REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 33 of 2005

SIMON NDUNGU)

JOSEPH WAWERU) .... APPELLANTS

VERSUS

KANGATHIA KIUNA .... RESPONDENT

(Appeal from the Judgment/Award or Order of the Central Provincial Land Disputes Appeals Tribunal at Nyeri dated 18th day of August 1999 in Central Province Land Disputes Appeals Tribunal No. 61 of 1999)

J U D G M E N T

Simon Ndungu and Joseph Waweru, hereinafter referred to as the appellants are sons to the late Munji Kiuna hereinafter referred to as "*the deceased.*" The deceased was a brother to Kangathia Kiuna hereinafter referred to as "*the respondent.*" It would appear that at some stage the deceased offered to sell his parcel of land Gatamaiyu/Kagwe/543 to the respondent. The appellants and their mother were not in favour of the transaction. Despite the appellants' and their mother's spirited efforts to stop the transaction, the deceased nonetheless persisted in his endeavour. Eventually the dispute ended up with the Chief's office which ruled that the respondent should not buy the whole land. He should at least leave 1 acre for the deceased's children on condition that he is refunded Kshs.55,451/= already paid to the deceased. It was then decided that Gatamaiyu/Kagwe/ 543 be subdivided into two portions measuring 1 and 2.25 acres respectively. The 1 acre became Gatamaiyu/ Kagwe/1066 and 2.25 acres became Gatamaiyu/ Kagwe/1067. The latter parcel was transferred and registered in the name of the respondent despite protestations from the appellants. They never consented to the transfer. The respondent somehow managed to obtain the consent of the relevant land control board and had the said parcel of land which hereinafter I will refer to as "*the suit premises*" transferred and registered in his name on 16th May 1994. The appellants were not however down and out yet.

By a complaint dated 11th May 1998 lodged with the office of the District Commissioner, Kiambu by the 1st appellant against the respondent he sought that a competent tribunal comprising of impartial local and other elders conversant with Kikuyu customary law on land inheritance be constituted in accordance with

Land Disputes Tribunal Act to hear and determine their legitimate and genuine complaint. The thrust of the complaint was in these terms:-

3. At all material times Land Parcel No. Gatamaiyu/
Kagwe/1066 and Gatamaiyu/Kagwe/1067 are
family properties (hereinafter referred to as
"the disputed premises") and are both sub-
divisions of Land Parcel Gatamaiyu/Kagwe/543
which prior to sub-division was registered in the
name of Munji Kiuna, the complainant's father.

4. The Complainant's late father the said Munji Kiuna died on or about 11th February 1995 leaving behind eleven (11) children all depending on the disputed premises for their livelihood and well-being.

5. Prior to the death of the complainant's late father the Respondent took advantage of the deceased's senile and deteriorating health condition and managed to manipulate the complainant's father to fraudulently and through misrepresentations to transfer Land Parcel No. Gatamaiyu/Kagwe/1067 to himself, the Respondent.

6. The Respondent has furthermore taken possession of Land Parcel No. Gatamaiyu/ Kagwe/1066 and has on several occasions threatened members of the family of Munji Kiuna deceased, including the complainant, within and outside the disputed premises, with severe consequences including physical injuries, in their attempt to occupy and utilise the disputed premises or any part thereof.

7. In the event of the Respondent continue with dispossession the late Munji Kiuna's dependants of their rightful and beneficial interests in the disputed premises, they (the dependants) will suffer irreparable loss and damage and will be rendered destitutes.

Upon receiving the complaint, it would appear that the District Commissioner referred the dispute to the Lari land disputes tribunal. The said tribunal having heard the evidence of the respective parties made its award in the following terms:-

"........ Land Gatamaiyu/Kagwe/ 1067 legally belongs to Kangatha Kiuna. Thus the claim of the Objectors is not genuine. The objector should pay kshs.55,451/= as earlier decided by their father ......"

The appellants were again not deterred by this set back. Through the 2nd appellant this time, they moved to the Provincial land disputes appeals committee, Central Province at Nyeri by way of an appeal pursuant to the provisions of the Land Disputes Tribunal Act. Again having carefully listened to the appeal, the Provincial Land disputes appeals committee aforesaid made its award in these terms on 18th August 1999. "..... The Provincial Land Appeals Tribunal upholds in total the decision of the land disputes that:-

(a) The land parcel No. Gatamaiyu/Kagwe/ 1067 of 2.25 acres belongs to Kangatha Kiuna and that the claim by the appellants does not hold any substance.

(b) The appellants shall pay Kangathia Kiuna Kshs.55,451/= as earlier decided by their father Munyi Kiuna.

ORDER

The executive officer of Principal Magistrate's Court Kiambu to issue the necessary documents to enforce the payment of Kshs.55,451/= to Kangathia Kiuna on or before 30th September 1999."

Once again the appellants were aggrieved by these decision and pursuant to the provisions of section 8(a) of the Land Disputes Tribunal Act moved to this court challenging the decision of the Provincial land disputes Appeal committee. Under this section the appellants can only canvass on appeal issues of law and cannot introduce factual matters that were conclusively determined by the respective tribunals. The points of law raised by the appellants and which formed the basis of their memorandum of appeal were to this effect:-

"1. That the Committee erred in law in finding that there was a valid consent by the Land Control board to transfer the subject land to the Respondent despite clear provisions of land Control Act.

2. That the committee erred in law in finding that Land parcel No. Gatamaiyu/Kagwe/1067 measuring 2.25 acres belong to the respondent.

3. That the committee (sic) in law in delivering a decision, which does not conform to the parent Act.

4. That the committee erred in law in not giving reasons for its awards (sic) and more specifically the award of kshs.55,451/= and in effect upholding an award by a copy (sic) unknown to law.

