



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 79 of 2004

NJOROGE KARIUKI MICHUKI APPELLANT

VERSUS

JOHNSON ROBERT KARIUKI RESPONDENT

J U D G M E N T

Njoroge Kariuki Michuki (hereinafter referred to as the Appellant) is aggrieved by the decision of the Provincial Appeals Committee Central Province delivered on the 12th March 2003 in which the committee adopted the report of the Surveyor and ruled that 0.52 Ha of land which was subject of a dispute between Land No. Nyandarua/Mawingo/87 belonging to the appellant and Land No. Nyandarua/372 belonging to the Respondent Johnson Robert Kariuki, is actually part of Land No. Nyandarua/ Mawingo/327. The appellant has set out several grounds of appeal as follows:-

1. That the Provincial Appeal Committee erred in law by entertaining a dispute involving parcels of land registered under Registered Lands Act Cap 300 Laws of Kenya
h dispute was beyond the Committee's jurisdiction
2. The Appeals Committee erred in law to award 0.52 Hectares of the Appellant's land to the Respondent without following proper legal procedures and without any proper legal claims being put due forward having regard to the period Appellant was in occupation and the status of the registration
3. The Appeals Committee erred in law by basing its award on findings of one A.G. Kibebe acting for Provincial Surveyor Central Province which person was not a party to the proceedings and whose report was not put to cross-examination to attest its truthfulness.
4. The Appeals Committee erred in law by referring the matter to be adjudicated by a third party whose report formed the basis of the award without giving the parties opportunity to be heard thereby breaching the Appellant's natural rights and further lacked jurisdiction to refer the dispute to such other third parties.
5. The Appeals Committee erred in law by not finding that the matter had earlier been resolved as a boundary dispute by the lands registrar Nyandarua District on 30th November 1990 and as such the issues raised were beyond committee's jurisdiction.

6. The Appeals Committee erred in law by departing from issues forwarded to it for adjudication and going on a frolic of its own to entertain matters outside its scope.

The appeal before the Provincial Appeals Committee Central Province, was against the award made by the Nyandarua District Land Disputes Tribunal which found that the boundary between plot No. Nyandarua/Mawingo/89 and 87 was amended following a ruling made by the Land Registrar, and directed that the parties should go back to the original boundary as per the original map.

The Appeals Committee considered the surveyor's report and also noted that a boundary dispute was referred to the Land Registrar on 17th May 1990 who ruled that the disputed portion was part of plot No. Nyandarua/Mawingo/372 and directed that the map be amended accordingly. It was for these reasons that the Appeals Committee ruled that the disputed portion was part of Plot No. Nyandarua/mawingo/372.

Mr. Kiguru Kahiga who appeared for the appellant submitted that the effect of the decision of the Appeals Committee was to rectify the appellant's title by taking away 0.52 Ha. He submitted that the report of the Ag. Surveyor misled the Appeals Committee as the surveyor misinterpreted the ruling of the Land Registrar. Mr. Kiguru Kahiga castigated the Appeals Committee in failing to determine the matter before it, instead inviting a stranger to make the award on its behalf, and that whereas a Land Registrar could under section 3 (1) of Act 18 of 1990 assist the Appeals Committee, there was no provision for the participation of the Provincial Surveyor. Mr. Kiguru Kahiga further faulted the Appeals Committee for failing to allow the parties to call evidence to prosecute their appeals.

Further it was submitted that the decision of the Appeals Committee contravened sections 14 and 143 of the Registered Land Act (Cap 300) as Nyandarua/Mawingo/87 was a first registration and could not therefore be interfered with. Finally Mr. Kiguru Kahiga submitted that the dispute having been dealt with by the Land Registrar under sections 21 and 22 of the Registered Land Act Cap 300 neither the Tribunal nor the Appeals Committee had any mandate to re-open the matter.

Mr. Muchemi Kahiga who appeared for the Respondent opposed the appeal contending that the Appeals Committee had jurisdiction to deal with the matter as it was the appellant who had filed his appeal before the Appeals Committee. Mr. Muchemi Kahiga maintained that the Land Dispute Tribunal Act does not categorize or qualify land registered under any particular Act, but provides jurisdiction in the case of boundary dispute which is what was dealt with by the Tribunal and the Committee. He maintained that the dispute did not involve land ownership. Mr. Muchemi Kahiga argued that the Respondent could not be bound by the decision of the Land Registrar since he was not a party to the proceedings before the Land Registrar. He maintained that the award of the Tribunal was similar to that of the Appeals Committee as in both cases the Provincial Surveyor was directed to show the boundary. It was submitted that the surveyor could not be subjected to cross-examination because he was *functus officio* being a public servant. Finally Mr. Muchemi Kahiga submitted that the appeal was incompetent as it was not based on a point of law but was based purely on a matter of fact.

On the 14th February 2005, this court examined the memorandum of appeal and the record of appeal and certified in accordance with Section 8(9) of the Land Disputes Tribunal Act (No. 18 of 1990) that this appeal does raise issues of law. Moreover in the record of appeal at page 3, the advocate for the appellant has identified issues of law raised in the appeal. The issues include the jurisdiction of the Appeals Committee, whether the decision of the Appeals Committee amounted to interference with an indefeasible title under section 143 of the Registered Land Act, whether the rules of natural justice were breached and whether the dispute had already been resolved by the District Land Registrar Nyandarua and was therefore **res judicata**. I am in full agreement with Mr. Kiguru Kahiga that the issues which have been raised in the appeal are all issues of law and I do therefore reject the submissions of Mr. Muchemi Kahiga on this score, and do find that the appeal was properly admitted to hearing.

