



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

**Civil Appeal 12 of 2003**

**JANE WANGARI KAIRU**

**JOHNSON MACHARIA KAIRU..... APPELLANTS**

**VERSUS**

**JANE WACHUKA KARIUKI..... RESPONDENT**

*(Appeal from the award and decision of the Central Province Land Disputes Appeals Committee made on 29<sup>th</sup> January 2003)*

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

This is an appeal from the award and decision of the Central Province Land Disputes Appeals Committee made on 29<sup>th</sup> January 2003. That decision arose from an appeal lodged by the appellants from an award made by Nyeri Municipality Land Disputes tribunal in which it awarded 1 acre out of Land Parcel No. **Aguthi/Muruguru/615** to the Respondent herein. The Central Province Land Disputes appeals committee, hereinafter referred to as "*the appeals committee*" having heard the appeal came to the conclusion that "**..... The defendant had been cultivating one acre of land, parcel Aguthi/Muruguru/615 for over 34 years. Considering other facts in law appeal committee has no jurisdiction to hear res judicata case. The appeal is dismissed with costs.....**" It is this decision that has triggered this appeal. Through Messrs S.K. Njuguna & Co. Advocates, the appellants lodged the instant appeal setting out 6 grounds of appeal in their memorandum of appeal. They are as follows:-

- 1. That the Appeals Committee erred in law in failing to address itself to the point of law raised by the Appellants that by awarding one acre out of the Appellant's piece of land to Respondent, the District Land Disputes Tribunal erred in law as the (sale) transaction was null and void under Section 6 of the Land Control Act, Chapter 302, Laws of Kenya.**
- 2. That the appeals committee erred in law in failing to address itself to the ground of appeal raised by the appellants that the District Land Disputes Tribunal which heard this matter had no jurisdiction to hear and make a decision to enforce a contract which had already been rendered null and void under section 6 of the Land Control Act.**
- 3. That the Appeals Committee erred in law when it failed to address itself to the issue raised that the District Land Disputes Tribunal had no jurisdiction to make an order for specific performance on a contract or agreement for sale of land.**

**4. That the Appeals Committee erred in law in failing to appreciate and make a finding on the ground of appeal that even if the Respondent was buying a portion of one acre from the deceased husband of 1<sup>st</sup> Appellant who was also the father of the 2<sup>nd</sup> Appellant herein, sometimes in 1970 the sale agreement had been rendered void for all purposes as no consent was obtained within 3 months from the date of the alleged sale agreement.**

**5. That the Appeals Committee erred in law in finding that the case before it was res judicata whereas the High Court did not decide the matters in dispute between the appellants and the Respondent (the appellants will crave for the production of the High Court file).**

**6. That the Appeals Committee erred in law by its ignorance of the provisions of the Land control Act in regard to the refund of the purchase price in respect of a void transaction.**

The background to this appeal as can be captured from the evidence on the record of appeal as well as the supplementary record of appeal is that, one **Kairu Wambugu**, deceased was the husband of the 1<sup>st</sup> appellant and the father to the 2<sup>nd</sup> appellant. He was the registered owner of land parcel number **Aguthi/Muruguru/615** hereinafter referred to as “the suit premises”. The Respondent claimed that the deceased had sold to her one acre out of the suit premises for which she had fully paid the purchase price but that the deceased had died before he had transferred and registered in the Respondent’s name that portion of land that she had purchased.

The deceased passed on sometimes on 11<sup>th</sup> March 1981. Letters of administration were taken out by the appellants in succession cause number 22 of 1984 in the High Court of Kenya at Nairobi. On 31<sup>st</sup> January 2000 the temporary letters of administration aforesaid were confirmed on the basis that the suit premises would be registered in the joint names of the appellants in undivided shares. Pursuant to the confirmed grant a new title deed in respect of the suit premises was issued in the joint names of the appellants.

Upon obtaining the title deed as aforesaid the appellants filed a dispute with the Nyeri Municipality land disputes tribunal claiming that the respondent was trespassing and cultivating a portion of the suit premises belonging to the appellants and they sought to have the Respondent stopped from interfering with that suit premises and to give vacant possession of the portion that she occupies.

The respondent on the other stated that she was not a trespasser as she had purchased from the deceased one acre from the suit premises and had fully paid the purchase price of Kshs.50,000/=.

Having weighed and considered the evidence adduced by the Respective parties, the tribunal resolved the issue in favour of the respondent by holding that **“Jane Wachuka be given her 1 acre which she bought from the late Kairu Wambugu. The later title deed be surrendered to the chief magistrate’s court which is being held by the claimants.”**

Dissatisfied with the decision, the appellant preferred an appeal to the appeals committee faulting the tribunal’s award on the grounds that it had no jurisdiction to make an order of specific performance on contract, the award was founded on a null and void transaction pursuant to section 6 of the land control Act etc.

The appeals committee having considered the appeal carefully, dismissed the appeal holding that it had **“no jurisdiction to hear res judicata case .....”**

When the appeal came before me for hearing, the appellant’s were represented by **Mr. Njuguna** whereas the respondent was represented by **Mr. Kiminda**, both learned counsels. By the consent of counsel, it was agreed that this appeal be disposed off by way of written submissions instead of oral submissions. Counsel duly filed their respective submissions in support of and in opposition to the appeal together with authorities which I have carefully read and considered.

