REPUBLIC OF KENYA

HIGH COURT AT NYERI

CIVIL APPEAL 76 OF 2007

MURAGE MURIITHI)

JOEL KIHARA)..APPELLANTS

Versus

GATHAGANA RESIDENTS.....................RESPONDENTS

(Appeal from the Judgment of the Provincial Land Disputes Appeals Tribunal

at Nyeri No.4 of 2007)

J U D G M E N T

The respondents initially lodged a complaint with the Mathira Land Disputes Tribunals against the appellants. The complaint was that the appellants had refused to accord them access through their respective parcels of land to a watering point situate at the end of the respective parcels of land. The land parcels involved were **Kirimukuyu/Thiu/37 and 39.** Whereas 37 is owned by the 1st appellant, 39 is owed by the 2nd appellant. It was the case of the respondents that since early 1958 the members of the community had all along used a road of access running between the two parcels of land to access a cattle watering point registered in the name of county council of Nyeri. The appellants however contended that there was no access road through their parcels of land to the watering point. Rather the watering point was procedurally and legally only accessible through the opposite ridge and not through their respective parcels of land.

Having carefully listened to the dispute, the Mathira Land Disputes Tribunal rendered its verdict in these terms;

"……**The land Registrar to visit the place in dispute Kirimukuyu/Thiu/37 and 39 and mark the boundaries as they should be….."** On 5th October, 2006 at about 10 a.m. the District Land Registrar accompanied by the Provincial Surveyor visited the Locus in quo and carried out the instructions, prepared a report which he filed with the Senior Resident Magistrates Court, Karatina in Land Case Number 9 of 2005. Essentially their findings were the ground measurements tallied with the scaled measurements from Registry Index Map. What this meant was that no road or access existed leading to the watering point through the appellants' parcels of land aforesaid. On 14th February, 2007, the court adopted the award of the tribunal together with the report of the Land Registrar aforesaid as the judgment of the court.

Aggrieved by the decision, the respondents moved to the Provincial Land Disputes Appeals Committee, Central Province by way of appeal. Upon hearing the appeal, the Provincial Land Disputes

Appeals Committee overturned the decision of the Mathira Land Disputes Tribunal aforesaid holding instead that;

"….**The Central Province Appeals Tribunal agrees with Mathira Lands Tribunal ruling and awards the same. The Land Registrar and District Surveyor to pay a visit to the suit lands and mark the boundaries of the suit land and open up the closed access road – order that the road get open immediately…."**

I must confess that I had difficulties appreciating the purport of this award. If the Provincial land Disputes Appeals Committee agreed with Mathira Land disputes Award then there was no point in recommending that the Land Registrar and the District survey to visit the suit lands. They had already done so on the directions of Mathira Land Disputes Tribunal. Perhaps the Provincial Land Disputes Appeals Committee had meant "*disagrees*" rather than "*agrees*" with Mathira Land Disputes ruling. That is the only way sense may be read into the subsequent order. I take it that way.

This subsequent award triggered the instant appeal. Through their then advocates, **Messrs C.M. King'ori advocates**, the appellants impugned the award of Central Province Land Disputes Appeals Committee on the following:

1. The appeal committee erred in law in a proceeding in a matter that was outside its jurisdiction.

2. The appeals committee erred in law in sitting on appeal of Land Registrar's decision and proceeding therefrom to make its ward against the same contrary to the express provisions of the Registered Land Act, Cap 300 Laws of Kenya.

3. The appeal committee erred in not addressing itself to the matters before it and in particular the subject parcels of land.

4. The appeals committee erred in law in peremptorily denying the appellants an opportunity to be heard by refusing to admit their depositions presented thereby.

5. The appeals committee erred in law in proceeding to sit on an issue that was subject of a valid and existing court decree.

6. The appeals committee erred in law in proceeding to make an ward that affected title to land whereas it was not vested with jurisdiction thereof.

7. The appeals committee erred in law in entertaining the appeal by the appellants, an amorphous entity with no capacity to sue or be sued.

8. **The appeals committee erred in law in accepting, proceeding with and deciding on an appeal that was grossly out of time.**

The appeal was subsequently certified as raising points of law.

When the appeal came up for hearing, parties agreed to argue the same by way of written submissions. I have carefully read and considered the said written submissions together with the authorities cited. However I do not think that it shall be necessary consider all the other grounds of appeal save for whether the appeals committee had powers under the Land Disputes Tribunals Act to hear the dispute when there was already a judgment and decree of a court with competent jurisdiction.

It is not disputed that Mathira Land Disputes Tribunal's award including the report of the Land Registrar was adopted as a judgment of the court as required by *section 7(2)* of the Land Disputes Tribunal Act. That section provides that;

“……**the court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall forthwith issue and shall be enforceable in the manner provided for under Civil Procedure Act…..”**

As it is therefore, there is a judgment and decree in terms of the award by the Mathira Land Disputes Tribunal. That judgment and decree is not the subject of this appeal. Nor has it been a subject of review. Nor has it been set aside. It still stands.

Yet, the Central Province Land Disputes Appeals Committee by its ward has basically set aside the award of Mathira Land Disputes Tribunal. However that award has already become a judgment of the court. The appeals committee has no jurisdiction to set aside the judgment and decree of a court. Only the High court has appellate jurisdiction to entertain and determine an appeal made out against a decree of a subordinate court. As already stated the judgment and decree of the subordinate court is not subject of this appeal. Rather it is an appeal from the Provincial Land Diputes Appeals committee. If I was dismiss this appeal, we shall be straddled by the two judgments and decrees issued by two different courts with competent jurisdiction. One by this court an appeal, endorsing the decision of the appeal’s committee and one by the Senior Resident Magistrate’s Court, Karatina encompassing the decision of the Mathira Land Disputes Tribunal. That is a recipe for judicial chaos. The result would obtain if I was to allow the appeal.

The appellants should have taken the necessary steps to ensure that their appeal was not rendered otiose by ensuring that the award of the Mathira Land Disputes Tribunal does not become a judgment of the court.

In order to avoid an embarrassing situation where there will be two parallel judgment and decrees issued by two courts of competent jurisdiction, I will strike out this appeal on the basis that it has been overtaken by events, as already there is a decree and judgment of the Senior Resident Magistrate’s court on the same dispute. I make no order as to costs.

Dated and delivered at Nyeri this 17th day of September, 2009.

M.S.A. MAKHANDIA

JUDGE