



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

Civil Appeal 27 of 2003

GELARD WANJOHI MUTHOGO.....APPELLANT

VERSUS

BENSON RUMURU MWANGI.....RESPONDENT

(From original Judgment of the Provincial Lands Disputes Appeals Tribunal, Nyeri No.30 of 2002 delivered on 23.1.2003)

J U D G M E N T

The appellant and respondent herein are brothers. The appellant is the elder brother of the respondent. The genesis of this appeal is land reference number **Kiine/Kibingoti-Ngunguni/647** hereinafter referred to as “*the suit premises.*” According to the appellant he, single handedly bought the suit premises from **Mutugi Kithongo** and had himself registered as the proprietor in or about 29th July, 1985. However according to the respondent, he jointly purchased the suit premises with the appellant by contributing towards the purchase price of Ksh.48,300/= . As the respondent was residing on and taking care of another piece of land, he allowed his brother to take possession of the suit premises. Since then the respondent has severally approached the appellant to have the suit premises subdivided so that he can have his portion transferred and registered in his name. The appellant has all along refused to accede to the request.

The respondent having exhausted his patience with the appellant, he opted to commence proceedings to vindicate his claim with regard to the suit premises in the land disputes tribunal at Baricho. The tribunal having listened to both the appellant, the respondent and there witnesses made an award to this effect.

“.....Having considered all these factors it is evident that this land was jointly bought by the two brothers despite the registered owner being the objector because the witness there. It is therefore important to note that the two brothers should share their land equally. It is therefore ordered that the land parcel Kiine/Kibingoti-Ngunguni/647 to be shared as follows:-

Benson Rumuru Mwangi 1 ½ acres Gerald Wanjohi Muthongo 1½ acres.....”

The appellant was not happy with the award. Accordingly and pursuant to the provisions of the Land Disputes Tribunal Act, he lodged an appeal against the award to the Provincial Land Disputes Appeals Committee, Central Province. Having listened to the appeal, the Provincial Land Disputes Appeals Committee made the following determination;

“.....From the evidence adduced and the documents available the suit land must belong to the

two brothers – the appellant and the respondent. In the circumstances the panel has upheld the judgment of Kirinyaga land Tribunal that the suit land be subdivided as follows:-

- 1) Gerald Wanjohi (appellant) get 1.5 acres**
- 2) Benson Rumuru Mwangi (respondent) get 1.5 acres.....”**

Still unsatisfied with the above, the appellant lodged the instant appeal. In his memorandum of appeal, the appellant has advanced 3 grounds of appeal to wit:-

- 1. There was no land control board consent for the sale of Kiine/Kibingoti/Nguguini/647 to the respondent and both the decision of the Land Disputes Tribunal Baricho and the Provincial Land Dispute Appeals Tribunal were erroneous in law.**
- 2. Even so, the order of both tribunals to sub-divide the suit property was illegal.**
- 3. That the decree drawn by the Resident magistrate’s Court at Baricho in Land disputes Tribunal is contrary to Order XXII rule 7 of the Civil Procedure Act chapter 21, Laws of Kenya.**

When the appeal came up for hearing before me, the appellant was represented by **Mr. Mahan**, learned counsel whereas the respondent was represented by **Mr. Ndirangu**, learned counsel as well. They all agreed that the instant appeal be determined by way of written submissions rather than oral submissions. Accordingly both parties filed written submissions which I have carefully read and considered.

Pursuant to *section 8* of the Land disputes Tribunal Act, an appeal from the decision of the provincial land disputes appeals committee only lies to this court on points of law. On 6th July, 2004, **lady justice Okwengu** having perused the memorandum of appeal was satisfied that indeed issues of law were raised therein. What is the 1st issue of law raised? That there was no land control board consent for the sale of the suit premises to the respondent. Accordingly the decision of the Lands Disputes Tribunal Baricho and which was confirmed by the Provincial Disputes Appeals Committee was erroneous. What the appellant seem to be saying is that the suit premises was registered in his name and that all the transactions relating to the suit premises were between the their registered owner and the appellant to the exclusion of the respondent. That if indeed the respondent had jointly purchased the suit premises then they should have jointly sought and obtained the necessary land control board consent to the transfer. That from the evidence of the respondent in the tribunal, he concedes that several attempts were made to obtain the land control board consent, but for one reason or another no consent was ever given by the board to the respondent. To the appellant, by the two tribunals not considering this issue which is a matter of law, they gravely erred. The appellant sought solace in the decision of the court of appeal in **Nelson Githinji & Anor V Munene Ngunju C.A. NO.137 of 1987** (Unreported)

In response, the respondent takes the view that the issue was never canvassed before the two tribunals, secondly, the dispute before the tribunals was not hinged on consent but on a right to ½ portion of land bought together by the appellant and the respondent and in which the appellant was registered as the proprietor of the same on behalf of himself and the respondent, both having contributed to the purchase of the suit premises and finally, the respondent contended that the issue of consent cannot arise as he never claimed that the appellant was selling the suit premises to him.

