REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 53 of 2002

DANSON MUTUKU MUEMA ..……. APPELLANT

AND

JULIUS MUTHOKA NDOLO & ANOTHER …….....…..... RESPONDENT

(Being an appeal under Section 8 (9) of the Land Disputes Tribunals Act, 1990 against the decision of the Provincial Land Disputes Appeals Committee, Eastern Province dated 8/04/2002 in Appeal No. 23 of 2001 against the decision of the Machakos Land Disputes Tribunal Case No. 4of 2000.)

JUDGMENT OF THE COURT

1. Danson Mutuku Muema, the appellant herein, was the objector in Machakos Land Disputes Tribunal Case Number 4 of 2000 which was a claim for determination of boundaries in Plot No. 312, 276 and 275 within Mua Hills Settlement Scheme. The claimants in that dispute were the present respondents. The claimant's claim was that the appellant had since 1989 continuously interfered with the public road access, public borehole and public dam to the injury and the interests of the members of the public entitled to their use and enjoyment. The five members of the panel that heard the complaint ruled that Dam No. 312, site of the borehole and access road were all public utilities and that DANSON MUTUKU MUEMA should surrender them to the public.

2. Being dissatisfied with the Land Disputes Tribunal's findings, the appellant appealed to the Provincial Land Disputes Appeals Committee in Embu vide Appeal No. 23 of 2001. The respondents herein were also the respondents in the appeal before the Provincial Land Disputes Appeals Committee. The appellant's case was that the Machakos Land Disputes Tribunal had no powers to hear and determine the case as the case had allegedly already been heard and determined by the High Court in Civil Appeal No. 6 of 1991. He also stated that the land in dispute was allocated to him by the Settlement Scheme under the Registered Land Act, Cap 300 and therefore that the respondents had no right to claim a part of what rightfully belonged to him. Finally, the appellant told the Appeals Committee that there was no authority from the Director of Lands directing that the disputed portions of land were public lands.

3. The respondent, JULIUS MUTHOKA NDOLO (Ndolo) said that his portion of land being plot number 278 in Mua Hills Settlement Scheme was allocated to him way back in 1962 and that the plot borders an access road being plot number 276. That the access road leads to plot number 312 which is a public dam and that there is also a public borehole along the public road. Ndolo also said that plot no. 276 was originally allocated to one ANTONY MWENGA who in turn sold it to the appellant herein. He also said that the three public utilities were set apart as such and that they were not part of plot 276. He produced certain correspondent to support his claims and in particular a letter ref LO/289/278/37 dated 9/10/1991 from the Director of Land Adjudication and Settlement directing the Chief Land Registrar to withhold registration of plot numbers 7, 8, 51, 52, 93, 108, 115, 131, 195, 281, 282, 286, 287, 288, 292.

298, 300, 302, 303, 304, 307, 311, 312, 318, and 319 until resurvey of the same had been completed. The letter was copied to the Director of Surveys and also to the District Land Adjudication and Settlement Officer, Machakos.

4. Upon conclusion of the hearing of the appeal, the Provincial Appeals Committee dismissed the appeal and ordered the Ministry of Lands and Settlement to engage a surveyor for the purpose of clearly mapping out the three public utilities namely the dam, borehole and public access road. The committee also recommended legal action against the appellant herein if he should trespass upon the public utility areas in the future.

5. It is against that judgment of the Provincial Appeals Committee that the appellant has appealed to this Court. The amended Memorandum of Appeal duly filed in Court on 11/11/2005 sets out eight grounds of appeal as follows:-

a. The provincial appeals Committee erred in law in failing to note, appreciate and hold that neither the Machakos District Land Disputes Tribunal nor itself had jurisdiction to entertain the claim in issue in view of the fact that the dispute herein having involved the issue of legal Title to alleged Public utilities, did not fall under the provisions of Section 3(1) (a) (b) and (c) of the Land Disputes Tribunal Act and did not involve any issues of customary law but fell to be determined by the High Court under Section 159 of the Registered Land Act Cap 300 especially when it was admitted or claimed the alleged utilities lie within and form part of the Appellants private land plot No. 276 Mua Hills Settlement Scheme, already registered under his names.

b. The Provincial Appeals Committee erred in law in failing to notice appreciate and hold that section 3 (1) of the Land Disputes Tribunals Act does not confer jurisdiction on a tribunal for the determination of claims upon alleged public utilities and no representative suits or claims are permitted under the Act which envisages only individual claims to land if falling specifically under section 3 (1) (a) (b) & (c) of the Act and recognized customary law if applicable thereto and not otherwise.

