



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 9 OF 2005

JESSEE KAMAU KINUTHIA.....APPELLANT

VERSUS

TERESIA WANJIKU KAMANDE.....RESPONDENT

(Being an appeal against the decision of the Provincial Land Disputes Appeals Committee, Central Province, Committee Appeal Case No. Maragwa 57 of 1999)

J U D G M E N T

The appellant is the registered owner of land parcel **LOC.4/MURUKA/302** hereinafter referred to as “*the suit premises*”. It measures 4.7 acres. It is registered in the appellant’s name pursuant to the provisions of the Registered Land Act Cap.300 Laws of Kenya. It is also a first registration.

Jessee Kamau Kinuthia hereinafter referred to as “*the appellant*” and members of his family, were in full and exclusive occupation and possession of the suit premises until sometimes in 1998 when Teresia Wanjiku Kamande hereinafter referred to as “*the Respondent*” raised a claim for 2.3 acres out of the same. Her claim was that, the appellant being the elder brother to her deceased husband one Kamande who died in or about 1986, held a portion thereof in trust for her, being the rightful heir of whatever her deceased husband could have claimed from the appellant. The respondent wanted the said trust to be dissolved so that she can get absolutely 2.3 acres out of the suit premises. When the appellant refused to countenance her claim, she proceeded to lodge her claim with Maragua Land Disputes Tribunal pursuant to the provisions of the Land Disputes Tribunals Act.

After a full hearing the award was made by the Tribunal in terms:

“....That the three brothers to get 2.3 acres and defendant 2.4 acres. The plaintiff should also get an access road to his shamba from main road. The court to use any means it deems fit to have the defendant sub-divide the disputed shamba and the plaintiff to be issued with title deed.”

The net effect of this award was that the appellant was compelled to subdivide the suit premises and transfer to the respondent 2.3 acres thereof with the consequence that he would be left with only 2.4 acres. He was obviously not amused by the decision of the tribunal and pursuant to *section 8 (1)* of the Land Disputes Tribunals Act (“*the Act*” hereinafter) the appellant filed an appeal to Provincial Land Disputes Appeals Committee, Central Province. This appeal was heard and the decision of the appeals committee was:

“.....To uphold the decision of Maragwa Land Disputes Tribunal as follows:-

1. **Teresia Wanjiku Kamande to get 2.3 acres with access road from the main road.**
2. **Jesse Kamau to get 2.4 acres.**

The appellant to refund Ksh.4,500/= to the respondent. The Executive Officer Maragwa Magistrate's Court to sign the necessary documents to facilitate subdivision and transfer as necessary."

The appellant was still dissatisfied and exercising his undoubted right of appeal donated by *section 8(9)* of the act, he lodged this appeal in this court through **Messrs Kamiro R.N. & Co. Advocates**. He raised three grounds of appeal in his memorandum of appeal to wit:

1. **The committee erred in law in embarking to hear the appeal without firstly noting that the subject matter of the appeal and the whole dispute involved ownership to registered land parcel Loc.4/Muruka/302 and the committee has no jurisdiction to determine ownership of registered land.**
2. **The committee erred in law by proceeding on the basis that there was across-appeal by the respondent in that the committee in its findings awarded to the respondent 2.3 acres.**
3. **The committee erred in law in purporting to award the appellant his own land.**

The appeal was placed before **Juma, J** (*as he then was*) on 16th January, 2003 for the necessary certificate. The learned judge in issuing the certificate stated as follows: **".....I certify that the appeal raises issues of law. It is admitted to hearing."** This certificate was pursuant to the proviso to *section 8 (9)* of the Act. The appeal was thereafter fixed for directions on 3rd July, 2007. I gave directions in terms that the record of appeal was certified to be in order and that the appeal could be set down for hearing for two hours in this court.

On the day that the appeal came up for hearing before me on 29th July, 2008, the appellant was represented by **Mr. Kamiro** learned counsel. However the respondent was absent. Being satisfied that the respondent had been duly served with the hearing notice for the appeal and their being no explanation for her absence, I ordered that the appeal proceeds to hearing the absence of the respondent notwithstanding. The appellant however offered to argue the appeal by way of written submissions which proposal was acceptable to court. Subsequent thereto, the appellant filed his written submissions with relevant authorities which I have carefully read and considered.

The case for the respondent before the tribunals was anchored on family trust. Does, the Land Disputes Tribunals have jurisdiction to entertain such claims? I do not think so.

