REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL NO. 128 OF 2002

VIRGINIA WANJIRU KIIRU ..... APPELLANT

VERSUS

PRISCA WARUGURU KIIRU ..... RESPONDENT

(Appeal from original Decision of the Provincial Land Disputes Tribunal in Nyeri Tribunal Case No. 10 of 2002 dated 29th May 2002)

J U D G M E N T

The appeal before this court is from the decision of the Provincial Land Disputes Appeal Committee, Central Province dated 29th May, 2002. By this decision the appeals Committee reversed the decision of Othaya Land Disputes Tribunal in case number 1 of 2001. The appellant is the biological daughter of the respondent herein.

The appellant took her mother (the respondent) before the Othaya land disputes tribunal seeking that her mother be compelled to subdivide land parcel **Othaya/Kihome/1127** so that the appellant is given a portion thereof as her inheritance as she is unmarried daughter. The dispute was heard by the tribunal and in an award dated 18th December 2001, the tribunal held thus:

"**..... The parcel No. Mahiga/Kihome/1127 comprising 8.7 acres at present is registered in the names of Prisca Waruguru Kiiru and Watetu Kiiru Gitahi jointly who are co-wives. The land should therefore be subdivided into two portions.**

1. Prisca Waruguru Kiiru – 4.35 acres

2. Watetu Kiiru Gitahi – 4.35 acres

The portion for Prisca Waruguru Kiiru to be shared further as follows:

1. Prisca Waruguru Kiiru – 3.35 acres

2. Virginia Wanjiku Kiiru – 1 acre

Prisca Waruguru Kiiru's land comprising 3.35 is for herself and her two sons.

The respondent herein was unhappy with the decision of the tribunal and in a memorandum of appeal

dated 29th March 2002 and filed with the provincial land Disputes appeals committee on 2nd April 2002, the respondent preferred an appeal. By an award dated 29th May 2002 the provincial land disputes appeals committee Central Province ruled as follows:

"**..... The Provincial Land Disputes Committee has set aside the ruling of Othaya Land Disputes Tribunal. Virginia should be satisfied with 2 acres given to her at Oruku and the ½ acre given to her son. Virginia is given until 31st December 2002 to move to her land at Oruku and leave Prisca and other children in the land in dispute ....."**

This decision by the Provincial land Disputes Appeals Committee has provoked the instant appeal. In the memorandum of appeal dated 29th July 2002 the appellant through Messrs Rika & Co. Advocates has faulted the decision on the following grounds that:-

"**1. The tribunal erred in law in entertaining the**

appeal while it was clearly time barred.

3. The tribunal erred in ordering that the appellant be evicted.

4. The tribunal erred in law in dealing with registered land while it had no jurisdiction to do so.

On 23rd September 2003 and as required by the rules, this court issued a certificate to the effect that there were issues of law involved in this appeal.

The jurisdiction of the land Disputes tribunal to hear disputes touching on land is donated by section 3(1) of the land Disputes tribunal Act. It is couched in these terms:-

5. (1) Subject to this Act, all cases of a civil nature involving a dispute as to (a) the division of, or the 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 . From the foregoing it is clear that the tribunal can only entertain disputes relating to boundaries, a claim to occupy or work land and trespass. The instant case does not fit in any of the aforesaid categories. The dispute between the appellant and the respondent had nothing to do with trespass, boundaries or any claim to occupy work land. What the appellant was asking the respondent to do is to give her, her inheritance whilst the respondent was alive. The tribunal has no such jurisdiction. Although it does not come out clearly, it is implicit in the appellant's claim and evidence that her claim is anchored on a trust. It would appear that she is claiming her portion of the suit premises on the footing that the suit premises being family land, it was registered in the name of the respondent in trust for herself and also in trust for her off-springs the appellant included. That claim cannot possibly be anchored on section 3(1) of the land Disputes tribunal Act. A claim based on trust as we all know can only be entertained and or ventilated in court by way of a suit and not in tribunal under the Land Disputes tribunals Act.

