REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Civil Appeal 60 of 2002

WILSON WOKABI MAGONDU ……..……..…….. APPELLANT

VERSUS

JOSEPHINE GATHERU NJANJA ……..…. RESPONDENT

(Appeal from the Provincial Land Disputes Appeals Committee Central Province sitting in Kianyaga Appeal No. 181 of 2000 in respect of Rice Holding No. 2409 Mwea Irrigation Settlement Scheme.)

J U D G M E N T

Wilson Wokabi Magondu, hereinafter referred to as "the appellant" has appealed to this court against the award made by the Provincial land Disputes appeals committee, central Province sitting on appeal case number Kirinyaga 181 of 2000 which award was adopted by the District Magistrate's Court, Wanguru as a judgment of the court. In his memorandum of appeal, the appellant has set out six grounds to wit:-

(i) THAT the Central Province Provincial Appeals Committee erred in law in denying the appellant Natural justice by refusing to hear him on his appeal thus arriving at one sided decision after hearing only the Respondent and her witnesses.

(ii) THAT the central Provincial Appeals Committee erred in law in not declaring the Respondent's claim in Mwea Land Disputes Tribunal as being time barred.

(iii) THAT the Central Province Provincial Appeals Committee erred in law in not declaring the Mwea Land Disputes Tribunal as lacking jurisdiction to entertain the matter.

(iv) THAT the Central Province Provincial Appeals Committee erred in law in not declaring the Respondent as lacking locus standi.

(v) THAT the Central Province, Provincial Appeals Committee erred in law by not finding that the Respondent has absolutely no legal, equitable rights or interests in the subject matter, i.e. the appellant's land as she has her own parcel of land given to her by the clan.

(vi) THAT the Central Province Provincial Appeals Committee erred in law by not finding that the appellant held land parcel No. Mwea/2409 absolutely and not in trust.

The record of this appeal is in tatters and is difficult to tell whether in accordance with Section 8(9) of the Land Disputes Tribunal Act this appeal was certified by a judge as disclosing points of law to warrant being heard by the High Court. Looking at the sorry state of the record, I am inclined to hold that the

certificate may have been issued otherwise I am certain if that were not case, the issue would have been raised during the hearing of the appeal.

The synopsis of the dispute is that according to the respondent, she was given a parcel of land in Mwea settlement scheme number 2409 by her clan *Unjiru Mbari ya Ndutu* sometimes in 1966. However she caused the land to be registered in the appellant's name in trust for her as at that time women could not own land. The appellant was a close relative of the respondent on her late husband's side.

Sometimes later when the respondent attempted to reclaim and cultivate a portion of the land she was rebuffed, harassed and restrained by the appellant. The respondent then took up the matter with Wanguru land Disputes tribunal. Having heard the appellant and her witness, the tribunal made the following award:-

(i) Mr. Wilson Wokabi Magondu must give two acres of Mwea Settlement Scheme holding No. 2409 to Mrs. Josephine Gatharu Njanja.

(ii) The settlement irrigation manager is requested to facilitate the subdivision of Mwea Settlement Scheme holding No. 2409 into two equal portions and one portion to be allocated to Mrs. Josephine Gatharu Njanja, and the other portion to remain with Wilson Wokabi Magondu.

It does appear from the record that in arriving at the decision, the tribunal relied only on the evidence of the Respondent and two witnesses. The record does not show that the appellant and or his witnesses ever testified in support of their case.

The appellant was dissatisfied by the award by Wanguru land disputes tribunal. Accordingly he preferred an appeal as required before the Provincial Land Disputes Appeal Committee, Central Province wherein an award dated 14th September 2000 was made upholding the Wanguru Land Disputes tribunal's decision to he effect that:

"**(1) Mwea Settlement Scheme holding No. 2409 be subdivided into two equal portions so that Mr. Wilson Wokabi Magondu retains 2.0 acres and Josephine Gatheru Njanja takes 2.0 acres.**

(2) The executive officer SRM Court Kerugoya signs the necessary Documents to subdivide and issue necessary documents to each beneficiary.

(3) The aggrieved party to appeal to the High Court on a point of law within 60 days."