c. The Provincial Appeals Committee erred in law in failing to find and hold that the claim as lodged did not fall to be determined in accordance with recognized customary law and there was no jurisdiction to determine the same when no issue of customary law arose, especially when it involved legal Title or interest registered land under the registered land Act.(sic)

d. The Provincial Appeals Committee erred in law in permitting cross-examination of the parties when the law provides only for submissions this being an appeal and not an original Tribunal hearing and further erred in permitting the production of further evidence and documents on appeal which is inadmissible, and not previously before the original Tribunal.

e. The Provincial Appeals Committee erred in law in admitting on appeal documents not duly adopted incorporated into or forming part of the final judgment in H.C.C.A No. 6 of 1991 neither were they produced by any witness in tribunal case No. 4 of 2001 and their decision is inconsistent with the decision of High Court Civil Appeal No. 6 of 1991 as the Appeals Tribunal allowed the production of documentary evidence on appeal including documents the subject of Judgment in RMCC No. 47 of 1989 which judgment was overturned in appeal No. HCCA 6/91 and accordingly were of no legal validity.

f. The finding of the Provincial Appeals Committee are ultra Vires the Land Disputes Tribunals Act in so far as the findings are upon matters that do not come within the confines of matters set out under Section 3 (1) (a), (b) & (c) of the Act and there is no provision in the Act granting jurisdiction to deal with claims upon alleged public utilities agreed or claimed to be situated within a private registered land when there was no allegation of an issue as to division of or determination of boundaries to land, a claim to occupy or work land or trespass to land, and no issue of recognized customary law was involved at all.

g. The Provincial Appeals panel was improperly constituted in so far as it had four participants instead of 3 and the decision was not signed as required.

h. The Provincial Appeals Committee erred in law in not closely examining the parties to the Dispute and failing to make a finding that the claimants had no legal capacity to institute the claim based on alleged public interest, such rights ought only to have been exercised by the Honourable the Attorney-General of the republic of Kenya.

6. The appellant is represented by Mr Mwania Mbithi advocate while Mr F.M. Mulwa appears for the respondents. Section 8 (9) of the Land Disputes Tribunals Act, (No.18 of 1990) provides as follows:

"**8(9) 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 has certified that an issue of law (other than customary law) is involved."

7. The issues that have been raised by the appellant in his amended Memorandum of Appeal are all issues of law oscillating around the jurisdiction of the Land Disputes Tribunal in the first instance, and the Provincial Appeals Committee in the second instance. The limitation of jurisdiction for Land Disputes Tribunals under the Land Disputes Tribunals Act, 1990 is provided for under section 3 (1) of the said Act which says that:-

"**3 (1) 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; or

c. **trespass to land**.

shall be heard and determined by a Tribunal established under Section 4."

8. Thus, the length and breath of the Land Disputes Tribunals is found within the above section and nowhere else. Mr Mwania Mbithi for the appellant argued that the Provincial Appeals Committee failed to appreciate that the Machakos Land Disputes Tribunals Committee did not have jurisdiction in the first place to entertain the claim before it, and therefore that the decision of the Machakos Land Disputes Tribunal was null and void ab initio. He argued further that the appellant's title was indefeasible by virtue of the provisions of sections 27 and 28 of the Registered Land Act, (Cap 300) Mr Mbithi said that section 3 (1) of the Land Disputes Tribunal Act does not empower the Land Disputes Tribunals to deal with disputes over public utilities and further that the Act does not have room for representative suits.

9. Sections 27 and 28 of the Registered Land Act, under whose umbrella the appellant has come to this Court provide as follows:-

"**27. Subject to this Act:-**

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

"**28. The rights of a proprietor, whether acquired on a first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b. unless the contrary is expressed in the register, to such liabilities rights and interests as affect the same and are declared by section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."

10. Mr Mbithi argued that the alleged public utilities are part and parcel of the appellant's title which title is indefeasible under the Provisions of the above sections 27 and 28 of the Registered Land Act. It was also contended on behalf of the appellant that any customary rights in the suitland were ousted by the provisions of section 30 of the Registered Land Act. The section deals with overriding interests in land such as:-

– rights of way, rights of water and profits subsisting at the time of first registration under this Act;

– natural rights of light, air, water and support;

– rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

-leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;

-charges for unpaid rates and other moneys which without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

- rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

– the rights of a person in actual possession or occupation of land to which he is entitled only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

-electric supply lines, telephone and telegraphic lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law;

It does not matter that such overriding interests are not noted on the register.

