu Land Disputes Tribunal seeking that she be given 3.4 acres out of **Thegenge/Kihora/41** hereinafter referred to as "*the suit premises"* on which the appellant had settled and which portion of land had been given to her by her father, the late **Samuel Wanjau.** The appellant and respondent though are cousins. The appellant's and respondent's fathers were brothers. The suit premises initially belonged to their grandfather, **Mureithi Waguanya**. The portion she was claiming rightfully belonged to her father and which was held by the appellant.

However the appellant's case was that the respondent's father came from Nakuru with 3 children. They were given a place to settle by the appellant's father. After six months the respondent's father went back to Nakuru and left his children including the respondent behind being cared for by their grandmother. The respondent's father later came back and put up a house which was occupied by their grandmother, but later requested the appellant's father to give him a place to construct his own house and he was given ¼ of an acre. The appellant's grandmother requested again the appellant's father to add the respondent's father another portion of land in order for him to be able to bring up his children. He was duly given. Eventually the respondent's father ended up with 1 ½ acres. In 1985, the respondent's father fell sick. He summoned 11 clan elders and told them that he was giving his final wishes. He told them that he would wish the appellant to take the portion of the suit premises that he was cultivating. However the appellant was to give the respondent a portion thereof to cultivate in order that she may raise her children. After bringing up her children, the appellant would if he so wishes repossess the said portion of the land.

The tribunal having carefully listened to the dispute returned a verdict in favour of the respondent as already indicated elsewhere in this judgment. Pursuant to the Provisions of Land Disputes Tribunals Act, the appellant proceeded to the Provincial Land Disputes Appeals Committee, Central Province on appeal where again he lost.

Undeterred, the appellant has now moved to this court by way of a second appeal. In a memorandum of appeal dated 17th May, 2002 and filed in this court on 20th may, 2002, through **Messrs Mathenge & Muchemi advocates**, the appellant faults the award of the Provincial Land Disputes Appeals Committee, Central Province on only one ground, to wit;

"…..**That neither the District Land Disputes Tribunal nor the Provincial Land Disputes Tribunal had the jurisdiction to entertain this matter touching as it is on issue of title……"**

On 9th July, 2002 **Juma J**. as he then was certified that the appeal raised issues of law as required by the relevant provisions of the Land Disputes Tribunals Act. On 19th march, 2009, when the appeal came up for hearing before me, parties agreed to argue the same by way of written submissions. Those written submissions were subsequently filed and exchanged. I have since had occasion to read and consider them alongside cited authorities.

It does appear to me that in reaching their decision, both the Tetu Land Disputes Tribunal as well as the Provincial Land Disputes Appeals Committee, Central Province may unknowingly and or unwittingly have dealt with dispute touching as it is on the issue of title. Both tribunals of course lack jurisdiction to entertain such a claim. *Section 3* of the Land Disputes Tribunals Act does not bestow those tribunals with any power to deal with issues of ownership or title to land. The appellant is registered as the sole proprietor of the suit premises. The tribunals in reaching their verdicts complained of thus may have not have had the jurisdiction to order for the cancellation and transfer of 1 acre out of the suit premises to the respondent. That jurisdiction is vested in the High court of Kenya pursuant to *section 159* of the Registered Land Act.

However a close scrutiny of the respondent's claim tends to reveal that the respondent's claim was strictly not a challenge to the appellant's title. Rather she instituted her claim claiming the right to occupy and work on a portion of the suit premises which she had always worked on and occupied and on which his father and brother are buried. Her claim ordinarily therefore falls within the ambit of *section 3(1) (b)* of the Land Disputes Tribunals Act. Accordingly to that limited extent, both tribunals had jurisdiction to entertain the dispute.

Even if I am wrong on this aspect of the matter, I would still have found it difficult to upset the decisions of the two tribunals for the simple reason that both awards had since been adopted as judgments of the court. Consequent upon which decrees were duly issued and have since been executed. This fact has not been disputed by the appellant. Those decrees were never set aside on appeal and or reviewed. As correctly submitted by **Mr. Wambugu,** learned advocate for the respondent, there has never been any lawful challenge of those decrees which therefore still stand. For this court to allow this appeal and set

aside the award as prayed, it would result in a most embarrassing and awkward situation in which there would be in existence two valid but inconsistent decrees, one by this court and the others by the subordinate court, a situation which ought to be avoided at all costs. Indeed I quite agree that such an eventuality is untenable.

It is for this reason that I find this appeal unmerited. Accordingly I dismiss the same with costs to the respondent.

Dated and delivered at Nyeri this 18th day of June, 2009.

M.S.A. MAKHANDIA

JUDGE