



**FRANCIS MUKIRAE..... APPELLANT**

**VERSUS**

**STANLEY WAWERU..... RESPONDENT**

(Being an appeal from the decision and award of the Provincial Lands Dispute Appeals Tribunal made on the 12<sup>th</sup> day of November, 1998 and entered as judgment of the Resident Magistrate Court at Kikuyu, Civil Misc. Application No. 7 of 1998 on the 29<sup>th</sup> day of April, 1998)

## **J U D G M E N T**

1. This is an appeal originating from an award of the Provincial Lands Dispute Appeals Tribunal made on the 12<sup>th</sup> November, 1998. The appeal to the Land Disputes Tribunal arose from a decision of the Kikuyu Land Disputes Tribunal, in a land dispute which was referred to the Kikuyu Land Disputes Tribunal by Stanley Waweru, hereinafter referred to as the respondent. The respondent complained against his uncle Francis Mukirae, hereinafter referred to as the appellant, for refusing to transfer one acre out of Kabete/Karura/131 hereinafter referred to as the suit land, (which was 8.5 acres in total). The respondent maintained that he was given 1 acre out of the suit land by his grandmother, Damaris Warira Nyakinyua, (Nyakinyua) who is also the mother to the appellant. The respondent claimed that Nyakinyua died before the land was subdivided and the 1 acre transferred to him. The respondent maintained that his mother, who was not married, was buried on the disputed land.
2. The appellant denied the respondent's claim. He maintained that the respondent's mother was married under Kikuyu Customary Law. She lived in Kisumu with her family. At some stage they came back and rented a house at Kihara. The respondent's mother disagreed with her husband; by then she was pregnant with the respondent. The respondent's mother lived with her mother that is, Nyakinyua. She later bought some land in Narok where she built her house and resided until she fell ill. She went back to Nyakinyua's home where she died and was buried in 1987. The appellant maintained that the respondent's mother was buried on his land. He maintained that the respondent had no right to share his land.
3. The respondent called three witnesses. Karanja Muritu who claimed to be a brother to the appellant, claimed that the disputed land belonged to the appellant's late father. That during the emergency the appellant's mother, that is Nyakinyua said that the land should be registered in the name of the appellant as a trustee, and that the land should be subdivided into 3 portions. Before Nyakinyua died, she called the elders and confirmed that those were her last wishes. The land was to be divided among Nyakinyua's children. The respondent's mother was to get one acre and her three brothers were to share the remainder equally.
4. Joseph Kiarie Muritu, also confirmed that Nyakinyua had on several occasions called him to witness her giving of the disputed land to the respondent in place of the respondent's mother who would have inherited it had she been alive. A family meeting was called and Nyakinyua directed that the land be

divided into 4 portions. The respondent was given 2 acres and the appellant was to share the remaining portion with his brothers. Later, the family reviewed the matter and reduced the portion given to the respondent to 1 acre. However, the respondent complained that the appellant had refused to transfer the one acre to him.

5. Geoffrey Ngugi Kiarie, also confirmed that Nyakinyua went to him and informed him that she wished to have her land subdivided into 4 portions amongst her four children including her daughter who was the mother to the respondent.

6. In its award, the Kikuyu Land Disputes Tribunal referred to a letter dated 21<sup>st</sup> January, 1997 which showed that the clan elders discussed and agreed that the disputed land was to be subdivided by Nyakinyua's 3 children and Nyakinyua, who was to retain one acre. The Tribunal noted that some of the clan elders testified before it confirming the above. It was further established that the respondent's mother was buried on the disputed one acre land. The Kikuyu Land Dispute Tribunal therefore found that the respondent was entitled to the one acre out of the disputed land.

7. Being aggrieved by the decision of Kikuyu Land Disputes Tribunal, the appellant appealed to the Provincial Lands Dispute Appeals Committee. Having heard the parties, the Appeals Committee found that the appellant had disagreed with Nyakinyua who wanted a piece of the land, which portion she had bequeathed to the respondent. The Appeals Committee further found that the respondent had also disagreed with the clan elders' decision and the decision of the Kikuyu Land Disputes Tribunal, that the respondent be given the one acre which was bequeathed to him by Nyakinyua. The Appeals Committee found that the one acre portion of land was actually given to the respondent by Nyakinyua. The Appeals Committee therefore upheld the decision of the Kikuyu Land Disputes Tribunal that the respondent be awarded one acre out of LR No. Kabete/Karura/131.