I must from the onset state that an issue of law can be raised at any stage. It does not really matter that the issue was never raised and or canvassed before the Land Disputes Tribunal and or the Provincial Land Disputes appeals committee. In the case of **Nelson Githinji (Supra)** the court of appeal observed

“...The transaction for which the respondent sought specific performance required the consent of the relevant land control board. This was a legal requirement. The effect of the arbitrator’s award was to grant the respondent the specific performance he sought. If no consent of the relevant land control board was obtained, then, that award was illegal.....In the

circumstances obtaining to the proceedings before the arbitrator, we are in no doubt that the award was made without the understanding the relevant law....”

There is no doubt that the instant suit premises was agricultural land. Accordingly, the relevant land control board was absolutely necessary to the sale and subsequent transfer to the appellant of the suit premises. It does appear however that the appellant did obtain the relevant consent of the land control board to the transfer. If I understand correctly the respondent’s case, he is claiming his share in the suit premises which he jointly purchased with the appellant but had the same registered in the name of the appellant. If this be the case, then the issue of the consent of the land control board cannot arise. Had the respondent been claiming that the appellant was selling him a portion of the suit premises, then perhaps the issue of consent would have been but a relevant consideration. That being my view of the matter, I would dismiss the first ground of appeal.

On the 2nd ground, the appellant submits that section 3 of the Land Disputes Tribunal Act does not give jurisdiction to the Land Disputes Tribunal on matters of trust which is what the respondent was claiming, secondly that members of the tribunal did not all sign the award; therefore ipso facto the award was a nullity and finally that the respondent’s claim was time barred.

On his part, the respondent countered the above arguments by saying that the order to subdivide the land could not and in fact was not illegal. It flowed from the findings that the land belonged to both the appellant and respondent.

Section 3 of the Land Disputes Tribunal confers jurisdiction to the Land Disputes Tribunal to hear certain disputes relating to land. Trust is certainly not among those disputes that the Land Disputes Tribunal can adjudicate upon. The respondent’s claim is that he bought the suit premises jointly with the appellant. However the appellant ended up being registered as the sole proprietor. Though so registered, it would appear to be the case of the respondent that, he still holds a portion of the land in trust for the respondent and that is why he was asking the tribunal to order the appellant to subdivide the suit premises so that he may get his portion. That being the case, both tribunals lacked jurisdiction to entertain such proceedings. In upholding the respondent’s claim, the tribunals were effectively confirming the respondent’s contention that the appellant held a portion of the suit premises in trust for him as they had jointly purchased the same. This was not the proper forum to ventilate such an issue. The respondent’s remedy in my view lies elsewhere.

I have also carefully perused the original award of the Land Disputes Tribunal at Baricho. The panel of the elders who made the award were three. It would have been expected that the three elders **Joseph Kangangi, Nelson Muchiri** and **Joel Magondu** would all append their signatures to the award. However it would appear that they did not. The award it would appear was signed by one person on behalf of the rest. If that was not the case then there would have been no point in having prefix “**For**” before the purported signatures of **Nelson Muchiri** and **Joel Magondu**. The award having not been signed by the elders as required it was a nullity and therefore the Provincial Land Appeals committee had no business confirming it.

From the record, it does appear that the suit premises were allegedly bought jointly in 1982. The respondent said so in his testimony before the land Disputes Tribunal and the provincial Land Disputes Appeals committee. The proceedings before the Land Disputes Tribunal commenced in the year 2002. This was exactly 20 years after the cause of action arose. Section 13(3) of the Land Disputes Tribunal Act specifically bars tribunals from entertaining proceedings in respect of which the time for bringing such proceedings is barred under any law relating to Limitation of Actions. A claim to recover land cannot be brought and or adjudicated upon after 20 years. Under the Limitation of Actions Act, such claim must be brought within 12 years. The claim having been brought after 20 years, the tribunal certainly lacked jurisdiction to entertain the same.

In the final analysis, I find that ground two in the memorandum of appeal has considerable merit and I allow it. It is sufficient to dispose off this appeal. I do not need to consider the last ground of appeal in the circumstances.

I therefore, allow the appeal and set aside the judgment of the Provincial Land Disputes Appeals Committee. I further direct that the decree issued in respect of Land Disputes Tribunal case number 17 of 2002 in the Resident Magistrate's Court at Baricho dated 13th August, 2002 be and is hereby set aside.

Since the appellant and respondents are close relatives, brothers in fact, I would wish to spare them the pain of one of them having to pay costs of the proceedings to the other. Each party shall therefore bear his own costs.

Orders accordingly.

Dated and delivered at Nyeri this 31st day of January, 2008.

M.S.A. MAKHANDIA

JUDGE