



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

Civil Appeal 116 of 1999

JOSEPH GATERI APPELLANT

VERSUS

ESTHER MICHERE GATIMU RESPONDENT

(Appeal from the Ruling of the Central Province Appeals Committee at Nyeri Case No. 141 of 1999 as entered by Mr. W. N. Njagi Senior Resident Magistrate in Kerugoya LDT 49 of 1999 on 8th October 1999.)

J U D G M E N T

This appeal arisen from the judgment of **W. N. Njage**, Senior Resident Magistrate in Kerugoya SRM LDT 49 of 1999 in which the learned magistrate entered judgment in terms of the award of the Central Province Land Disputes Appeals Committee which was made on 2nd September 1990. It was the holding of the Central Province land disputes appeals committee that “..... **the land Disputes appeals tribunal is not competent to hear succession case as it would be ultra vires..... Because it does not fall under section 3 of the Act 18 of 1990, Baricho Land Disputes should not have heard this The only open recourse is to appeal the matter to the High Court.....**” The appellant felt aggrieved by this decision and hence preferred this appeal setting out 7 grounds through **Messrs J.N. Mbuthia & Co. Advocates**. The said grounds of appeal are as follows:-

- 1. The appeals committee judgment was wrong, void and a nullity as so (sic) judgment was ever entered in respect of the District Land Disputes Tribunal award made on 15.6.99 and filed in court as LDT Case No. 33 of 1999 hence no appeal could in law be filed nor entertained.**
- 2. The Provincial Appeals Committee erred in making an award without the statement made by the parties.**
- 3. The Provincial Appeals Committee wrongly and erratically divested itself of jurisdiction despite the same being statutory when the said committee refused to her the appeal on the mistaken belief that the committee was dealing with a succession case. Their finding was contrary to the order of reference by Justice J. L. A. Osiemo dated 1.2.92 and an earlier order of 11.7.90 that the appellant’s father files a civil case.**
- 4. The Committee further erred in law in finding that an appeal should have been filed in Nyeri High Court Succession Cause No. 36 of 1986 without the said committee taking cognisance of the judge’s order in the same succession cause (Ruling of 11.7.90).**

5. The Committee misapplied the law relating to the limitation of actions and in finding as a consequence that the claim by the applicant should not have been entertained.

6. The committee wrongly and irrelevantly referred to a land parcel No. Mwerua/Kiandai/31 which parcel was never in dispute.

7. The Committee failed to exercise even the most basic requirements of any tribunal to give issues full consideration, to record evidence or arguments by both sides and to base the decision on the said arguments.

The brief facts of the case as captured from the record are as follows:-

Mr. **Moses Mutuanguru Kangethe** now deceased filed in this court civil case number 9 of 1991 against the Respondent who happens to be his daughter praying for:-

(a) A declaration that the whole land parcel No. Mwerua/Kiandai/586 legally vests to the plaintiff and an order to the District Land Registrar to register the same in the name of the plaintiff.

(b) An order that the Defendant doth execute all documents of transfer in default the executive officer of the court to be authorised to execute the same.

(c) The costs of this suit

(d) Any other relief and or alternative order which this Honourable Court may deem fit.

The defendant who is the respondent herein as expected denied the claim maintaining that the land parcel **Mwerua/Kiandai/586** is the property of the Estate of late **Josiah Gatimu** and the Plaintiff or any other person has no interest in the said land. That the suit premises vest to the beneficiaries of the estate of the late **Josiah Gatimu** and the plaintiff is not entitled to orders sought in the plaint.

The case was then referred to arbitration. The terms of reference were that the District officer was to be assisted by 4 elders to be nominated by either side. The arbitration panel having listened to the parties returned a verdict which was filed in court. An application by way of notice of motion was subsequently filed seeking to set aside the said award which had been filed in court on 1st February 1992. The main ground for the application was that the award was not signed by all the elders. Justice Osiemo heard the application and by a ruling dated 21st February, 1997 allowed the application. The learned judge proceeded to set aside the elders award but simultaneously ordered that the dispute again be referred to the Lands Disputes tribunal for arbitration.

