REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 67 of 2008

PETERSON MAINA KARITU ..... APPELLANT

VERSUS

AUGUSTINE MWANGI NDONYI ..... 1ST RESPONDENT

MUKAMI NDONYI IRUNGU ..... 2ND RESPONDENT

(Appeal from the Judgment and orders of the Senior Magistrate's Court at Murang'a

in Succession Cause No. 136 of 1997 dated 21st June 2002 by L. Nyambura – R.M.)

J U D G M E N T

The genesis of this dispute was a claim filed by the respondents in Ndia Division Land Disputes Tribunal against the appellant. The dispute was about ownership of land parcel **Mwerua/kanyokora/331** then and still registered in the name of the appellant. The tribunal having listened to both the appellant and respondents as well as their witnesses returned a verdict in these terms:-

"**The panel's judgment is that Peterson Maina Karitu is occupying land parcel No. Mwerua/Kanyokora/331 illegally. The land parcel No. Mwerua/Kanyokora/331 belongs to the family of Ndonyi Irungu, so Peterson Maina Karitu should stop occupying land parcel No. Mwerua/Kanyokora/331 so it has now been ordered that Peterson Maina Karitu stop occupying the said parcel of land and that the District Land Registrar issue the family of Ndonyi Irungu the land title deed of parcel No. Mwerua/Kanyokora/331.**

Each party to meet their cost".

The appellant was aggrieved by the decision. As expected he preferred an appeal to the Land Disputes Appeals Committee, Central Province at Nyeri. The appeals committee having deliberated on the appeal came to the following decision:-

"**(1) As far as we are concerned the land belongs to the**

family of Ndonyi Irungu. According to the clan statement and testimony present in the court.

(2) We therefore have the right to support district land tribunal of Baricho as they stated.

(3) "The land parcel No. Mwerua/Kanyokora/331 belongs to the family of Ndonyi Irungu so Peterson Maina Karitu should stop occupying land parcel No. Mwerua/Kanyokora/331. So it has now been ordered that Peterson Maina Karitu stop occupying the said parcel of land and that the district land registrar issue the family of Ndonyi Irungu the land title deed of parcel No. Mwerua/Kanyokora/332.

Each party to meet their cost".

Undeterred, the appellant came knocking to the doors of this court by way of 2nd and perhaps last appeal. Through **Messrs Lucy Mwai & Company Advocates**, he faulted the decision of the land disputes Appeals Committee on the following grounds:-

1. The Central Province Land Disputes Appeals Committee erred in law and in fact in dealing with matters touching on title to land parcel Mwerua/Kanyokora/331 without jurisdiction to do so.

2. The Central Province Land Disputes Appeals Committee further erred in law and in fact in ordering title to land parcel Mwerua/Kanyokora/331 be rectified by deleting the name of the Appellant and registering the family of Ndonyi Irungu as the new owner without jurisdiction.

3. The Central Province Land Disputes Appeals Committee further erred in law and in fact in purporting to order the cancellation of title to land parcel Mwerua/Kanyokora/331 while the said title is a first registration.

4. The Central Province Land Disputes Appeals Committee erred in law and in fact in entertaining the Respondents' claim to land, while the said claim was time barred.

5. The Central Province Land Disputes Appeals Committee erred in law in making an award that is incapable of being effected as a title deed cannot be issued in the family name as awarded.

Subsequent to the filing of the said memorandum of appeal, the appellant somehow discovered that in the Resident Magistrate's Court at Baricho had in the meantime adopted the award of Ndia division land Disputes Tribunal as a judgment of the court on 30th June 2004, vide Baricho Resident Magistrate's Court LDT No. 2 of 2004. The appellant therefore sought and obtained leave to amend his memorandum of appeal and thereafter filed a supplementary record of appeal dated 9th March 2009. The amendment was in respect of ground 1 only of the memorandum of appeal which now read:-

"**1. The Central Province Land Disputes Appeals**

Committee and the Ndia Division Land Disputes Tribunal erred in law and in fact in dealing with matters touching on title to land parcel Mwerua/Kanyokora/331 without jurisdiction to do so. Thus the judgment entered in terms of the Ndia Division Land Disputes Tribunal in Baricho R.M.C Land Disputes Tribunal No. 2 of 2004 is a nullity".

On the 20th January 2009 **Kasango J** certified that the appeal raised issues of law relating to the jurisdiction of the Tribunals established under the Land Disputes Tribunals Act and whether they had power to determine issues relating to title to land.

On 29th June 2009, the appeal came before me for hearing. Both parties agreed to canvass the same by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside the authorities cited.

