



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

**AT NYERI**  
**Civil Appeal 91 of 2004**

**EPHRAIM KARIUKI WAMBUGU**

**GEORGE MATHANGANI WAMBUGU**

**KARIUKI MATHANGANI WAMBUGU**

**EPHRAIM GATHUMA KABUNGO**

**PETER WACHIRA MAINA..... APPELLANTS**

**VERSUS**

**MADALINA WANGUI MWANIKI ..... RESPONDENT**

*(Appeal from the decision of the Provincial Land Disputes Appeals Committee*

*Central Province which upheld the decision of the Nyeri Municipality Land Disputes tribunal)*

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

This appeal arises from the decision of the Provincial land Disputes appeals committee – Central Province, which upheld the decision of the Nyeri Municipality Land Disputes tribunal to the effect that the Respondent **Madalina Wangui Mwaniki** and her sisters are members of **Wambugu Mathangani's** family and that they should be beneficiaries of the land parcel number **Aguthi/Gatitu/3446**. The appellants being disappointed by this decision have through **Messrs Nderi & Kiingati** preferred this appeal. In their memorandum of appeal, the appellants fault the decision of the Provincial land Disputes appeal committee on 6 grounds to wit;

- 1. The Appeals committee erred in entertaining the appeal whereas neither the municipality land dispute tribunal nor itself had jurisdiction to entertain the respondent's claim.**
- 2. The committee erred in failing to find that the issue of succession could not be dealt with in the forums that they were presented by the respondent.**
- 3. The committee erred in failing to consider if the respondent was a beneficiary to the trust created concerning parcel of land in issue.**
- 4. The tribunal erred in law in awarding land to people not parties to the dispute.**
- 5. The committee erred in failing to evaluate the issues that were put before them which were not**

**within its mandate to entertain.**

**6. The tribunals failed to address themselves to parties in the suit especially deceased persons among the appellants.**

The brief facts of the case are that on 24<sup>th</sup> May, 2001, the respondent commenced proceedings before the Nyeri Municipality land disputes tribunal claiming for herself and her sisters a share in land parcel No. **Aguthi/Gatitu/3446**. It would appear that the respondent's claim was on the footing of a declaration that she and her sisters ought to have been treated as heirs to a portion of the aforesaid land by reason of consanguinity with the original owner thereof. The appellants on other hand took the position that the respondents were not entitled to a portion of the parcel of land as she and her sisters were married and had land elsewhere. The tribunal having considered the evidence on both sides reached the decision interlia:

**“..... We severally recommend that the beneficiaries of Nyinyu Wambugu namely Madalina Wangui Mwaniki, Faith Muthoni Nyinyu and the offspring of the late Lydia Wanjiku Nyinyu be allotted equal share in land parcel No. Aguthi/Gatitu/3446 like any other member of Wambugu Mathangani's family.....”**

The decision was on appeal confirmed by the Provincial Land Disputes Appeal committee, hence this further appeal.

When the appeal came up for hearing, the appellant was represented by **Mr. Nderi**, learned counsel whereas the Respondent was represented by **Mr. Muthoni**, learned counsel as well. The respective counsel agreed that instead of the appeal being heard by way of oral submissions they would rather that they tender written submissions in support of their respective positions. It was therefore agreed by consent that the appeal be heard by way of written submissions. Counsel duly filed their written submissions which I have carefully read and considered.

The first issue raised by the appellant is one 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 Tribunal Act. The respondent countered that argument by stating that the appellants participated meaningfully in both tribunals and never raised the issue of jurisdiction. Secondly, counsel for the respondent submitted that the tribunals had jurisdiction to entertain the dispute, as it was one based on a claim to work or occupy land.

My take on this is that section 3(1) of the land Disputes Tribunals Act provide that **“..... 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, shall be heard and determined by tribunal under section.**

Having carefully read the award, I am tempted to agree with **Mr. Muthoni** learned counsel for the appellant. Although the respondent's plea would appear like she is seeking declaration, a careful consideration of her evidence clearly show that her claim is based on her right to occupy and or work land. That being the case therefore both tribunals had the necessary mandate to entertain the claim. Further I note that 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 award? 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 regarding the issue.

**“..... 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 appeal, 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. That should not be allowed to happen as it will open the judiciary to public ridicule and may well become a laughing stock in the eyes of the public. Instead of filing this appeal, it was open to the appellant to challenge the judgment of the magistrate's court by way of judicial review. They did not. Accordingly that judgment still stands. It has neither been reviewed and or set aside. On this basis the grounds of appeal touching on jurisdiction must of necessity fail.

The other issue raised by the appellant deals with the succession. It is the contention of the appellant that the tribunals dealt with and determined an issue relating to the deceased person's estate, a mandate specifically reserved for the High Court under the law of succession Act. It also proceeded to deal with issues that transcends the Trustee's Act by trying to determine a trust that had been put into effect under another jurisdiction.

The Respondent's take on this was that there was no issue of succession being determined by the tribunals as it had found that the appellants were registered as trustees of the land in issue. The tribunals merely affirmed the respondent's right to work and or occupy the land, a fortiori, the tribunals were not sitting as succession courts.

Looking carefully at the award again, I am unable to agree with the submissions of the learned counsel for the appellant. There is no evidence on record that the suit premises were the subject of succession proceedings. The tribunals merely asserted the respondent's right to the land. By so doing the tribunals cannot be accused of usurping powers of the High Court in succession matters. How about trust? Did the tribunals undermine a trust that had been put into effect under another jurisdiction as alleged by the appellants? I do not think so. The tribunals did not at all determine a trust. The decision cannot be said to have determined and or undermined the trust already in place.

The appellant has also raised the issue that in the award, the tribunals awarded land to strangers and even those who were dead. The evidence on record does not support those contentions by the appellants. There is no proof on record that persons or people who were not parties to the dispute were given land. One would have expected that the appellant would back up this claim by giving the names of the alleged strangers and the acreage of the land awarded to them. To the extent that no such details have been proffered, the appellants' assertion can only be treated as a mere allegation. The same goes for the contention by the appellants that some of the beneficiaries of the award were dead. There is absolutely nothing on record to show that the arbitration proceedings were conducted when some of the appellants were dead. The appellants or one of them should have brought forth the information to the tribunal. Nothing stopped them from alerting the tribunal that one of them had passed on. It was not up to the Respondent to inform the tribunals. The appellants having failed to pass on the information to the tribunals regarding the death of one of their own cannot now be heard to complain. It appears that they chose to hide this information from the tribunal for reasons best known to themselves. They should suffer the consequences.

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 31<sup>st</sup> day of January 2008***

**M. S. A. MAKHANDIA**

**JUDGE**