To my mind the case before the tribunal was simple and straightforward. It was to determine whether or not the respondent was trespasser. The case for the appellants was that the respondent was a trespasser on the suit premises and that as she was cultivating a portion of it, they wanted her to be ordered to give vacant possession. The net effect of the decision handed down by the tribunal was to give to the Respondent what she had not asked for. The tribunal had no business doing so. As correctly submitted by learned counsel for the appellant, it would appear that due to the matters the tribunal was mandated to hear by the land disputes tribunal Act under section 3(1) of the Act, parliament did not deem it necessary for a defendant cum respondent before the said tribunal to file a counterclaim or even to argue a counterclaim. All that a defendant is required to do under section 3(5) of the said Act is to **“file with the tribunal an answer containing a reply to the matters stated in the claim” and a summary of the facts upon which he wishes to reply**”. Consequently in ordering the appellant’s to surrender to the respondent an acre out of the suit premises; the tribunal was acting as though there was a counterclaim brought in the proceedings by the Respondent when there was none. All that the tribunal was required to establish was whether or not the respondent was a trespasser, period! and nothing more. It would appear from the award that the tribunal was convinced that the Respondent was not a trespasser to the suit premises but was in lawful occupation thereof. Having held so it should have proceeded to dismiss the claim. In ordering otherwise, the tribunal acted in excess of jurisdiction. I would also point out that if the decision of the tribunal was to be implemented it would amount to subdivision of the suit premises into two parcels of land and opening a register in respect of each subdivision and thereafter the transfer of the subdivision of one acre to the respondent. If that be case, the tribunal would in effect have dealt with a claim relating to title to land. Such dispute is not, in my view, within the purview of section 3(1) of the land disputes tribunal. See **Jotham Amunavi v/s The Chairman Sabatia Division Land Disputes tribunal & Another, C.A. No. 256 of 2002 (unreported)**. See also **Wamwea v/s Catholic Diocese of Murang’a Registered Trustees (2003) KLR 389** where justice Khamoni held at page 394 line 2 that:

**“..... Disputes over title to land are not within the jurisdiction of tribunal and Lands Disputes appeals Committee. It can also be said that disputes over contracts are not under that jurisdiction.....”**

Although this is a decision of the High Court which is not binding on me I am nonetheless in agreement with the reasoning. It would appear therefore that in compelling the appellants to transfer to the Respondent an acre out of the suit premises, the tribunal was in effect enforcing a contract for the sale of land which jurisdiction it does not have. In so ordering therefore the tribunal acted ultra viresly. As already stated the tribunal should have confined itself to the case of trespass put forth by the appellant only.

Even assuming that the tribunal had such jurisdiction, the award would still have come a cropper for want of consent by the relevant Divisional land control board. The respondent claimed that she had purchased a portion of the suit premises. This being an agricultural land, the consent of the appropriate land control board to the transaction was necessary. No such consent had been obtained. Accordingly, the transaction had become void by virtue of section 6 of the land control board. On this issue, the respondent has submitted that the issue of consent never arose before the land disputes tribunal and an attempt to raise it was only made in the appeals committee. My take on this is that the issue of consent is a matter of law. It matters not at what stage it is raised. Having raised the same at the appeals committee stage, the appeals committee was duty bound to consider it. It did not and ended up effectively endorsing an award which the tribunal had made without jurisdiction in that it ordered specific performance of a contract for the sale of land where no land control board’s consent had been obtained. The respondent has also submitted that the land disputes tribunal in the unique circumstances of this case, where even before the filing of the succession cause, the road was demarcated at the request of the appellant and agreement reached on the filing of the succession cause, the tribunal was correct in upholding that the Respondent was entitled to one (1) acre. My response to that submission is very simple. No unique circumstances can turn an illegality to a legality. No unique circumstances can confer jurisdiction where there is none. To my mind the respondent’s remedy over her claim to one acre of the suit premises lies elsewhere and not in the tribunal proceedings.

Was the appeals committee right in refusing to deal with the issues raised in the appeal because of the

doctrine of Res judicata? According to the respondent, members of the appeals committee being laymen may have misapprehended the meaning of Res judicata. However they appreciated the facts before the tribunal. To the appellant however, the appeals committee erred in law by failing to allow the appeal before it on the grounds that it had no jurisdiction to hear the case as it was res judicata. I agree with submission of the learned counsel for the appellants. The Respondent was not a party to the High Court Succession cause. Indeed the parties to that cause were the appellants herein. Further the issue of the sale of the one acre to the Respondent was not an issue in the proceedings nor was a decision made thereon in the succession case. Accordingly the doctrine of Res judicata was inapplicable in the circumstances of the case. In invoking the same and as correctly submitted by learned counsel for the Respondent, the appeals committee misapprehended the meaning of the same. The appeals committee therefore ought to have considered the issues raised in the appeal before it and made a determination thereof. In failing to do so under the pretext that the matter was Res Judicata, the appeals committee gravely erred.

In the end, I have come to the inevitable conclusion that the appeal has considerable merit. Accordingly, I allow it and set aside both decisions of the Land Disputes tribunal and the Provincial Land Disputes appeals committee dated 2<sup>nd</sup> March, 2002 and 29<sup>th</sup> January 2003 respectively. Considering the unique nature of the proceedings and the circumstances obtaining I make no order as to costs. The appellants other prayer in the appeal was for the eviction of the Respondent which I decline to grant as it has not been established that she is a trespasser.

*Dated and delivered at Nyeri this 31<sup>st</sup> day of January 2008*

**M. S. A. MAKHANDIA**

**JUDGE**