The thrust of this appeal is the question of jurisdiction. It is the appellant's contention that the dispute that the original tribunal dealt with did not by any stretch of imagination fall within the tribunal's mandate as captured by section 3 of the land Disputes Tribunals Act. The respondent countered that argument by stating that it is the appellant who lodged the claim with Ndia land Disputes tribunal as well as land disputes appeals committee. He therefore subjected himself to their respective jurisdictions. He never challenged the jurisdiction of those tribunals at any stage. He cannot now therefore turn around having lost all through to challenge the powers of those two tribunals on the basis of jurisdiction. In any event the appeal to the land appeals committee, central province was an act in futility as the award of Ndia land disputes tribunal dated 30th June 2004 had already been adopted as a judgment of the court on 30th July 2004.

My take on all these submissions is that section 3(1) of the land Disputes Tribunals Act provides interlia:-
"**..... subject to this Act, all cases 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;

(c) Trespass to land,

(d) shall be heard and determined by tribunal under section.

Having carefully read the two awards, I am tempted to agree with **Ms Mwai,** learned counsel for the appellant that the two

tribunals dealt with matters touching on title to land when they ordered that title to the suit premises registered in the name of the appellant be rectified by cancelling his name and replacing it with that of the family of **Ndonyi Irungu**. Further the registration of the appellant with regard to the suit premises was a first registration and therefore by dint of section 43(1) of the Registered Land Act the said registration could not be rectified, even if it was obtained fraudulently.

However the award has since been adopted as a judgment of the court. If I was to allow this appeal and set aside the award, what will be the fate of that judgment already entered by the learned magistrate on the basis of the award by Ndia Division Land Disputes Tribunal? In the case of **Wamwea v/s Catholic Diocese of Murang'a Registered Trustees, (2003) KLR 389**, confronted with a similar scenario **Justice Khamoni** had this to say:-

"**..... Where such a decision of the court exists therefore, what is the propriety of appealing against the mother decision of the tribunal or the mother decision of the appeals committee alone when in law, that decision has been overtaken by, and has become, a decision of the magistrate's court? Does that not result into inconsistent court decisions, one from a magistrate's court not appealed against and therefore existing and the other one from the High Court? Strictly looking at section 8 without more as Mr. Kahuthu maintains, is a magistrate's court decision not a decision of a court of law? Is it to be ignored? ..... in this matter, my judgment will not be inconsistent with the judgment of the magistrate's court in the matter although the two judgments will remain as two separate and independent judgments, the one in the magistrate's court not having been challenged in this court in this appeal .....**"

I am in total agreement with these observations. If I was to allow this appeals, there will definitely be two inconsistent and conflicting judgments from two courts; this court and of course the magistrate's court over the same issue. It would be totally absurd if that was allowed to happen. Of course in the Amended memorandum of appeal dated 4th February 2009, the appellant has sought to have this court hold that the judgment entered in terms of the Ndia Division land Disputes Tribunal in Baricho LDT 2 of 2004 was a nullity. I think that the appellant realised the awkwardness of his position and hence this prayer in the amended memorandum of appeal. However the same is not available to him. This is not a judicial review application. Further the decision of the learned magistrate aforesaid cannot be the subject of this appeal. Section 8(a) of the Land Disputes Act allows only appeals to this court from the decision of or award of the land disputes appeals committee and not from the decision of the magistrate's court adopting the award as a judgment of the court. If I was to entertain the prayer in the amended memorandum of appeal aforesaid, I will effectively be dealing with two appeals in one but from two different judicial organs viz magistrates court as well as from the tribunals under the land disputes tribunals. That is untenable. In any event no competent appeal, against the judgment of the magistrate's is before this court. That judgment was given on 30th June 2004. No formal appeal was strictly lodged in this court against the said decision within the stipulated time. Accordingly the prayer aforesaid in the amended memorandum of appeal is time barred. There is no evidence that the appellant sought and obtained leave to file an appeal against the magistrate's ruling aforesaid out of time. For all the foregoing reasons the prayer that this court holds the magistrate's decision aforesaid as a nullity is not available to the appellant with the consequence that, that judgment still stands.

The legal effect of the entry of the judgment in terms of the award was that the award ceased to exist. That being the case the only remedy available to the appellant was to challenge that decision by a separate appeal and or even by way of judicial review. As correctly observed by **Mr. Kiama**, as of now there is a valid judgment of the Resident magistrate dated 30th June 2004. Unless and until this judgment is set aside, the award of the land disputes Appeals Committee is incapable of being challenged since it is of no legal consequence. Whether the award of the appeals committee is set aside or not does not change the status of the judgment of the subordinate court.

On the basis of the foregoing I did not therefore find the authorities cited by the appellant in support of his case useful. The facts therein are clearly distinguishable from those obtaining in this case.

The end result of this appeal is that it lacks merit. Accordingly it is dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 30th November 2009

M. S. A. MAKHANDIA

JUDGE