Can the appellant's claim pass for a claim to occupy and work land? It could have been so if the appellant was claiming before the tribunal that her mother, the respondent had hitherto stopped her from working and or cultivating land which she previously used to do or that she had forced her off the suit premises. The appellant's claim herein is far from that. She insists that a portion of the suit premises should be curved out and given to her as an absolute proprietor. That cannot be the domain of the land Disputes tribunals. Section 27 (a) of the Registered Land Act provides interlia:

"**Subject to this Act The registration of a person as the proprietor of land shall rest in that person the absolute ownership of that land together with all rights and Privileges belonging or appurtenant thereto ....."** *and section 28 of the same Act provides thus:*

"**The rights of a proprietor, whether acquired on 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, from all other interest and claims whatsoever, but subject:-**

(a) to the leases, charges and other encumbrances, if any, shown in the register.

(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.

Section 30, above deals with overriding interest which need not be noted in the register as attaching to any given parcel of land registered under the Act.

The appellant's claim it would appear was also based on what she alleged was a customary law right. As unmarried daughter she was entitled to a portion of land as of right. Sections 27 and 28 of the registered Land Act which I have set out above in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and or only subject to rights and encumbrances noted on the register or overriding interest which are set out section 30 of the Act. The evidence on record is silent on whether or not the appellant's kikuyu customary law rights as regards property are noteable in the land register respecting the land. In the absence of such evidence we may not properly infer or imply that they are. Assuming for a moment that such customary rights exists, is it an overriding right or interest recognisable under that section. As held in the cases of **Obiero v/s Opiyo & Others (1972) E.A. 227** and **Esiroyo v/s Esiroyo & Another (1973) E.A. 388** they are not. In any event, considering the provisions of section 3 (2) of the judicature Act, customary law rights being subject to written law the appellant's rights are clearly excluded by the clear language of section 27 of 28 of the registered land Act. However the only customary rights giving rise to a trust are the only ones now recognised as constituting an overriding interest recognisable under section 30 of the said Act. See **Mbui (2005) 1 E.A. 256 and Gathiba v/s Gathiba (2001) 2 E.A. 342**. However as already observed, the tribunal was not seized of jurisdiction to declare a trust founded on a customary right. Secondly and as held in **Githuki v/s Gichuki (1982) KLR 285**, a party relying on the existence of a trust must prove through evidence the existence and creation of such trust. So that even if the tribunal had been clothed with such jurisdiction, it could still not have found for the appellant for want of evidence.

In the case of **Marigi v/s Marigi & Others (1996) LLR 463 (CAK),** the court of appeal had this to say:-

"**..... It is however, noteworthy that the law of succession Act ... does recognise the rights of wives and children over their husband's or father's estate as the case may be. Those rights accrue after death. Otherwise the rights remain inchoate are not legally enforceable in any court of law or otherwise. Whenever they accrue the estate is shared either according to the personal laws of the deceased in case of Agricultural land or as provided in the relevant provisions of the law of succession Act. The appellant as the registered owner of the suit property is still alive. His property is not yet available for such decision and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.....**"

The same situation obtains here. The respondent is part registered owner of the suit premises. She is alive and kicking. Her share in the suit premises is not yet available for subdivision and distribution among her children except if on her own free will and voluntarily opts to do so. She cannot be ordered or directed to subdivide the same among her siblings as urged by the appellant. Indeed the appellant should be grateful that out of her free will the respondent had bought for her and her son a total of 2½ acres of land at Oruku and Mweiga respectively. She should be contented with what she has so far reaped from

the respondent in her lifetime.

From the record, the award of the Othaya land Disputes tribunal was read out to the parties on 18th December 2001. The appeal against the said award was filed by the respondent on 2nd April 2002. Clearly 30 days permitted by section 8 of the land Disputes tribunals Act for the appeal to be lodged with the provincial land Disputes Appeals Committee had lapsed. There is no evidence that the appellant obtained leave to file the appeal out of time. The said appeal was thus incompetent.

In the result and for all the foregoing reasons, to the extent that the appellant wanted the land Disputes tribunal to compel the respondent to share out the suit premises during her lifetime, the tribunal did not have jurisdiction to entertain the dispute. The dispute between the parties was therefore, improperly entertained by Othaya land Disputes tribunal. The award ensuing therefrom was therefore a nullity. The appeal arising therefrom was similarly a nullity as it was also filed out of time. Accordingly I set aside both the awards of Othaya land Disputes tribunal as well as provincial land Disputes appeals committee, Central Province for want of jurisdiction.

On the question of costs of the appeal, I reckon that this is a land dispute pitting a daughter against a mother. In the circumstances, it is just that costs should not be awarded to any party. It is so ordered.

Dated and delivered at Nyeri this 2nd June 2008

M. S. A. MAKHANDIA

JUDGE