Section 3 (1) of the Land Disputes Tribunal Act sets out the mandate of the tribunals set up pursuant to the relevant provisions of the Act. It provides that:

"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*"**

Nowhere in the above mandate is a tribunal authorized to hear claims based on family trust or title to land. The tribunal therefore acted without jurisdiction by purporting to dish out 2.3 acres of the suit premises to the respondent blatantly ignoring the fact that the appellant is the registered owner of the suit premises. Pursuant to *sections 27 and 28* of the Registered Land Act, once a person is registered as the proprietor of a parcel of land, that registration vests in that person the absolute ownership of that land

together with all rights and privileges belonging or appurtenant thereto. Those rights are not liable to be defeated except as provided for in the same Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. However a trust is one of the interests recognized by the Act that may very well defeat the interest conferred by such registration and or the rights of the proprietor as aforesaid. However it is not within the realm of the Land Disputes Tribunals to ventilate causes of action based on family trusts. Those causes of action are best left to be ventilated elsewhere and in particular our civil courts. The Land Disputes Tribunals are certainly not among those civil courts.

In ordering the subdivision of the suit premises, the tribunal dealt with matters relating to title to land which jurisdiction it does not have. Such jurisdiction under *section 159* of the Registered Land Act and as pointed out by **Justice Aganyanya in Mbugua Thiga V Teresia Wangechi Macharia & 2 others HCCA No.460 of 2000 (UR)** is again vested in our civil courts. The learned judge opined:

“.....Neither the District Land Disputes Tribunal at Maragwa nor the Provincial Land Disputes Appeals Committee had any power to adjudicate over the issue of title to land, since this jurisdiction is still vested in either the High Court and or the Resident Magistrate’s Court depending on the pecuniary value of the subject matter – see section 159 of the Registered Land Act..... To carry out the orders of the Maragua Divisional Land Disputes Tribunal and or the Provincial land disputes appeals committee would result in the rectification of the Register which goes against the spirit of section 143 of the Registered Land Act when conditions laid down in that section for such an order to be made were not shown to exist in the case.....”

I appreciate that this is a decision of persuasive value only having been made by a judge of concurrent jurisdiction. However I agree entirely with his reasoning. The same situation obtains here. A dispute as to title to land can only be ventilated either in the High Court or the Resident Magistrate’s Court depending on the pecuniary value of the land. This provision of the law clearly and expressly therefore ousts completely the jurisdiction of the Land Disputes Tribunals in hearing and entertaining claims pertaining to title to land.

Jurisdiction is jurisdiction and is everything. Jurisdiction is expressly conferred and cannot be inferred. It matters not that in the circumstances of this case, the appellant submitted himself to the jurisdiction of the Land Disputes Tribunal. Jurisdiction cannot be conferred by the consent of parties where there is none. Jurisdiction cannot be conferred merely because a party acquiesces to some proceedings. Estoppel as a principal of law cannot be invoked to confer jurisdiction. It cannot be invoked to confer jurisdiction where there is none or where it has been expressly ousted. Indeed jurisdiction is a matter of law and can be raised at any stage of the proceedings. The mere fact that the applicant did not raise the issue during the proceedings before the tribunals does not bar him from raising it as he has done in the instant proceedings.

As stated by the court of appeal in **Humphrey Olwisi Muranda V Yakobet Nechesa Wabuko, C.A. No.44 of 2006 (UR)** before embarking on the hearing of any matter, every court and indeed any tribunal established pursuant to any legislation must be satisfied that it has jurisdiction i.e. the legal power or authority to hear and determine a matter. If the court or tribunal has that power, then and only then does it proceed to hear the dispute; but if the court or tribunal determines that it has no jurisdiction then as was said in the case of **“The owners of the motor vessel ‘Lilians’ V Caltex Oil (Kenya) Ltd (1989) KLR 1 the court must down tools....”**

I have had occasion in the past to decry and lament the rampant abuse of jurisdiction by these tribunals. They have become like rogue elephants on the loose. They tend to think that they have jurisdiction to hear anything and everything under the sun as long as it touches on land. There is need to rein them in by appropriate legislation. Indeed time might be nigh to do away with the entire Land Disputes Tribunals Act, for it appears to me that the good intention of the Act may have been missed or squandered in its application and enforcement. If anything it has created more problems than it was intended to solve.

For all the foregoing reasons, I would allow the appeal and set aside the award of the two tribunals

awarding 2.3 acres of the suit premises to the respondent. Since the parties to this appeal are close relatives I direct that each party bear his/her own costs of this appeal.

Dated and delivered at Nyeri this 28th day of November, 2008.

M.S.A. MAKHANDIA

JUDGE