



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 114 of 2002

LENA WANJIKU.....APPELLANT

Versus

PETER MUIRURI KIMANI KIMANI.....RESPONDEENT

(Being appeal from the award of the Provincial Land Disputes Committee Central Province at Nyeri dated 15th May 2002 being Appeal No. Kiambu 172 of 2000)

JUDGMENT

This dispute initially related to three pieces of property namely KIAMBAA/THIMBIGUA/306, 301 and 110. No. 301 is registered in the name of PETER MUIRURI KIMANI (*hereinafter called Kimani*), No. 306 is registered in the name of LENA WANJIKU KINYANJUI (*hereinafter called Lena*) and No. 110 is registered in the name of DAVID MUCHINA NJOROGE (*hereinafter called Njoro*). Both Kimani and Njoro alleged before the District Land Disputes Tribunal that their Land extended to the other side of the river to where Lena's Land is. The matter was heard by the District Land Disputes Tribunal where various persons including the persons involved in the dispute gave evidence. At the conclusion the said Tribunal made the following finding:

“This court after listening to all parties this court(sic) rule that the boundary remains at the river not beyond the river. The area of the three lands KIAMBAA/THIMBIGUA/301, KIAMBAA/THIMBIGUA/1110 and KIAMBAA/THIMBIGUA/2088 measures upto the river”

This finding was made on 3rd November 2000. There is in the record of appeal the report of the District Surveyor/Kiambu. That surveyor stated in his report that:

“The measurements were taken as shown in the tracing to conform the position of the river on the ground. The river was therefore found to be in position and is the boundary in the map which was ordered by the Tribunal.”

Kimani appealed against the Tribunal decision at the Provincial Land Dispute Appeal Committee, Central

Province. The Appeals Committee visited the scene of the dispute accompanied by the Provincial Surveyor with a view, as they state in their finding, of verifying the measurements of the three parcels of Land in dispute. The Provincial Surveyor investigation revealed that there was no dispute in respect of the boundary of **parcel No. 1110** but that the dispute was between **parcel No. 301** and **306**. He recommended that **parcel No. 301** be adjusted from 16.33 acres to 16.04 acres. The Appeals Committee wholly adopted the finding of the Provincial Surveyor. The Appeals Committee issued the following order:

“The Executive Officer at Kiambu S.R.M.’s Law Courts is requested to sign the necessary documents to facilitate the necessary adjustments to rectify the errors revealed by the work that was carried out by Provincial Surveyor according to his report which was adopted by the Appeals Committee and of necessity must be complied with in order to alleviate any further boundary dispute on the plots Nos. KIAMBAA/THIMBIGUA/301, 306 and KIAMBAA/THIMBIGUA/1110 which have been the subject of boundary dispute which must be solved once and for all according to Provincial Surveyor’s report.”

That finding of the Appeals Committee has provoked the present appeal filed by Lena. The Appellant’s grounds of appeal are as follows:

- 1. THAT the Honourable Provincial Land Disputes Appeal Committee erred in Law by dealing with matters relating to Title which is a matter out side its jurisdiction.**
- 2. The Honourable Provincial Land Disputes Appeals Committee erred by exceeding its jurisdiction by purporting to deal with matters that were not heard by the District Tribunal.**
- 3. The Honourable Provincial Land Disputes Appeals Committee erred by hearing the matter afresh instead of dealing with the matter on the evidence before it.**
- 4. The Honourable Provincial Land Appeals Committee erred by purporting to change the acreage of the Land of the parties before it, a matter it had no jurisdiction or authority to deal with.**
- 5. The Honourable Provincial Land disputes appeals Committee erred by ignoring a natural boundary and purporting to fix a boundary of its own and thereby exceeded its powers and jurisdiction.**
- 6. The Honourable Provincial Land Disputes Appeal Committee exceeded its jurisdiction by awarding costs and ordering the court to effect its orders which were unlawful in any event.**
- 7. The Honourable Provincial Land Disputes Appeals Committee erred by entertaining an Appeal by an Advocates, allowing one party to be represented by Counsel and therefore by having unfair advantage over the Appellant.**

I shall begin by considering grounds No. 1, 4 and 5 together since they relate to the legal jurisdiction of the Appeals Committee. Counsel for the Appellant argued that the Appeals Committee exceeded their jurisdiction by deciding on the issue of title which they are not entitled to do by virtue of Section 3 of The Land Disputes Tribunal Act. That section provides:

- 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.

In this regard Appellant relied on the cases –

1. HC.MISC. APPLICATION NO. 1310 of 2002 (NAIROBI) E. M' MUTHURI KAMERU M'NJOGU =VERSUS = MERU CENTRAL DISTRICT LAND DISPUTES & ANOTHER.

2. HC.MISC.NO.935 OF 1999 (NAIROBI) THE REPUBLIC =VERSUS= THE LAND DISPUTES TRIBUNAL NAIVASHA DISTRICT & ANOTHER.

In both these cases the matter was referred to the High Court for orders of *Certiorari* to quash the decisions of the Land's Dispute Tribunal for exceeding on their jurisdiction and dealing with the issue of title. Appellant also relied on a Court of Appeal decision namely:-

CIVIL APPEAL NO. 256 OF 2002 BETWEEN JOTHAM

= AND= THE CHAIRMAN SABATIA DIVISION LAND DISPUTE TRIBUNAL & ANOTHER.

The Court of Appeal found that the decision of the Tribunal related to both title and to beneficial interest in land and therefore found:-

“Such a dispute is not, in our view, within the provisions of Section 3(1) of the land dispute Tribunal Act.”

The Respondent's Counsel stated that the Appeals Committee did not exceed their jurisdiction and that they dealt with boundary as permitted by *Section 3 (1)* of the Land Disputes Tribunal Act.

On those grounds I reject the argument raised on behalf of the Appellant and instead I favour the argument of the Respondent. The Appeals Committee in their deliberation and their final decision clearly dealt with boundary between **parcel No. 301** and **306**. The Committee did not at all deal with title. I do therefore find that grounds 1, 4 and 5 of appeal fail.

Grounds Nos. 2 and 3 deal with the procedure adopted by Appeals Committee in this matter where at the hearing of the appeal they invited the Provincial Surveyor to carry out investigation on the boundary dispute. The surveyor did so and presented his report which was wholly adopted by the Appeals Committee. The Respondent's response on these grounds was that there is no procedure laid down on the manner in which appeals before Appeals Committee should be conducted. That the Act is silent on this. Indeed that is correct. The Act does not provide how the Appeals Committee should conduct its hearing. But as much as that is so, it cannot be acceptable that the Committee would invite a surveyor to carry out his investigations on the boundary dispute and such a report made by him is not the subject of examination by the parties. The common law principle is that the first appeal, the parties are entitled to obtain the appeals court decision on issues of fact and law, after the appellant court has re-evaluated the evidence, having due regard that the appellant court has not heard or seen the witnesses. The Appeals Committee did not re-evaluate the Land Dispute Tribunal. Indeed what the Appeals Committee did was to call for the report of the Provincial Surveyor then proceeded to adopt it. That procedure adopted by the Appeals Committee denied the parties an opportunity to cross-examine the surveyor. That did violate the parties principles of natural justice. The parties were condemned by the report of the surveyor without being heard. On those grounds alone I will allow the Appellant appeal and I do hereby set aside the order of the Appeals Committee Case No. 172 of 2000 delivered on 15th May 2002. The costs of the Appeal Committee hearing and the costs of this appeal are awarded to the Appellant.

Dated and delivered at Nyeri this 29th day of June 2007.

MARY KASANGO

JUDGE