REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 79 OF 2007

JAMES KABEERE KUNGURU…….……..APPELLANT

VERSUS

JAMES MUKONO KUNGURU……RESPONDENT

(Appeal from the award of the Provincial Land Disputes Appeals Committee at Nyeri dated 13th June, 2007.)

J U D G M E N T

The dispute leading to this appeal commenced in Kirinyaga District Land Disputes Tribunal when **Joseph Mukono Kunguru** hereinafter referred to as "*the respondent"* sometimes in 2008 initiated proceedings against **James Kabeere Kunguru** hereinafter referred to as "*the appellant."* The genesis of the dispute was the claim by the respondent that his deceased grandfather, **Barnabas Mujono** had picked three sons of his brother namely himself, **Michael Njamumo Kunguru** and the appellant to inherit his parcel of land known as **Baragwi/Raimu/23** hereinafter referred to as "*the suit premises."* The respondent was tasked with the subdivision of the suit premises among the three brothers aforesaid. However he was unable to implement the decision immediately and their grandfather passed on in 1980. Sometimes later the appellant approached him and requested him to release to him the death certificate of their deceased grandfather for purposes of initiating succession proceedings. Those proceedings were commenced in the Senior Resident Magistrate's Court Kerugoya. The respondent remembered going to the court with the appellant and his other brother, both of whom gave consent to the appellant to act on their behalf. Later the appellant requested for money from the respondent and the other brother for purposes of subdividing the suit premises in or about 1990. This was done subsequently. However, the appellant ended up with 2 ½ as opposed to ½ acre each given to the respondent and the other brother. The two were aggrieved by this subdivision and approached the appellant for reconsideration but he declined. Clan intervention did not yield any fruits either. Not even provincial administration could move the appellant. All that the respondent and the other brother were asking was to be given an extra ½ each. They were willing to have the appellant retain 1 ½ acres. The appellant having categorically turned down the respondent's plea, the respondent commenced these proceedings in Kirinyaga Land Disputes Tribunal.

For the appellant, his case was that, yes, he got the death certificate from the respondent and filed succession proceedings. Thereafter he commenced the subdivision of the suit premises in the presence of the respondent and the other brother. It would appear that the appellant justified his entitlement to more land than the respondent and the other brother on account that he solely incurred expenses in pursuing the

succession proceedings as well as subdivision expenses.

After careful consideration of the evidence tendered by the respective parties, the tribunal unanimously resolved that the land parcel **Baragwi/Raimu/1034** now in the name of the appellant and which was a subdivision of the initial suit premises measuring 2 ½ acres be shared as follows:-

1. **The respondent - ½ acre**

2. **Brother - ½ acre**

3. **Appellant - 1 ½ acre**

The appellant was not happy with this result. Accordingly he lodged an appeal to the Land Disputes Appeals Committee, Central Province. The committee having considered the appeal reached the following decision;

"…….**We therefore put aside the ruling of Kirinyaga District Tribunal and award as follows: Baragwi/Raimu/1034, two and half acres to be shared between two leaving (sic) brothers.**

- **Joseph Mukono Kunguru – one acre**

- **James Kabere Kunguru – one and a half acres**

Both parties to sign Land Control Boards (sic) consent documents…."

The appellant was still undettered. His next port of call by way of further and final appeal was this court. In a memorandum of appeal drawn and filed by **Messrs Wambugu, Mureithi & Co. Advocates,** the appellant faulted the decision of the Provincial Land Disputes Appeals Committee, Central Province, on 3 grounds, to wit;

"**1. That the Tribunal erred in law in determining a succession matter which it has no powers under the Land Disputes Tribunal Act number 18 of 1990.**

2. That the Tribunal over stepped its powers conferred by section 3 of the Land Dispute Tribunal Act No.18 of 1990.

3. That the Tribunal acted without power by altering a confirmed grant."

On 15th October, 2007, a certificate was duly issued in terms that the appeal as filed raised issues of law in terms of *section 8(9)* of the Land Disputes Tribunals Act.

