



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Civil Appeal 791 of 2005

FAITH NYAMBURA NJIRI:.....:APPELLANT

VERSUS

JOSEPH MAINA NJIHIA:.....:1ST RESPONDENT

JANE WAMBUI NJIHIA:.....:2ND RESPONDENT

JUDGEMENT

The appellant has invoked the jurisdiction of this court, or alternatively she has chosen to approach the seat of justice vide a memorandum of appeal dated 11th day of October 2005 and filed on the 13th day of October 2005. Three grounds of appeal are put forward namely:-

- 1. The appeals tribunal erred in law in adjudicating matters affecting title to land without jurisdiction to do so.*
- 2. The appeals tribunal erred in considering extraneous matters to the appeal.*
- 3. The appeals tribunal erred in law in failing to consider that the Maragua/Mariira land disputes tribunal had no jurisdiction to consider matters affecting title to land Reference Numbers Loc. 2/Kangare/1961 and Loc. 2/Kangare/1962 in their case number 2/2003.*

In consequences thereof the applicant sought orders that:-

1. The award in the Maragua/Mariira case number 5 of 2002, and the Central Province land disputes Appeal Tribunal case number 30 of 2003 be set aside with costs to this appeal and the tribunals below be awarded to the appellants.

In his oral representations, counsel for the appellant put forward the following points:-

- Section 3 of the Land Dispute Act 1990 specifies the tribunals' mandate. In it, there is no power to deal with land titles.
- By dealing with land titles, the tribunals overstepped their bounds.
- The appellant is the registered owner of the suit land. Title was issued to her in 1993.

- It is their stand that by the time the matter went before Kigumo court, land had been given to the appellants' husband long before the appellant was registered in respect of the same.
- Concede that indeed they had moved to the high court, seeking orders to quash the judgement of the lower court, confirming the tribunals' award only to learn that in fact as at the time they moved to the high court, seeking judicial review the tribunals award had not been made a judgement of the court.
- Since there was no award, which had been adopted by the lower court, the only recourse they had to address their grievance was only an appeal.
- They also state that there is no provision which exist to declare the appeal a nullity.
- It is their stand that Maragua land tribunal attempted to nullify a title which was ultra vires.
- That they have put forward sufficient grounds to warrant the relief sought.

In response counsel for the respondent countered that submission with the following points:-

- Section 8 (9) of the tribunals Act makes provision that an appeal from the provincial appeals tribunal lies to the high court only on points of law.
- It is their stand that Registration of the title does not oust the jurisdiction of the land Disputes tribunal.
- Assert that the tribunal had jurisdiction to deal with the dispute.
- It is on record that the issue being raised on appeal was not raised before the tribunal.
- The appeal is incompetent as it was made over one year later, when it ought to have been raised before the tribunal.
- Contend that no provision of law has been cited to the court, to warrant the courts', intervention in their favour.
- The court, is urged to confirm the award so that litigation can be brought to an end.

In response to that submission by the respondents counsel, the appellants counsel reiterated the earlier grounds and then stressed the following points:-

- Irrespective of the mode of land registration, they still maintain that the tribunal has no jurisdiction to entertain issues relating to registered land.
- Irrespective of when the issue is raised the tribunal has no jurisdiction to deal with the matter.
- They contend that the tribunal overstepped its bounds.
- The issues of the appeal having been filed out of time does not arise as the appeal was accepted and has to be decided on its merits.

On the court's assessment of the facts herein, it is clear that the following facts don't seem to be in dispute.

1. The subject matter of the proceedings is registered land namely Loc.2/Kangari.1961,1962.
2. Proceedings were in the first instance initiated in Mariira land disputes tribunal vide case No. 5/2003.
3. The final decision of the tribunals decision was as follows:-

“.....the title deeds to be nullified and new ones issued bearing the names of these two children, Joseph Maina and Jane Wambui”

4. The award was filed in Thika CMS court vide case number 15 of 2002.

5. Before the award was confirmed the appellant ran to the high court, and filed HCCC Misc application number 427/2002 seeking to quash the adoption of the award by the Thika CMS court, but later realized that the award had not been adopted and so they terminated the proceedings for judicial review in the High court. The same was withdrawn. A subsequent attempt to revive the judicial review proceedings also flopped.

6. Upon realizing that the award had not been confirmed, the appellant moved to the provincial tribunal and filed appeal number 3/2003. The final result of that appeal is found in a communication emanating from the Provincial Commissioner to the District Commissioner Maragua dated 18th July 2005. the relevant portion reads:-

“.....on these grounds the appeal is hereby terminated and declared null and void. Any party in the matter is therefore at liberty to apply for any order in any court of law as DO’S case No. 15 of 2005”

The afore set out is the scenario that this court, has been called upon to resolve. The tool of trade the court, is called upon to use is non other than the Land Disputes Tribunals Act 1990, No. 18 of 1990. the appellant relies on section 3 of the said Act to support their case. Whereas the Respondent relies on section 8 of the same Act. The relevant portions reads:-

“Section 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 na determined by a tribunal established under section 4. Section 8 (1) Any party to a dispute under section 3 who is aggrieved by the decision of the tribunal may within 30 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.....

7. The decision of the Appeals Committee should be final on any issue of facts and no appeal shall lie there from to any court.

8. 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”

Due consideration has been made of these two provisions and applied them to the Rival arguments herein and the court, proceeds to make the following findings:-

1. It is correctly submitted by the applicant’s counsel, that since the tribunal has no jurisdiction to adjudicate over title to land, the entire proceedings were a nullity. Being a nullity the same was null and void abinitio. It means that the award emanating from these proceedings was also tainted with nullity and being so tainted, the tainting proceeded to affect all the transactions done within and without the various courts that handled the said award for whatever reasons.

2. By reason of what has been stated in number 1 above, it means that the entire proceedings in Thika CMCC NO. D.O.S case number 15 of 2002 were null and void and an exercise in futility as there was no valid award capable of being received by the said court, for purposes of confirmation.

3. Likewise since there was no valid award capable of being received by Thika CMC court for purposes of deliberation upon with a view of confirming the same. As such, all the proceedings undertaken by Thika CMC court in D.O.S. case no. 15 of 2002 are null and void and an exercise of futility.
4. likewise the judicial review proceedings vide Nairobi Misc application No. 427/2002 were null and void and an exercise in futility as there was no valid award capable of being received by Thika CMS court and which could be quashed by judicial review proceedings.
5. By reason of what has been stated in number 3 and 4 above, the purported appeal to the Nyeri Provincial Appeals Tribunal was null and void and an exercise in futility as there was no valid award of the land tribunal capable of being appealed against.
6. By reason of what has been stated above, the purported termination of the said appeal process by the provincial commissioner was null and void and of no consequence because there was no award capable of being appealed against.
7. Indeed from the record of the proceedings that were filed in the Thika CMS court, there were strong reasons for giving the orphans the land, it was however wrong on the part of the tribunal to purport to award the same on grounds of sympathy as courts of law and quazi judicial tribunals are enjoined to act according to law and not sympathies. That notwithstanding the beneficiaries of the said nullified award are not remediless. They are at liberty to commence declaratory proceedings seeking declaration of the existence of a trust in their favour, adduce evidence and should they win their case, the title to the suit land can be rectified to have the property changed into the orphans' names.
8. By reasons of what has been stated above in number 1, 2, 3, 4,5,6,7 and 8 the appeal has merit the same is allowed as prayed with costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2009.

R.N. NAMBUYE

JUDGE