5. That the tribunal lacked jurisdiction to determine a matter relating to title of land.

On 8th September 2005, Lady Justice Okwengu certified the above as points of law for determination in this appeal.

When the appeal came up for hearing before me on 18th June 2008, the appellants acting in person and Mr. Githinji, learned counsel for the respondent, agreed that the appeal be argued by written submissions. In fact the appellants had already filed their written submissions as at that time. The court was not averse to the idea.

I have since carefully read and considered the voluminous written submissions filed and the authorities annexed thereto. I must at once say that a lot of what was canvassed in the written submissions by both parties were issues of fact which goes against the spirit and intend of section 8 (a) of the land Disputes tribunals Act aforesaid. They called upon this court to enter into the arena of evaluating factual matters that were raised before the two tribunals and a determination made thereon.

To my mind however this appeal can be disposed off by dealing only with ground 5 in the memorandum of appeal. This ground touches on the jurisdiction of the land disputes tribunals. The jurisdiction of the Land Disputes tribunals Act by virtue of section 3(1) thereof is a very limited jurisdiction indeed. Land Disputes tribunals set up pursuant to the said Act can only deal with disputes relating trespass, boundaries, claim to work or occupy land etc. What went on before the two tribunals does not fall within any of the above categories of disputes that the tribunals have jurisdiction to adjudicate over. As a matter of fact the parties herein were litigating on matters pertaining to title. If there was any doubt as to the nature of the dispute, one has only to look at the complaint originating the dispute reproduced above and the testimonies of the appellants as well as the respondents in the two tribunals that adjudicated on the matter. Initially for instance the appellants prayed specifically that "Order that the law (sic) title deeds be nullified." Further looking at the written submissions filed herein, there is no doubt at all that they all relate to title in respect of the suit premises. They dwell on the process of acquisition of the title and why it should be invalidated and the suit premises revert to the appellants. There are issues of the consent of the land control board as well. Even the authorities cited have nothing to do with the jurisdiction of the land disputes tribunals. They deal with the need in a controlled land transaction to obtain a consent of the relevant land control board and the consequences that may ensue if such consent is not obtained. It cannot be any more clearer that the tribunals were being called upon to adjudicate on matters of title. That was not the intention of parliament in enacting the land disputes tribunals Act. Had that been the intention the parliament in its wisdom will have specifically stated so. The land tribunals in essence and in so as far as I can gather and comprehend were never intended to deal with matters connected with title to the land or to reverse the provisions of the law. The two tribunals had no jurisdiction to arbitrate over this parcel of land in the manner they did and whatever proceedings that went on were therefore a nullity.

Mr. Githinji has sought to oppose the appeal and in a way support the awards of the two tribunals on the ground that the appellants had no locus standi to institute and prosecute this appeal for want of letters of administration. That the land belonged to the deceased who held it as an absolute proprietor under the registered land Act. That the appellants' father died intestate on 11th February 1995. the appellants originated the proceedings before the land Disputes tribunal in May, 1998. it is the respondent's submission therefore that upon the death of the appellants' father his properties reverted to his estate and only an administrator to whom a grant of letters of administration has been made could prosecute the matter. I am unable to buy this argument. First and foremost, the appellants did not commence the proceedings on behalf of the estate of their deceased father. They brought the action in their personal capacities challenging the purported sale of the suit premises to the Respondent. Indeed the suit premises were already registered in the name of the respondent. How again would it have reverted to the estate of the deceased. Further from the record, this is a dispute that has been raging for a long time. It started when the deceased was still alive. It pitted the appellants and their mother against the respondent and the deceased. So that even if the deceased thereafter passed on, it does not alter the situation. The appellants are pursuing a claim against the respondent quite unrelated to estate of the deceased. They accuse the respondent of having used underhand methods to acquire the suit premises from their deceased father. In the circumstances of this case, the case of Troustik Union International & Another v/s Mrs. Jane Mbeyu & Another, C.A. No. 145 of 1990 (NRB) is not helpful. The appellants had the necessary locus standi to commence and prosecute the case all the way from the land disputes tribunals to this court.

The respondent has also raised the issue of Estoppel. That the appellants are estopped form raising the issue of jurisdiction on appeal before this court. That the appellants are the ones who sued the respondent before the land disputes tribunal by their complaint dated 14th May 1998. They then proceeded to actively participate in the proceedings upto this stage of appeal. The appellants having Originated the proceedings in the forum of their choice and did not object to the jurisdiction then they cannot be heard now to challenge the jurisdiction they chose and willingly participated in for over a decade.

It has been said that jurisdiction is everything. It is also a matter of law. Where there is no jurisdiction, the judicial organ must down its tool. Estoppel cannot be used to confer or oust jurisdiction, so it has been said. Yes, the appellants may have initiated and participated in the proceedings in both tribunals. However those proceedings were a nullity for want of jurisdiction. The Land Disputes tribunals Act has conferred on the tribunals specific jurisdiction. If the said tribunals act in excess of jurisdiction or conferred on themselves jurisdiction which they did not have, Estoppel cannot come to their aid. Estoppel cannot be used to enlarge or narrow the specific provisions of an Act of parliament. This is where the case of Stephen Bowen v/s Gilbert Muraguri C.A. No. 112 of 1996 (NK) cited by the respondent is distinguishable.

In the end the conclusion I have come to in respect of this appeal is that it has merit. Accordingly it is allowed. The awards both by the land Disputes tribunal Lari, and the Provincial Land Disputes Appeals Committee, Central Province are all set aside. Since the antagonists herein are close family members I will make no order as to costs lest I exacerbate the already volatile situation on the ground.

Dated and delivered at Nyeri this 9th day of October 2008

M. S. A. MAKHANDIA

JUDGE