



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI**

Civil Appeal 1 of 2000

JOHANA NDURA WAKARITU.....APPELLANT

Versus

DOMINICA WAMUYU KIHU.....RESPONDENT

(Being judgment from the award of the Provincial Land Disputes Tribunal and Central Provincial Land Disputes Appeals Committee in Appeal Number 89 of 1999)

JUDGMENT

This is an appeal from the appeals Committee as set up by *Section 9* of the Land Disputes Tribunal Act. This matter began when a plaint was filed at the Principal Magistrate's Court at Nyeri in September 1989. The plaintiff in that action is the respondent in the appeal. The defendant is now the Appellant in the appeal. The plaintiff in that plaint averred that a trust was set up by her late father whereby her late father in 1958 registered property number **MAGUTU/GATHEHU/53** in the name of **JOHANA NDURA WAKARITU** the Appellant herein and the terms of that trust were that the said Wakaritu was to subsequently transfer that suit property to the Plaintiff **DOMINICA WAMUYU KIHU**. The said Plaintiff Kihu was a minor in the year 1958.

It is further averred in the said plaint that the fragments of parcels of land which were consolidated into the suit property belonged to Kihu's late father. That despite the trust that had been set up Wakaritu refused or neglected to transfer the suit property to Kihu. Kihu therefore prayed in that plaint that Wakaritu would surrender to her the suit property. The court by an order made on 13th August 1996 referred this dispute to Nyeri District Land Disputes Tribunal for hearing and determination. The said Tribunal found in favour of Dominica Wamuyu Kihu and ordered that the suit property be deregistered from the name of Wakaritu and be registered in the name of Kihu. The said Wakaritu was dissatisfied with that finding and therefore proceeded to file an appeal to the Provincial Land Disputes Appeal. The same was heard and again the Appeals Tribunal held in favour of Kihu by finding that the suit property belonged to Kihu's late father who had died in 1953 and on making that finding the Appeals Tribunal ordered that the suit property be registered in the name of Kihu. Wakaritu being dissatisfied with that finding filed the present appeal.

In the first ground in the Memorandum of Appeal the Appellant stated that the Provincial Land Disputes Appeals Committee erred in law in entertaining a claim which was time-barred since the Respondent filed her claim over land parcel **MAGUTU/GATHEHU/53** in 1989 against first registration which was done in 1966. In support of that ground Appellant's Counsel submitted that the Respondent's claim was time-barred. That in filing the action in the Magistrate's Court, which was later transferred to the Land Dispute Tribunal, she did not seek the leave of the court to file the same out of time. Counsel also submitted that the registration of the suit property in the name of the Appellant was a first registration

under the Registered Land Act. In response to those submissions the Respondent's advocate submitted that the Appeals Committee only dealt with the appeal and accordingly the issue of limitation could not be raised against them.

The Appellant's second ground of appeal is that the Provincial Land Disputes Appeal Committee and the Nyeri District Land Disputes Tribunal erred in law in deliberating on matters outside their jurisdiction by ordering the Appellants to transfer the suit property to the Respondent. That the Tribunal and the Appeals Committee dealt with matters of title to land without any mandate from the law creating them. In support of this ground Appellant's counsel submitted that *Section 3* of the Land Disputes Tribunal Act, particularly *Section 3 (i)* thereof the Tribunal did not have power to adjudicate on the ownership of the suit property. More particularly that they could not make orders for the cancellation of the title of the Appellant. In response the Respondent's Counsel faulted the second ground by saying that it related to the hearing at Nyeri District Land Disputes Tribunal and yet the appeal was against the finding of the Appeals Committee.

On the final ground in the Memorandum of Appeal the Appellant stated that the Land Disputes Appeal Committee and the Tribunal erred in law in entertaining the Respondent on her claim through her father who allegedly purchased land from one George Mukiri in 1938. That the Respondent had no *locus standi* to pursue the claim since she is not the legal administrator to the estate of her father. In support of that ground the Appellant's counsel referred to the proceedings before the Tribunal where the Respondent stated that she sought the transfer of the suit property into her name because it had been purchased by her late father from George Mukiri in 1938. The Appellant's Counsel stated that it was necessary for the Respondent to have obtained Letters of Administration for the purpose of pursuing her father's property. Again in responding to this ground the Respondent's advocate faulted this ground by saying that it was incompetent for having mentioned the hearing before the Tribunal. He referred to *Section 8* of the Land Disputes Tribunal Act whereby he stated that an appeal only lies to the High Court from the Appeals Committee. The Respondent's Counsel further submitted that the Appellant was relying on grounds in the Memorandum of Appeal which grounds related to point of facts and not law which is not permitted by *Section 8 (8)* of The Land Dispute Tribunal's Act, hereinafter called the Act.

