



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 89 OF 2007

LAWRENCE MUTERO KAMUKUNJI.....APPELLANT

VERSUS

GRACE KABUCHI MUTERO.....RESPONDENT

(Appeal from the decision of the Provincial Appeals Committee at Nyeri dated 1st August, 2007 in Land Dispute Tribunal Claim No.Kirinyga 26 of 2004.)

J U D G M E N T

The genesis of this dispute is a complaint by **Grace Kabuchi Mutero** in the Gichugu Land Disputes Tribunal on 24th June, 2004. The said **Grace Muteru Mutero** is the respondent in this appeal and is a daughter of **Lawrence Mutero Kamukunji** the appellant. Her complaint was with respect to land parcel **Ngariama/Ngiriambu/2489** hereinafter referred to as “*the suit premises*” which is registered in the name the appellant herein. Her complaint was that she was a single mother of 4 children. She needed a portion of the suit premises from the appellant for herself and her children. Clan elders had met and deliberated over the issue and resolved that she be given $\frac{1}{4}$ acre of the suit premises, her other sister, **Jane** was to get $\frac{1}{2}$ acre too whereas their brothers were given $1\frac{1}{4}$ acres each. The suit premises were subsequently subdivided locally along those lines. However her brother did not take kindly to the decision and kept on creating problems for the respondent and her sister aforesaid. They were later summoned to the lands office, Kerugoya and asked to produce documents to support the purported subdivision. They did so and the respondent’s portion was given number 3363. Later the appellant advised her and her sister to look for some people to buy their parcels of land so that they may use the proceeds thereof to buy parcels of land away from the family to avoid the unnecessary confrontation with their brothers. They did so. For the respondent she sold her portion to one **Ephantus Njogu Murage** for Kshs.60,000/=. However when **Ephantus Njogu Murage** cleared the portion in readiness for planting on the onset of the rains, the appellant intervened and planted crops himself instead. Since then the appellant and his sons have made sure that the said **Ephantus Njogu Murage** does not take possession of the portion sold to him by the respondent as aforesaid. The respondent therefore wanted the tribunal to assist her so that the purchaser aforesaid could take possession and be issued with the title deed in respect of the portion aforesaid sold to him.

As for the appellant, his position was that the complainant was his daughter. His daughters, the respondent and one, Jane approached him sometimes and requested to be given portions of the suit premises to farm. He gave each one of them a $\frac{1}{4}$ an acre to till for their upkeep and that of their children.

Later the two daughters relocated to Kianyaga where they conspired to sell the portions so allocated them without his knowledge and or consent. When he objected, the two took him to the local chief and complained that he had refused the buyers from taking up their portions which they had sold to them. The Chief advised him to refund to the purchasers money paid to his daughters but he told him that he had no knowledge of the land sale. As far as he was concerned he never sold his land and could not understand why his daughters sold the portions he had allocated them when it was clear that he never gave them to sell.

The tribunal having listened to the complaint, the response as well as the evidence of the witnesses called by the parties returned the following verdict;

“The panel of elders upon exhaustively examining both oral and written evidence came to the conclusion that Grace Kabuchi and Jane Wanjiku are entitled to their share in their father’s estate.

While we ascribe to the defendant’s view that land should not be sold arbitrarily, we cannot nonetheless deny the buyer access to their land as they paid for it and there is no possibility that their money can be paid back.

The panel of elders therefore request the relevant authorities to facilitate for necessary registration formalities.”