11. Mr Mbithi also contended that the claim before both the Machakos Land Disputes Tribunal and the Provincial Appeals Committee was void ab initio because of lack of leave of the court to the parties to bring a representative suit; and further that the capacity to sue in this case was vested in the honourable the Attorney General and not the individual respondents herein.

12. It was further submitted that the procedure adopted by the Provincial Appeals Committee was flawed on the ground that the parties were allowed to testify and to cross-examine and to produce new documents at appeals stage, a procedure which Mr. Mbithi said was highly prejudicial to the appellant. Though Mr Mbithi contended that the procedure during the Land Disputes Tribunal hearing does not provide for cross-examination, section 3 (7) of the Land Disputes Tribunal Act, 1990, clearly provides for such cross-examination. It is Section 8 that prohibits the admission of fresh evidence. The Provincial Appeals Committee acts on submissions of the parties only as provided under section 8(7).

13. Mr Mbithi also contended that the Provincial Appeals Committee was improperly constituted in that it comprised four instead of three numbers and further that the judgment of the Provincial Appeals Committee was not even signed. Section 8 (5) of the Land Disputes Tribunal Act, 1990, on appeals to the Provincial Appeals Committee provides as follows:-

"**8 (5). The appeal shall then be determined by the Appeals Committee which <u>shall</u> consist of three members appointed under Section 9."**(emphasis mine)

14. Appointment of members of the Appeals Committee is mandated under Section 9 of the Act which provides:-

"**9 (1) The Minister shall establish for each province a Land Disputes Appeals Committee which shall consist of:-**

a. a chairman appointed from time to time by the Provincial Commissioner from the panel of elders appointed by the Minister by notice published in the Gazette for purposes of appeals under this Act; and

b. such persons, not being less than five, appointed by the Minister;

(**2) For the purpose of hearing appeals from Tribunals in the province for which the committee is constituted the committee <u>shall</u> sit in a panel of three members and in such places as may be determined by the Provincial Commissioner."** (emphasis mine)

15. It is clear that both Sections 8 (5) and 9 (2) are couched in mandatory terms. So that a composition of the Provincial Appeals Committee that does not comply with the said provisions would be an illegal composition. In the present case, the panel at the appeals level consisted of four members as listed on page 6 of the Record of Appeal. The same record shows that the parties gave evidence on oath and were cross-examined before the Committee gave its judgment dismissing the appeal. In my view, both the composition and the procedure of the Committee were wrong.

16. Mr Mbithi also contended that the Provincial Appeals Committee had no jurisdiction to determine the issues that went before it, and further that the findings of both the committee and the Land Disputes Tribunal Act, 1990 whose provisions I have already set out elsewhere in this judgment were void ab intio. Before determining whether or not the dispute in this case fell under the said Section, it is important to set out the respondent's side of the story.

17. Mr F.M. Mulwa responded first by saying that the judgment of the committee, in its unsigned and uncertified form was incompetent and was annexed to the pleadings as a ploy to mislead the court as to the law. Further, Mr Mulwa argued that the appellant ought to have taken the path of filing Judicial Review Proceedings to call into the High Court the decision of the Appeal's Committee and to have them quashed.

18. Regarding the composition of the panel, though admitting that there were four persons, Mr Mulwa contended that the 4th person,was not a member but a secretary to the panel whose main task was to take minutes of the committee. Mr Mulwa also argued that Section 61 of the Civil Procedure Act does not apply in this case. Section 61 speaks of suits arising out of public matters and provides that:-

"**61 (1) In the case of a public nuisance , the Attorney General or two or more persons having the consent in writing of the Attorney General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.**

(2) Nothing in this section shall limit or otherwise affect any right of such suit which may be appropriate to the circumstances of the case."

19. The <u>Collins Thesaurus A – Z Discovery</u> defines nuisance as trouble, problem, trial, bore, drag (informal) bother, plague, pest, irritation, hassle (informal) inconvenience, annoyance, pain (informal), pain in the neck (informal), pain in the backside (informal), pain in the butt (informal). Does the action of preventing members of a community from using the access road, the public borehole and public dam amount to a nuisance?