8. The award of Appeals Committee was adopted by the Resident Magistrate's Court at Kikuyu in Misc. Application No.7 of 1998 on the 9<sup>th</sup> of August, 1998. Subsequently, a decree was issued which was in the following terms:

*"It is hereby ordered –*

*(i) That the award of the Provincial Lands Dispute Appeals Tribunal decided on the 12<sup>th</sup> day of November, 1998 and filed on the 10<sup>th</sup> day of December, 1998 upholding the decision of Kikuyu Land Dispute Tribunal that Stanley Waweru be awarded 1.0 acre out of LR No. Kabete/Karura/131 is hereby entered as judgment of this Honourable Court. "*

9. The appellant being dissatisfied with the judgment and decree issued, has now come to this Court against the said judgment raising 4 grounds as follows:

(i) The learned Chairman, elders and District Magistrate erred in law in exceeding their jurisdiction in giving the respondent one acre of land.

(ii) The learned Chairman, elders and District Magistrate erred in law in failing to appreciate that the land KABETE/KARURA/131 is registered in the appellant's name as trustees for himself and his brothers.

(iii) The learned Chairman, elders and District Magistrate erred in law in failing to appreciate that the appellant's late mother the late Damaris Warita Nyakinyua had in the land KABETE/KARURA/131 was a life interest.

(iv) The learned Chairman, elders and District Magistrate erred in failing to appreciate that the late Damaris Warira Nyakinyua did not own any land as absolute proprietor or at all.

10. The appeal was heard by Hon. Mutungi J who retired from the service before delivering his judgment. The parties have agreed by consent that I deliver a judgment on the basis of the submissions which were made before Hon. Mutungi, J.

11. The appellant's main ground in the appeal was on the issue of jurisdiction of the Tribunal. It was submitted that the Tribunal award giving the respondent 1 acre out of the disputed land was in excess of the Tribunal's jurisdiction as it was dealing with the issue of title to land, contrary to section 3(1) of the Land Disputes Act No. 18 of 1990. It was also submitted that the Tribunal exceeded its jurisdiction in attempting to defeat the rights of a registered proprietor contrary to section 28 and 159 of the Registered Land Act, Cap.300. The Court was therefore urged to set aside the decision of the Tribunal.

12. For the respondent it was submitted that the Tribunal had jurisdiction to hear and determine the dispute as it involved a claim to occupy land based on the customary law of the Gikuyu. It was maintained that the appellant was registered as a trustee for the respondent. The Court was therefore urged to dismiss the appeal.

13. In reply to the submissions made on behalf of the respondent, it was submitted that the appellant was holding the land as trustee for himself and his brothers, and not as trustee for his nephew, that is the respondent. It was maintained that the respondent was not a brother to the respondent but a nephew. It was submitted that even assuming that there was a trust, the Tribunal would not have power to deal with the issue of title to land.

14. I have deliberately set out the background to this appeal and the facts resulting in the judgment subject of this appeal. This is in an effort to bring out clearly the dispute which the Land Disputes Tribunal and the Provincial Appeals Committee dealt with. The respondent's complaint before the Tribunal was a claim for one acre out of the suit land, which portion he claimed had been given to him by Nyakinyua. That claim raised issues regarding title to the suit land. For instance, did Nyakinyua have any proprietary rights over the one acre portion of the suit land which she could transfer or will to the respondent? Secondly, since the suit land was registered in the name of the appellant, there was an issue as to whether the rights of the appellant as a registered proprietor could be defeated by other interests which were not registered against the title.

15. The jurisdiction of the Land Disputes Tribunal and the Land Dispute Appeals Committee are clearly provided under Section 3(1) of the Land Disputes Tribunal Act No.18 of 1990 as follows:

“3(1) subject to this Act, 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,

shall be heard and determined by a Tribunal established under section 4.

16. It is clear that in determining this dispute both the Tribunal and the Appeals Committee went beyond their jurisdiction as the dispute did not involve the division of, or the determination of boundaries to land, including land held in common, nor did the dispute involve a claim to occupy or work land, or a claim of trespass to land. It was clearly a claim for title to part of the suit land. Indeed, the decree provides for one acre of the suit land to be subdivided and given to the respondent. Even assuming that the respondent's claim was anchored on the appellant holding the land in trust for him, the issue of trust was also not a matter within the jurisdiction of the Tribunal.

17. I find that the Tribunal exceeded its jurisdiction. The judgment of the lower Court adopting the award of the Tribunal cannot therefore stand. The appeal is accordingly allowed, the award of the Tribunal and the judgment of the lower Court adopting the award, is set aside. I make no order as to costs.

Those shall be the orders of this Court.

**Dated and delivered this 30<sup>th</sup> day of October, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the appellant, absent

Wamwanyi holding brief for Ms. Muhuhu for the respondent

Eric, court clerk