On 6th March, 2009, the appeal came before **Kasango J**. for directions. Directions given were that the appeal be heard by way of written submissions. Subsequent thereto parties filed their respective submissions. However when the appeal came up for mention on 8th June, 2009, **Kasango J**. had been transferred to the High Court of Kenya at Meru and could not handle the appeal any further. Parties however agreed by consent that I should act on the written submissions filed and exchanged, thereafter craft and deliver the judgment. I have since carefully read and considered the respective written submissions on record.

It is trite law that the jurisdiction of the tribunals established pursuant to the relevant provisions of the Land Disputes Tribunals Act is very limited. Those tribunals can only pursuant to the provisions of *section 3(1)* of the Land Disputes Tribunals Act entertain;

"**All cases of a civil nature involving a dispute as to:-**

(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

(c) trespass to land….."

The dispute herein to my mind does not in anyway fall in any of the above categories. Accordingly in purporting to entertain the same both tribunals were acting ultra vires the statute that set them up. It is a misnomer for the tribunals to assume that they can hear anything and every thing under the sun for as long as it relates to land. The dispute herein revolves around inheritance and administration of the estate of their deceased grandfather. As correctly submitted by **Mr. Wambugu,** learned counsel for the appellant, a succession matter like in the instant case is not one of the things that the tribunals are allowed to deal with under the said section of the Land Disputes Tribunals Act and thus both tribunals in this case exceeded their jurisdiction when they went ahead to entertain the dispute. A confirmed grant under the Law of Succession Act can only be interfered with either by rectification, revocation or by way of an appeal. It cannot be the subject of deliberations by the tribunals as was the case here.

It would appear that following the petition of letters of administration intestate initiated by the appellant in the Senior Resident Magistrate's Court at Kerugoya being Succession Cause number 41 of 1990, a grant was subsequently issued and confirmed to the appellant. Through the process of transmission, the appellant subdivided the suit premises and separate titles were issues to the appellant, respondent and the other brother. With that therefore the original register of the suit premises was thereby closed. In making the above awards, the tribunals were in effect re-opening a matter already concluded and were in effect altering a confirmed grant. That was illegal and irregular. Further the tribunals by ordering the appellant to subdivide further his parcel of land **Baragwi/Raimu/1034** were in effect dealing with issues of title which again they have no jurisdiction to handle.

The respondent has submitted that the appeal ought to be dismissed as there is no decree against which the appellant has lodged the instant appeal. The Land Disputes Tribunal Act does not envisage the extraction of the decree before an appeal therefrom is filed. There are only two requirements that the intended appellant has to meet; that the appeal is filed within 60 days if the award is by the Provincial Land Disputes Appeals Committee and 30 days if the appeal is from the award of the Local Land Disputes Tribunal. The 2nd requirement is that if the appeal is to the High Court from the decision of the Provincial Land Disputes Appeals Committee, then it must be on points of law only and the judge has to certify the same as such before the appeal is admitted for hearing. In any event the proceedings before these tribunals are informal and to expect them to extract decrees will go against the noble intentions of the Act. Proceedings therein are conducted without undue regard to technicalities, small wonder then that lawyers have been barred from appearing for litigants in those proceedings. To insist on a decree being extracted before an appeal is filed is to unnecessarily clog the informal proceedings of the tribunals. Further, the proceedings before the tribunals are governed by a specific piece of legislation; the Land Disputes Tribunals Act. That statute does not provide that a decree must be extracted before an appeal can be filed. I hold the view that where a statute has made elaborate provisions how matters under it should be handled pursuant to its provisions, unless the same statute or other statute or subsidiary legislation donates to the court power to do certain things outside the provisions of the said Act, the court will not have any inherent power to do those things. In the circumstances of this case since the Land Disputes Tribunals Act is silent on the need to extract a formal decree before lodging an appeal, it should be deemed that, that is not necessary and I so find. Accordingly the provision of *order XLI rules 8B (4)* of the Civil Procedure Rules are in applicable in the circumstances of this case.

The upshot of al the foregoing is that the appeal has merit. It is allowed with no order as to costs since the parties are brothers. The awards by Kirinyaga Land Disputes Tribunal and Provincial Land Disputes Appeals Committee, Central Province are hereby set aside.

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

M.S.A. MAKHANDIA

JUDGE