As regards the ground that the Appeals Committee had no jurisdiction to entertain the dispute involving parcels of land registered under the Registered Land Act Cap 300 Laws of Kenya, I can do no better than reproduce Section 12 of the Land Dispute Tribunal Act No. 18 of 1990 which states as follows:-

“12. Section 159 of the Registered Land Act is amended by deleting the words “where the disputes comes within the provision of Part IIIA of the Magistrate’s Court Act, in accordance with Part” and inserting “where the dispute come within the provisions of section 3 (1) of the Land Disputes Tribunal Act in accordance with that Act”

Clearly this provides jurisdiction to the Appeals Tribunal to deal with all disputes involving land registered under Registered land Act Cap 300 where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunal Act, i.e. involves:

- (a) the division of, or the determination of boundary to land, including land held in common.**
- (b) a claim to occupy or work land or**
- (c) trespass to land**

From the proceedings before the Land Disputes Tribunal and the proceedings before the Appeals Committee it is evident that although the Respondent initially brought the matter as a claim in respect of trespass to land, the dispute between the Applicant and the Respondent was essentially a boundary dispute, each claiming that his boundary included the disputed land. The challenge before the Tribunal and the Appeals Committee was to establish the boundary between land parcel No. Nyandarua Mawingo 89 and the neighbouring land parcel No. 372 (which was a sub-division of Nyandarua/Mawingo/89). The award of the Tribunal dated 11th August 2000 clearly reflected this as the award was as follows:-

“1. District Surveyor to show both parties their proper boundary as per the original map.

2. Court to execute all the documents

3. No orders as to costs.

The focus of the ward of the Appeals Committee was however not on the boundary but on the 0.52 Hectare portion of the land over which each party claimed his boundary extended to. The Appeals Committee therefore ruled that the disputed portion was part of land parcel No. Nyandarua/Mawingo/372. I think that both the Tribunal and the Appeals Committee were looking at the same coin though viewing it from different sides. The fact of the matter is that it was the determination of the boundary which determined where the disputed 0.52 Hectare land fell. Essentially this was a determination of a boundary dispute and not interference with a title as the registered proprietor remained the same. The determination of the boundary was therefore not a contravention of the registered owner’s indefeasible title under section 28 of Registered Land Act as read with Section 144 of the Registered Land Act. Nevertheless, the Appeals Tribunal went overboard in its award by focusing on the 0.52 Hectare disputed portion rather than focusing on the boundary. This obscured their ruling with regard to the boundary. Moreover the Appeals Committee adopted the findings of the surveyor that the disputed portion was part of land parcel No. 372. In his report dated 23rd January 2003 the surveyor reported that the land Registrar who dealt with the boundary dispute on the 17th May 1990, ruled **“that the disputed portion belonged to plot 372 and the map was amended accordingly.”** This was however a distortion of the facts as the proceedings and findings of the Land Registrar which were produced in the Tribunal shows the land Registrar’s ruling at page 5 as follows:-

“It is therefore my ruling that the disputed boundary between these two parcels i.e. 87 and 372 old No. 89 is that boundary that has been maintained by Njoroge Kariuki which indicates that his land crosses the stream to the road as that disputed portion.

It is therefore the responsibility of the complainant in this case Mr. Mbugua Nganga to compensate in whichever manner to the person he sold this small portion. The existing RIM to be amended accordingly.”

Njoroge Kariuki in favour of whom the Land Registrar appears to have ruled is appellant herein and is the

owner of Nyandarua/Mawingo/87. The land Registrar did not therefore rule as stated by the surveyor that the disputed portion fell within plot No. 372. To this extent the Appeals Committee erred in not considering the award of the Tribunal or the ruling of the Land Registrar but relying solely on the misleading report of the Land Surveyor. Moreover the Appeals Committee having called in new evidence through the surveyor, it ought to have given the parties a chance to cross examine the Surveyor so as to test his evidence.

Further the dispute before the tribunal and the Appeals Committee having been a boundary dispute and it being apparent that the Nyandarua Land Registrar had already heard the boundary dispute and fixed the boundary under section 22 of the Registered Land Act, it was not open to the Tribunal and the Appeals Committee to entertain the dispute.

It is noted that the Respondent was not party to the dispute before the Land Registrar. However, Mbugua Nganga the owner of the original title Nyandarua/Mawingo/89 from which Nyandarua/Mawingo/372 was subdivided was party to the proceedings. Since Mbugua Nganga is the person from whom the Respondent derived his title, the Respondent is bound by the decision of the Land Registrar relating to the boundary and the same being a quasi-judicial decision, it could only be challenged through invoking the supervisory jurisdiction of the High Court. The Appeals Committee and the Tribunal had therefore no jurisdiction to ignore the ruling of the Land Registrar and re-open the dispute.

I come to the conclusion that although grounds No. 1, 2 and 6 in the Memorandum of Appeal has not been established ground 3, 4 and 5 have been established. I find that the Appeals Committee erred in relying on the report of the surveyor and in entertaining a boundary dispute which had already been heard and the boundary fixed by the Land Registrar.

On these grounds I allow the appeal and set aside the award of the Appeals Committee and the Land Disputes Tribunal.

Each party shall bear his own costs.

Dated and signed this 4th day of April 2007

H. M. OKWENGU

JUDGE