The appellant was aggrieved by the award. Pursuant to the provisions of *section 8(1)* of the Land Disputes Tribunals Act, he lodged an appeal against the award to the Land Disputes Appeals Committee, Central Province. The appeals committee having deliberated on the appeal was of the considered view that:

“Having heard and considered the representations of all the parties and their witnesses have considered all documents submitted to us we hereby decide as follow:-

- 1. We abide by the District Tribunal**
- 2. Grace Kabuchi Mutero ¼ acre**
- 3. Jane to get ½ acre**
- 4. Right to appeal in 60 days**
- 5. Each parties (sic) to bear their cost.”**

The appellant was still undeterred. Being unhappy with the decision of the appeals committee, he moved to this court by way of 2nd and final appeal pursuant to the provisions of *section 8 (9)* of the Land Disputes Tribunals Act. However such an appeal is only limited to points of law. The appeal was lodged on the following grounds:-

- “1. The Provincial Appeals Committee erred in law in upholding the award of the Gichugu Land Disputes Tribunal in a matter where the Land Disputes Tribunal lacked jurisdiction.**
- 2. The Provincial Appeals Committee erred in law in directing or compelling the appellant how to share his land to his daughters during his lifetime and which said directive or order was ultra vires the provisions of *section 3(1)* of the Land Disputes Tribunals Act 1990.**
- 3. The Provincial Appeals Committee erred in law in awarding the appellants (sic) land to one Jane who was not a party to the appeal before them.**
- 4. The Provincial Appeals Committee erred in law in giving an award over Land whose title was unknown to them.”**

On 18th June, 2008 a certificate under *section 8(a)* that an issue of law (other than customary law) was involved in the appeal was duly issued. On 6th March, 2009, directions were given that the appeal be heard by way of both oral and written submissions. On 27th April, 2009 this appeal was scheduled for hearing before **Kasango J.** However she declined to handle it any further as she was on transfer from this court. By then the appellant had already filed and served his written submissions. The appeal was then stood over to 9th June, 2009 for mention before me for further directions.

On the said date, it transpired that all the parties involved had filed and exchanged written submissions. **Mr. Muchira**, learned counsel for the appellant informed the court that his client wished to have the appeal proceed from where **Kasango J.** had left. He implored the court to act on the written submissions filed and thereafter craft a judgment. The respondent who appeared in person was of the same view. That being the case, it was then by consent agreed that I should proceed from where **Kasango J.** had left. It is on that basis that I have crafted this judgment.

I have carefully considered the record of appeal and rival submissions filed herein. It is trite law that under *section 3 (1)* of the Land Disputes Tribunals Act, the tribunals so established can only deal with all case of a civil nature involving a dispute as to –

- (a) **the division of, or determination of boundaries to, land, including land held in common;**
- (b) **a claim to occupy or work land; or**
- (c) **trespass to land.**

It is quite clear to me that the respondent's complain in the Gichugu Land Disputes Tribunal and Land Disputes Appeals Committee, Central Province, did not fall within the ambit of any of the aforesaid categories of disputes that the tribunals have jurisdiction over. As it is, the jurisdiction of the tribunals aforesaid is very limited. Those tribunals can only deal with issues pertaining to the aforesaid 3 categories and not everything and anything under the sun for so long as it touches on land. The dispute between the appellant and respondent had everything to do with enforcement of contract of sale of land, inheritance as well as title to land.

The suit premises are registered in the name of the appellant under the Registered Land Act. Accordingly the two tribunals lacked jurisdiction to deal with the issues of title. The award of Gichugu Land Disputes Tribunal which was confirmed by the appeals committee seeks to award the respondent and her sister **Jane Wanjiku** titles from the suit premises that belong to their father, the appellant. The award in so far as it relates to **Jane Wanjiku** is even illegal in the sense that she was not a party to the proceedings in the tribunal nor the appeal. The record shows that there was only one complainant, the respondent. **Jane Wanjiku** merely featured as a witness of the respondent. It was thus improper, unlawful and indeed illegal for the two tribunals to have made the award in favour of **Jane Wanjiku** in the circumstances.