The second tribunal having listened to the dispute and taken evidence of the parties to the dispute and their witnesses returned a verdict in favour of the appellant saying “..... ***the court found between claimant and objector and both witnesses the land belong to the company. It is true (sic) Moses Mutuanguru (deceased) to be given land parcel Mwerua/Kiandai/586 and because of the objector entering (sic) the claimant a great loss, the objector to meet the cost....***”

It would appear that the Respondent was not happy with the decision and therefore lodged an appeal to the provincial lands Disputes appeals committee at Nyeri and as already stated the committee dismissed the appeal. It was then that the appellant lodged this appeal.

When the appeal came up for hearing before me, the appellant was represented by **Mr. Mbuthia** whereas the respondent was represented by **Mr. Nganga**, both learned counsels. By consent of the respective counsel it was agreed that the appeal be heard and determined by way of written submissions. Subsequent thereto written submissions were filed. I have carefully read and considered them.

I think that this appeal can be determined on one issue only and which is whether the reference to

arbitration by Justice Osiemo of the dispute was in accordance with the Lands Disputes tribunal or under order 45 of the Civil Procedure Rules. It is the appellant's submission that the referral to the tribunal was for "arbitration" meaning that the award was supposed to be filed in the High Court. The reference was therefore strictly not in accordance with the Land Disputes tribunal Act which confers limited jurisdiction to the land Disputes tribunal under section 3 of the said Act but in accordance with order 45 of the Civil Procedure Rules. The respondent in her written submissions did not directly respond to the issue. However she submitted that by the Honourable Judge referring the dispute to the land Disputes tribunal, he was only putting the matter before the right forum to deal with all issues in regard to the matter.

In my view the order referring the dispute to the Land Disputes tribunal for arbitration having been made by this court, the award thereof ought to have been filed in this court. Strictly speaking therefore I do not think that the proceedings in the tribunal were to be conducted in accordance with the Land Disputes tribunal. Indeed although the order by **justice Osiemo** did not specifically state under what provision of the law the matter was being referred to the land Disputes tribunal for arbitration so that it was ambiguous as to whether the same was being referred for arbitration under order 45 of the Civil Procedure Rules or under the Land Disputes tribunal Act, I find that the reference could not have been made under the Land Disputes tribunal Act. This is because the dispute as is evident from the plaint and prayers sought went beyond the jurisdiction of such a tribunal as provided under the land Disputes tribunal Act that limits the jurisdiction of the tribunal to dealing with disputes relating to:-

- (a) **The division of or the determination of boundaries of land including land held in common.**
- (b) **A claim to occupy or work land, or**
- (c) **Trespass to land.**

In this case the issues raised included an issue as to whether the Respondent was holding the land in trust for the appellant. This being the case the only arbitration process available to the parties could only have been pursuant to the provisions of order 45 of the Civil Procedure Rules. I am further fortified in this holding by the fact that to date the case HCCC No. 9 of 1991 in which the order for arbitration was made is still alive. Further, an award made under the land Disputes tribunal cannot be filed in the High Court but in the subordinate court.

In my considered opinion the land Disputes tribunal erred in handling the reference as though it was under the Land Disputes tribunal. The tribunal obviously misconstrued and misinterpreted **justice Osiemo's** order. The tribunal complicated the matters further by filing the award in the SRM's Court, Kerugoya when the suit in the High Court was still pending. As correctly submitted by the appellant, the respondent herein had only one option if he was dissatisfied with the decision, to apply to set aside the award under order 45 rule 15(1)(a) and (b) of the Civil Procedure rules, as the reference of the dispute to arbitration was made in accordance with the said order.

In the circumstances outlined above I find that the award of the lands Disputes tribunal was a nullity as the same was made outside the jurisdiction of the tribunal and was not filed in the case pending in the High Court. Consequently the appeal before the appeals committee was also a nullity.

I therefore allow this appeal and set aside both the award of the Land Disputes tribunal and the decision of the provincial appeals committee. That is to say that the parties must now revert back to HCCC No. 9 of 1991 for any recourse. As none of the parties are to blame for the confusion, each party shall bear his or her own costs.

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

M. S. A. MAKHANDIA

JUDGE