



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 92 of 2007

BONIFACE NJUGUNA GAKURU APPELLANT

VERSUS

PAUL NJOROGE GAKURU RESPONDENT

(Appeal from the award of the Provincial Land Dispute Appeal Committee

Central Province at Nyeri dated 27th day of July 2007 being Appeal No. Maragua 8 of 2007)

J U D G M E N T

The appellant and Respondent herein are brothers. The appellant is the registered proprietor of land parcel Makuyu/Makuyu/Block 1/1315 hereinafter referred to as “*the suit premises.*” Originally the suit premises had been owned by their mother the late Wangari Gakuru. However in her lifetime she voluntarily transferred to the appellant the suit premises. She also had another parcel of land known as Kamahuha/25 which she also voluntarily transferred to the respondent. Both the appellant and respondent were at the material time residing however on the suit premises. Upon the suit premises being transferred and registered in the name of the appellant as aforesaid, the appellant requested the respondent to relocate to his land parcel Kamahuha/25. The respondent resisted the appellant’s request and in a huff referred the dispute to the land dispute tribunal Maragua in accordance with the relevant provisions of the Land Disputes Tribunals Act. The basis of the respondent’s claim in the said tribunal was that the appellant had unlawfully transferred the suit premises to himself though the suit premises had been given to them both by their deceased mother before she passed on in 1995.

The appellant’s response was that before their mother passed on she called the two and gave each one of them respective parcels of land. Whereas the appellant was given the suit premises, the respondent had been given Kamahuha/25. The respondent had only come to the tribunal after had been asked by the appellant to relocate to his parcel of land aforesaid and having realised that the suit premises were registered in the appellant’s name and title deed issued.

The tribunal having carefully listened to the dispute reached this verdict;

“..... The Plaintiff had an (sic) enough time to question that deed but he did not since the deceased had requested Njuguna to transfer land parcel number Kamahuha/25

to his brother Paul and this was done. The elders cannot alter the will of the deceased Wangari. This tribunal have found that the defendants’ mother transferred the land in question throw (sic) her wish/will but was not forced to do so. This transaction was carried out during the lifetime of the deceased.

However, Paul's ignorance of not responding to the Chief's office after being called for three times made his mother change her name Wangari Gakuru to Boniface Njuguna Gakuru.....”

The respondent was aggrieved by the award. He therefore moved to the Provincial land disputes appeals committee, Central Province, by way of appeal. The appeals committee having listened to the appeal made an award in these terms:

“..... Having carefully listened to all the parties and having perused all the documents available, this Central Provincial Appeals Panel sets the District Tribunal aside and rules that since the land was government gift to the deceased Lucy Wangari Mwangi both her sons Boniface Njuguna Gakuru and Paul Njoroge Gakuru have a right to share the suit land Makuyu/Makuyu/(Punda Milia) size 0.771 equally as follows:-

1. Boniface Njuguna Gakuru – Approx. (0.385)
2. Paul Njoroge Gakuru – Approx. (0.385)

The court registrar to sign the relevant land consent documents....”

This time around, the appellant was dissatisfied with the award. Through Messrs J.K. Ngaruiya & Co. Advocates he lodged in this court the instant appeal on 25th September 2007. The appellant in his memorandum of appeal states that:-

- “1. That Honourable Provincial Land Dispute Appeal committee erred in law by dealing with matters relating to title which is a matter outside its jurisdiction.
2. The Honourable Provincial Land Dispute Appeal Committee erred by exceeding its jurisdiction by purporting to deal with matters that were not heard by the District Tribunal.
3. The Honourable Provincial Land Disputes Appeal Committee exceeded its jurisdiction in ordering the Court Registrar to sign the relevant land consent documents.

When the appeal came up for directions the appellant was represented by Ms Wanjeri whereas Mr. Ndirangu appeared for the respondent. It was agreed then that the appeal be argued by way of written submissions. Parties subsequently filed their written submissions which I have carefully read and considered.

This appeal is bound to fail however on technicalities. I have carefully perused and considered the record herein. It does appear to me that no certificate by the judge that the

appeal raised points of law was ever sought and obtained as required by the proviso to section 8(a) of the Land Disputes Tribunals Act. That proviso is in these terms:-

8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

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.

As it can be gathered from the proviso the requirement for the certificate is mandatory and there is no escaping from it. There is nothing on record to suggest that the appellant crafted the points of law raised by the appeal and sought the certification thereof of the judge. Yes, the appeal may have been admitted to hearing by the judge on 11th March 2008. However that action does not preclude the issue being raised and or revisited. Indeed, the respondent has in his written submissions raised it in these terms:-

“..... The other aspect of this appeal is that on record of appeal there is no certificate by the judge that the

appeal herein involves points of law. In the absence of such certificate it is my humble submission that the appeal herein offends the mandatory of (sic) the provisions of section 8(9), the proviso thereof which requires certification that an issue of law other than customary law is involved

Despite the issue having been raised as aforesaid, the appellant did not see the need to respond to the same. The absence of his response can only lead me to the conclusion that the point was well taken and that he had no response to the same. Accordingly failure to obtain the certificate aforesaid rendered the appeal incompetent. On this ground alone this appeal should fail.

The other aspect of this appeal that has caused me anxiety is that after the provincial land disputes appeals committee Central Province, rendered its verdict, an application was made in the Principal magistrate's court at Murang'a on 18th November, 2007 for the award to be adopted as a judgment of the court. It would appear that the said application came up for hearing on 18th April 2008 and it was allowed. Consequently a decree was issued in these terms:

- “1. That the Nyeri land Disputes Appeal Committee award is hereby adopted as this court's judgment.
2. That Boniface Njuguna Gakuru should get approx. 0.385 and Paul Njoroge Gakuru to get approx. 0.385.”

The record before me does not suggest that the said decree has been set aside or is it a subject of an appeal. Nor does the memorandum of appeal and respective written submission address the issue. As it is therefore there is a valid court decree on the matter and which have superseded this appeal. Even if I was to allow the appeal and set aside the award by the Provincial land Disputes Appeals Committee Central Province, it will not affect or alter the said decree. Indeed we run a grave risk of having contradictory decrees issued by two different courts of competent jurisdiction on the same issue. There will be a decree arising from this appeal setting aside the award of the Provincial land disputes appeals committee, Central

Province and a decree issued by the SPM's Court Murang'a based on the same award. These are sought of things that turn the judiciary into a laughing stock. I have no doubt at all that the appeal has merits and would have succeeded but for the technicalities aforesaid. The appellant, in my view is wholly to blame for the outcome of this appeal. I think that he was negligent in the manner he went about the said appeal. He had counsel though on record. One cannot understand how a simple thing as obtaining a certificate would have escaped his attention. Similarly how could he fail to oppose the application in the SPM's court seeking to adopt the award by the Provincial Land Disputes Appeals Committee, Central Province as a judgement of the court knowing very well that he had lodged an appeal as required against the said award.

The upshot of the foregoing is that I find the appeal incompetent. Accordingly it is dismissed with no order as to costs as the parties are brothers.

Dated and delivered at Nyeri this 22nd day of July 2009

M. S. A. MAKHANDIA

JUDGE