Authorities are abound by the court of appeal and this court to the effect that the Land Disputes Tribunals set up pursuant to *section 4* of the Land Disputes Act have no jurisdiction to deal with issues of title, agreement of sale, refund or inheritance as the two tribunals herein purported to do. Suffice however to mention the case of **Beatrice M'Marete V Republic & Anor Exparte John Gitonga Mbui C.A. No.259 of 2000 (UR)**. In these decision, the court of appeal made these pertinent observations:

“....We have already set out at the commencement of this judgment the final decision of the tribunal. It was to the effect that the panel of elders awarded the parcels of land Nos.Nyaki/Mulathankari/

1680 and 1681 to the claimant (Beatrice) who is the appellant before us. These pieces of land were registered under Registered Land Act (Cap 300 Laws of Kenya). Awarding land to the claimant meant she acquired an interest in it by virtue of that award. In order to put that ruling into effect

the appellant would have to effect it by rectifying or canceling the titles..... In our view, the dispute before the tribunal did not relate to boundaries, claim to occupy or work land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the tribunal acted in excess of its jurisdiction....”

The same situation obtains. Indeed our case is even made worse by the fact that the two tribunals were making orders not asked for. The respondent had merely asked that the Gichugu Land Disputes Tribunal to assist so that **“the buyers to own their portion legally and have their title deeds....”** The respondent had not asked for the portion of land to be transferred and registered in her name. Further in making the award, it would appear that the two tribunals were oblivious of the requirements of *section 6* of the Land Control Act since the suit premises were agricultural land. In making the award therefore, they were perpetrating an illegality. It is not that they were not made aware of the need for consent of the relevant land control board for the subdivision and subsequent transfer of portions of the suit premises. Indeed the respondent testified **“.....We had booked land board on 6/5/04 but we could not attend because the dispute was imminent....”**

This aside, it would appear that the two tribunals in making those awards were in effect compelling the appellant to distribute his parcel of land among his daughters in his lifetime. This again falls short of the jurisdiction of the tribunal as fronted by *section 3(1)* of the Act. The court of appeal had occasion to deal with a similar situation as obtaining herein in the case of **Muriuki Marigi V Richard Marigi Muriuki & Anor. C.A. No.189 of 1996 (UR)**. The court stated:

“It is, however, noteworthy that the Law of Succession Act, (Cap 160 Laws of Kenya) does recognize the rights of wives and children over their husband’s or father’s estate as the case may be. Those rights accrue after death. Otherwise the rights remain inchoate and are not legally enforceable in any court of law or otherwise. Whenever they accrue the estate is shared either according to the personal laws of the deceased in case of agricultural land or as provided in the relevant provisions of the law of succession act. The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.

In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the court would aid them to enforce.”

The respondent’s response to the appeal is that the award was entered as judgment of the court on 27th September, 2004 in Kerugoya Disputes Tribunal case number 34 of 2004. The award having been so adopted as a judgment of the court, the court became *functus officio* and no further proceedings on the validity of the award obtains. That position cannot be possibly correct. The court that perhaps became *functus officio* was the magistrate’s court and not this court in its appellate jurisdiction. This court cannot allow an illegality to be perpetrated merely because the respondent in abid to the defeat the possible outcome of the appeal rushes to have the award adopted as a judgment of the court on the same day that the same was read to the parties. *Section 8 (1)* of the Land Disputes Act grants a party aggrieved by the decision of the tribunal, within thirty days of the decision, to appeal to the appeals committee constituted for the province. The award herein thus should not have been adopted as a judgment of the court on the same day that it was read out to the parties. Any action in furtherance of the same should only have been contemplated at the expiry of 30 days allowed for a dissatisfied party to appeal. The respondent made her bed and must sleep on it. She cannot hide behind the fact that the award has been adopted as a judgment of the court to defeat the possible outcome of this appeal.

For all the foregoing reasons, I would allow the appeal and set aside the awards of the Land Disputes Appeals Committee, Central Province dated 1st August, 2007 as well as the Gichugu Land Disputes

Tribunal dated 2nd August, 2004. Considering that the two tribunals acted without jurisdiction and as the dispute involves a family, I exercise my discretion on costs by making an order that each party bears its on costs.

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

M.S.A. MAKHANDIA

JUDGE