The award appears to have been filed in D.M's Court at Wanguru because on 19th GFebruary 2001 it was adopted as the judgment of the court vide land disputes tribunal case number 11 of 2000.

During the hearing of this appeal, the appellant was represented by **Mr. Kahiga**, learned counsel, whereas the Respondent appeared in person. In support of the appeal, **Mr. Kahiga** submitted that the appellant was issued with the licence on 4th June, 1966 in accordance with the irrigation Act. The person who dictates who owns what piece of land in the irrigation scheme is the National Irrigation Board. This board by virtue of the Licence aforesaid allocated the land to the appellant and he took possession thereof and has since been in occupation. 30 years down the line the Respondent appears and sues the appellant for the same, counsel further submitted. Coming 30 years down the line it was counsel's view that the Respondent's claim was time barred. Counsel further submitted that the decision by the two tribunals to award 2 acres of the subject parcel of land to the Respondent against the appellant's Licence was outside their jurisdiction. In so doing they interfered with the mandate of the National Irrigation Board which grants and revokes licences in the scheme. Counsel also pointed out that the Respondent's claim was based on trust. By virtue of section 3(1) of the land disputes tribunal Act, a trust cannot be determined by the tribunal. In support of all these submissions, counsel referred the court to the following authorities:-

(1) Monica Muthoni Kihara v/s james Kihara Macharia HCCA No. 1 of 2001 (unreported)

(2) Misc. C.A. No. 1 of 2005 Republic v/s The Chairman Mwea Divisional land disputes tribunal ex-parte Faith Kagure Muturi.

For the record however, I note that all these decisions are from the High Court. Accordingly they are not binding on me and are of persuasive authority only. I however hasten to add that I do agree with the reasoning and conclusions reached by my learned brothers in those authorities.

The appellant who appeared in person opposed the appeal on the grounds that she properly filed the case before the tribunal, that it was the appellant who took her to the provincial land disputes Appeals committee, that both tribunals had jurisdiction to hear and determine the issues of title, trust and limitation. That though she had no licence from the National Irrigation board the tribunals still acted within their jurisdiction in subdividing the land equally as it was clan land.

As I understand the mandate of the tribunals established under the Land Disputes Tribunal Act is set out in section 3(1) of the Act and it provides interlia:-

"…… **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 this Act is the land disputes tribunal or the provincial land Disputes Appeals Committee given mandate and or jurisdiction to entertain and arbitrate on a claim to land based on trust, disputes involving titles to land, nor are they granted power to override specific legislation touching on Limitation of actions. The jurisdiction of the Provincial Land Disputes Appeals Committee is by virtue of section 8 (1) of he Act limited to appeals against the decisions of the land disputes tribunal. Such appeals can only be within the armpit of the Act. It is evident therefore that both tribunals in purporting to resolve the issues aforesaid in favour of the Respondent gravely erred and acted outside the authority given to them by the Act.

The essence of the Respondent's claim to the land is that she caused it to be registered in the name of the appellant as her trustee. That the land was given to her by her clan. Such claim cannot be a dispute involving the division of, determination of boundaries to land including land held in common, or a claim to occupy or work land nor was it trespass. A declaration of a trust is beyond the mandate and or jurisdiction conferred on the land disputes tribunal by virtue of section 3 (1) of Land disputes tribunal Act. And even if the tribunal had such jurisdiction another issue arises. If indeed the land had been given to the Respondent by the clan, what was the rationale behind the tribunal ordering that the same should be shared equally between the two? I would imagine that if the tribunals were persuaded that indeed the land belonged to the respondent by virtue of it having been given to her by her clan, she would have been entitled to the whole portion and not half of it. Further I doubt really whether the clan was in position to give out land that belonged to a settlement scheme.