20. Further, Mr Mulwa submitted that the appellant's title does not enjoy the shade provided by Sections 27 and 28 of the Registered Land Act in that the utilities were not inside but adjacent to the appellant's land. Mr Mulwa also urged the court to strike out the Memorandum of Appeal for lack of decorum and for being argumentative and thus contravening Order 41 Rule 1 (2) of the Civil Procedure Rules which provides that the Memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection … without any argument or narrative, and such grounds shall be numbered consecutively.

21. In reply, Mr Mbithi submitted that the appeal is properly before this court, the same having arisen from proceedings before a Land Disputes Tribunal. Mr Mbithi further said that the appellant's choice to come to this court by way of appeal did not invalidate the choice made; that such a choice is specifically provided for under Section 8 (7) of the Land Disputes Tribunal Act, 1990.

22. These are the two contending views. It is now my duty as the court of appeal of first instance to reconsider the evidence on record and evaluate it afresh with a view to reaching my own conclusions in the matter. The appeal before me is on points of law only and not facts. Several issues arise for determination:- (a) did the Land Disputes Tribunal have jurisdiction to hear and determine the claim that went before it? (b) were the proceedings before both the Land Disputes Tribunal and the Appeals Committee valid?; (c) did the respondents have the mandate to bring the issue before the Land Disputes Tribunal? And (d) was the Appeals Committee membership right?

23. I have carefully perused the proceedings of both the Land Disputes Tribunal and the Appeals Committee I am inclined to find that and do hold the Land Disputes Tribunal and therefore the Appeals Committee had no jurisdiction to deal with the issues that were placed before them. I have already set out the provisions of Section 3 (1) of the Land Disputes Tribunal Act, 1990 which stipulate clearly that the disputes that are to go before the Land Disputes Tribunal are those that involve the division of, or determination of boundaries to land, including land hold in common; a claim to occupy or work land or trespass to land. The issues in this case had to do with the ownership of the public utilities that are allegedly situated in or adjacent to the appellant's land. The ruling of the Land Disputes Tribunal was "**that Dam No. 312, site of the borehole and access road are all public utilities and in that regard DANSON MUTUKU MUEMA should surrender them to the public."**

24. That decision, and therefore the claim giving rise to the decision went far beyond the Land Disputes Tribunal mandate as set out in Section 3 (1) of the Land Disputes Tribunal Act, 1990. Thus the Land Disputes Tribunal acted ultra vires the Act. Subsequently, the appeal to the Appeals Committee was already flawed, and became more flawed because the membership was beyond what is provided for in the Act. Mr Mulwa gave evidence from the bar by stating that the 4th member was a secretary to the panel. Unfortunately, the position of secretary is not provided for in the Act and if the legislature intended that it should be so provided, it would have said so. Mr Mulwa did not cite any relevant section of the law to buttress his assertion.

25. I have therefore found that the proceedings before both the Land Disputes Tribunal and the Appeals committee were a nullity. From the record, the judgments were not signed. I also find that within the meaning of the term "nuisance", what the respondents complained of was a public nuisance and that it was either the Attorney General himself, or the three respondents with the leave of the Hon. the Attorney General, to bring the action against the appellant. Without the leave of the Attorney General as provided under Section 61 of the Civil Procedure Act, the respondents had no capacity to file their representative action before the Land Disputes Tribunal. The action fails and I hold so.

26. Though parts of the grounds of appeal appear argumentative, I am satisfied that they bring out the points of law for determination by this court. Having found as I have that the Land Disputes Tribunal lacked jurisdiction to deal with the matters that were before it, the Appeals Committee ought not to have entertained the appeal. Instead the Appeals Committee went ahead and made a finding that was not even in tandem with the respondent's claim before the Land Disputes Tribunal and the content of their appeal. The Appeals Committee purported to deal with an issue of trespass that had not been placed before them. The respondents had complained before the Tribunal that the appellant had ….continuously since 1989 interferred with the public road of access, public borehole and public dam to the injury of the members of

the public entitled to their use and enjoyment. It was not a matter of trespass. It was a matter of denying the respondents and others the use of the three utilities.

27. Before I conclude this judgment, I wish to commend the two counsels for giving this matter their full attention and in particular the court would like to commend Mr Mbithi for his indepth and incisive research. He also urged the appeal with passion and zeal.

28. In the result, the appellant's appeal has merit. The same is allowed. The findings of both the Land Disputes Tribunal and the Appeals Committee are set aside. The parties are however at liberty to litigate the issue of the public utilities according to law.

29. Costs to the appellant both on the appeal and the tribunals below.

30. Orders accordingly.

Dated and delivered at Machakos this 21st day of February, 2008.

R.N. SITATI

JUDGE