REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL 143 OF 2007

[From Original Provincial Land Disputes Appeal Case No. 19 of 2007 Mombasa]

AMRI ABDALLA AMRI……..……..APPELLANT

VERSUS

MISHI AMRI & OTHERS……..…….....RESPONDENTS

JUDGMENT

This appeal is against the decision of the Provincial Appeals Committee – Coast in Appeal Case No. 19 of 1997 between Ms. Mishi Amri and Others and Amri Abdalla Amri. The appellant, Amri Abdalla Amri was the respondent before the Appeals Committee and Mishi Amri & Others were the respondents. The matter arose as follows:-

The respondents claimed that they were entitled to proceeds of sale of water from a well constructed on family land. The appellant resisted their claim contending that the well was his personal investment to which the respondents were not entitled. The respondents therefore referred the dispute to Msambweni Land Disputes Tribunal under the Land Disputes Tribunals Act, Act No. 18 of 1990 (hereinafter *"the Act"*). The respondents' case before the said Tribunal was presented by Swalehe Mohamed Baya. After considering the evidence which was presented before it by both sides, the Tribunal decided as follows:-

"……Accordingly, as the well stands the subject of the agreement the question of land ownership here does not arise. The same way the defendant holds the right of free use of the land and so is every member of the family of the late Amri Bin Omari Mwamchoro. Like any other member of that family who had invested on that family land, the defendant also did the same. But surprising enough is the continued misunderstandings between the defendant and the rest of the family members over the well. The Court of Elders clearly heard all the conditions given under the agreement between KAYDEE COMPANY and the defendant. It was a mutual enterprise between the two as persons and the fact that the defendant later welcomed the rest of the family members into the matter was solely his discretion. It would be unfair to force the defendant to expose his fortunes to the other persons/members with rental houses and other similar assets on the land undisturbed. To us it appears a personal or individual asset rather than a family one.

It is our opinion therefore that since the defendant has the right to invest on the said land like any other member of the family, then it must be understood beyond doubt that the well is his personal property which needs respect and protection. He is not the only member of the family to invest on that land and if

by so doing then it calls for such a provocation, it should then follow suit to the other members of the family who also happen to have properties on the land.

The defendant invested on that land by putting up a well on which he earns his living. He has the right to use that land because his father is entitled for a place to inherit. Perhaps the elders of that family should put it clear to all the descendants of the late AMRI BIN OMARI MWAMCHORO that development of that land must in future only be concentrated in some particular areas or places such that when time for sub-division of the land according to the family members would not prove difficult, otherwise the defendant should be left alone to use the well which belongs to him only."

Mishi Amri & Others were not satisfied with the decision of the Tribunal and pursuant to section 8 of the said Act, appealed to the Provincial Appeals Committee, Coast Province which reversed the decision of the Tribunal in the following words:-

"The decision of the Msambweni Land Tribunal is set aside. There is no dispute that the land is not family land. The well is a family project hence the well proceeds should be shared equally from 1995 to date. The respondent Amri Abdallah Amri to refund and pay back all the monies from well proceeds he received on behalf of the family from 1995 to date and to be shared by the family members including himself in accordance to customary Law.

COSTS AWARD

The Respondent to pay costs of the Appeal to the Appellant."

It was now the turn of Amri Abdalla Amri to be unhappy and exercising his right of appeal given by section 9 (9) of the Act, he has appealed to this court on four grounds expressed as follows:-

"1. That the Provincial Land Dispute Tribunal (sic) erred in Law by failing to appreciate the concept of customary law and to what extent it can apply to the issue of sharing a well.

2. That the Provincial Land Dispute Tribunal (sic) erred in Law by adopting and making findings upon evidence that was never adduced and/or recorded by the Msambweni Disputes Tribunal.

3. That the Provincial Land Disputes Tribunal (sic) erred in Law by making a decision without considering the relevance of the Land Disputes Tribunals Act No. 18 of 1990 and its applicability to the dispute in question.

4. That the Provincial Land Dispute Tribunal (sic) erred in Law by allowing the Respondents' appeal and setting aside the Award by the Msambweni Land Dispute Tribunal."

When the appeal came up for hearing before me on 1st July 2009, counsel agreed to file written submissions which they duly filed by 24th July 2009. I have considered the record of this matter, I have also given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. Sections 8, 9 and 10 of the Act read as follows:-

"(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(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.

(10) A question of customary Law shall for all purposes under this Act be deemed to be a question of fact."

Under the above provisions, an appeal to this court can only be on points of Law. A point of Law is not a point of Law merely because the ground of appeal says so. The point of Law should be demonstrated by the appellant.

Counsel for the appellant argued the four grounds of appeal as one ground. His view seems to be that the finding by the Provincial Appeals Committee that the well in dispute was family property was wrong in Law as the subject well was the appellant's personal investment from which the respondent's could not benefit. The appellant's further argument appears to be that the Provincial Appeals Committee relied on extraneous matters in arriving at its decision and finally that the said Appeals Committee failed to consider the Act under which it was established. There is no doubt that if indeed the Appeals Committee committed the acts or omissions complained of, the appellant would have been justified in lodging this appeal.

I have gone over the proceedings which took place before the Appeals Committee. The committee summarized and concluded as follows:-

"1) The well was sunk in a family land. There was a family consultation before the well was sunk witnessed by the area chief.

2) That from 1992 to 1994 the family used to share the proceeds from the water well paid by the Indian Ocean Beach Club."

The Committee then found as follows:-

"1) This is a family land, the well was sunk in that land.

2) Sharing from the well is an established and recognized customary law within community.

3) The well was dug under an agreement dated 23rd April 1991 and was sunk free of charge by Keydee Company.

4) There was a family consultation for the well to be sunk."

The conclusions and the findings are clearly borne from the record. The Appeals Committee profoundly appreciated the concept of customary law and appropriately applied the same with respect to the sharing of the proceeds of the well in dispute. The issue of family consultation and execution of the agreement by the appellant on behalf of the family were not extraneous findings as contended by the appellant. In any event the same are findings of fact upon which no appeal lies to this court.

With regard to the complaint that the Appeals Committee failed to consider the relevance of the Land Disputes Tribunal Act and its applicability to the dispute between the parties, the starting point is section 8 (1) of the Act which reads as follows:-

"8 (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated."

As already stated at the beginning of this judgment, the matter was originally dealt with by Msambweni Land Disputes Tribunal and had been commenced by the appellant under section 3 of the Act. That Tribunal considered the appellant's claim under sub-section (b) of section 3 i.e. a claim to occupy or work land. When the Tribunal rendered its decision already referred to above, the respondents were entitled to appeal to the Appeals Committee as they ultimately did. The Appeals Committee had the legal power or authority to consider the respondents' appeal. In usual parlance, the Appeals Committee had jurisdiction to determine the respondents' appeal.

The appellant's complaint that the Appeals Committee erred in Law by making a decision without

considering the relevance of the Act and its applicability to the dispute between the parties is accordingly without merit. The Appeals Committee, on the material placed before it determined that the proceeds of sale of water from the well in dispute be shared in accordance with customary Law. The Appeals Committee justified their decision on the basis that, the well in dispute is a family project undertaken on family land. Those were once more findings of fact upon which no appeal lies to this court.

In the end the entire appeal has no merit and is dismissed. As the dispute involves blood relatives, I order that each party bears its own costs of this appeal.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Gekonde for the Respondent and Simiyu holding brief for Genga for the Appellant.

F. AZANGALALA

JUDGE

9TH OCTOBER 2009