Counsel for the appellant argues that the land in the Mwea Settlement Scheme is vested in the National Irrigation Board under the provisions of the irrigation Act and therefore the tribunals cannot arbitrate over disputes arising over such land. Further the irrigation Act has got mechanism to resolve disputes of ownership of land in the scheme. Accordingly the land disputes tribunal had no business arbitrating over such disputes. It is the one which grants and revokes licences. In my view had the respondent's claim been based on the right to "Occupy or work the land," it would have been maintainable perhaps. I agree with the observations by **Justice Lenaola** in the **Ex-parte Faith Kagure Muturi case (supra)** and it is worthy reproducing him in extenso:

"…… **Firstly, I am still of the firm view that looking at the definition of land in the land Disputes Act, land falling within a National irrigation scheme where matter fall (sic) within the issues stated in section 3 (1) of the Act can and should properly be adjudicated by the lands Disputes Tribunal. The reason for saying is that "land" is defined in that Act as "agricultural land as defined in section 2 of the land control Act, whether or not registered under the registered land Act, but does not include land situated within an adjudication section declared under the land Adjudication Act or the Land Consolidation Act or land which is the subject of determination by the land registration Act under the land titles Act……."**

Section 2 of the land control Act defines "Agricultural land" as:

"(a) Land that is **NOT** within

(i) a municipality or township

(ii) an area which was, on or anytime after 1st July 1952 a township under the townships ordinance (now repealed) or

(iii) an area which was, at any time after 1st July 1952 a trading centre under the trading centres ordinance (now repealed)

(iv) in a market

(v) Land in Nairobi area or in a municipality township or urban centre that is declared by the minister to be agricultural land"……..

……. I have not been told neither do I find reason to hold otherwise, that land in a settlement scheme is not agricultural land as defined above neither is it excluded from that definition as land in an adjudication section is. If the framers of the land disputes Act thought so, they should have expressly said so. Again to that extent, the tribunal has jurisdiction……" I couldn't agree more.

However the decision taken by the tribunal being not division of, or determination of boundaries to land including land held in common, claim to occupy or work land or trespass to land but interference of title of the parcel of land belonging to the appellant is impugnable and beyond their mandate. The land belonged to the appellant by virtue of a licence granted to him by the National Irrigation board. In deciding to partition the land into two equal portions without recourse to his licence and without as much as any reference to national irrigation board, the two tribunals erred. I note that a licensee in regulation 2 of the Irrigation (National Irrigation Schemes) regulations is defined as "***any person to whom a licence is granted and includes any person who succeeds a licensee under regulation 7"***. My attention has also been drawn to the definition of authorised dependant in the regulation and it means in relation to the licensee "……***.. his father and mother, wives and such of his children as are unmarried and under the age of eighteen years ……."*** The respondent does not fall in any one of these categories. She cannot therefore maintain her claim against the appellant based on claim to occupy or work land.

Finally regulation 25 deals with the termination of a licensee and this can only be done by the licensee giving six (6) months notice of intention to do so or the manager with instructions from the minister giving the licence twelve (12) months to do so.

The totality of these provisions point to the fact that in determining that the appellant's licence could be interfered with without any input from the National Irrigation board and in the process impose a non-licensed person on the board the tribunals acted ultra viresly. The tribunals acted recklessly in ignoring completely the licence issued to the appellant and proceeded to create sub-licences without regard to the rights of the appellant, the lawfully licensed person and the terms of the licence.

It is also worthy noting the provisions of section 13(3) of the land tribunals Act which provide specifically that:

"**For avoidance of doubt it is hereby provided that nothing in this Act shall confer jurisdiction on the tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court……"**

The respondent commenced the instant proceedings sometimes in the year 2000. The land subject matter of the proceedings was given out to the appellant by the respondent's own admission sometimes in 1966. Yet section 7 of the limitation of Action Act provide:

"**An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or it is first accrued to some person through whom he claims to that person….."**

Clearly therefore the Respondent's claim was time barred by the time it was being entertained by both tribunals. The respondent came to the tribunal slightly over 31 years after the claim had accrued to her. It was statute barred. In entertaining the claim in the face of the express provisions of the law on limitation aforesaid, once again the two tribunals gravely erred.

The upshot of the above is that the appellant has satisfied me that both tribunals erred in law in arbitrating over a matter in respect of which they had no jurisdiction. I do therefore allow the appeal and set aside the awards made by the tribunals. Judgment entered pursuant to the award is accordingly set aside. The appellant shall have costs of this suit.

Dated and delivered at Nyeri this 15th day of October 2007

M. S. A. MAKHANDIA

JUDGE