At this stage it is important to remind myself that the present appeal only lies on the issue of law. On the first ground of appeal the Appellant argued that the Respondent's action, the subject of this appeal was time barred when it was filed. When one considers the Limitation of Actions Act particularly *Section 20*, one finds that *sub section (1)* provides that the six (6) years period of limitation, in land matters where there is a claim for trust, would not apply in respect of a fraud or fraudulent Breach of Trust which the Trustee was a party or is privy. The claim by Kihu is that the suit property was registered in the name of the Appellant as a trustee. That he was allegedly obliged by that trust to transfer the property to Kihu. He failed to so transfer. Although Kihu did not specifically plead fraud against the Appellant, the definition of fraud given in the definition section of The Limitation of Actions Act brings in the acts complained of by Kihu in this action within the definition of fraud. The definition is:

“Fraud” includes conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other.”

The acts Kihu complained of are that the Appellant, being a trustee, failed to abide by the terms of the trust and refused to transfer the land to her. That complaint removes the action from the confines of the Limitation of six (6) years provided in *Section 20* of Cap. 22. It ought to be noted, however, that hearings before the Land Dispute Tribunals are required to pay regard to the Limitations period provided by the law, see *Section 13 (3)* of the Act. In this case however, the limitation period did not apply. The Appellant's second ground was that the hearing of this matter by the Land Disputes Tribunal and by the Appeals Committee was without jurisdiction. The jurisdiction of the Tribunal is to be found in *Section 3 (1)* of the Act which provides:-

“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.”

That is the limit of what the Tribunal can entertain. What the Tribunal and the Appeals Committee did went beyond this recognized jurisdiction. The Tribunal concluded in its award:-

“From the evidence adduced by both parties the Tribunal has come to the conclusion that the whole parcel i.e. MAGUTU/GATHEHU/53 should be transferred to the claimant.”

The Appeals Committee in its award upheld the decision of the Tribunal and made the following orders:-

“1. The land parcel No. MAGUTU/GATHEHU/53 belonged to Dominica’s father Kihu who died in 1953.

2. That the same land, MAGUTU/GATHEHU/53 whole title deed is with John Ndura to be de-registered from his name and be registered (sic) Dominica Wamuyu Kihu.

3. The Appellant to vacate from the same shamba by 31st December 1999.

4. The Appellant to pay the costs of the suit which is Ksh.5,000/=.”

It is clear in reaching the decisions that they did, both the Land Dispute Tribunal and the Appeals Committee, exceeded the jurisdiction provided by the Act, as afore stated. They did not have jurisdiction to deal with the title of the suit property. The Respondent’s Counsel argued that the Appellant is only appealing against the finding of the Appeals Committee and the jurisdiction, or lack of it, of the Land Dispute Tribunal cannot be determined in this appeal. I disagree with that argument because the Appeals Committee should have determined when they were hearing the appeal, the lack of jurisdiction of the Tribunal in the determination they made. Their failure to so determine entitles this court to consider the same and make a determination. The Appeals Committee compounded the problem by confirming the finding of the Tribunal. This court however, finds that the Tribunal exceeded its jurisdiction and that excess ought to have been rejected by the Appeals Committee. On this ground therefore I find that the Appellant’s appeal must succeed.

The Appellant’s third ground of appeal is that the Respondent had not obtained Letters of Administration for her father’s estate to bring this action. Indeed as correctly argued, one cannot bring action on behalf of an estate without being empowered by the court, in respect of an intestate without Letters of Administration. The court however, is of the view that, that third ground of appeal is misconceived because the Respondent’s case is that the Appellant received the suit property in trust to re-transfer the same to the Respondent. Therefore the Respondent was suing as an alleged beneficiary. In that case it was not necessary for the Respondent to obtain Letters of Administration. That ground therefore fails.

The court’s finding, however, is that the appeal does succeed on the basis that both the Land Disputes Tribunal and the Appeals Committee exceeded their jurisdiction as provided in Section 3 of the Act, as stated hereinbefore. That being the finding of this court the court orders the appeal hereof be allowed and the decision of the Provincial Land Disputes Tribunal Appeals Committee in Appeal No. 89 of 1999 is hereby quashed and the award thereof is set aside. The Appellant is awarded the costs of this Appeal.

Dated and delivered at Nyeri this 15th day of June 2007.

MARY KASANGO

JUDGE