



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 151 of 2001

BENSON MAINA THIONGO APPELLANT

VERSUS

JOSEPH WARUI MWANGI RESPONDENT

J U D G M E N T

Benson Maina Thiongo hereinafter referred to as the Appellant has brought this appeal under Section 8(9) of the Land Disputes Tribunal Act (No. 18 of 1990) against the ruling of the Central provincial Appeals Committee delivered on 28th June 2001 in Murang'a No. 6 of 2001. The appellant contends that the Appeals committee erred in failing to set aside the award of the Tribunal as the Respondent who made the complaint to the Tribunal had no locus to bring the complaint on behalf of his deceased father without being appointed as a legal representative of his deceased father.

It was further contended that since the claim related to title to land the Tribunal had no jurisdiction to entertain the claim and that the Tribunal exceeded its mandate in awarding the transfer of the suit land to the Respondent.

Finally it was contended that the Tribunal Award ought not to have been upheld as it was based on an unenforceable agreement, as there was no written memorandum in support of the agreement for sale of land nor was there any consent from the land control Board for the transfer.

For the respondent it was submitted that the appeal was fatally defective as order 41 rule 8 (b) (4) of the Civil Procedure Rules was not complied with as neither a decree nor the order appealed against has been annexed. That the appeal was incompetent as it was filed after more than 60 days from the date of the award of the Appeals committee and no leave was granted for the appeal to be filed out of time.

It was maintained that the appeal is an abuse of the court process as it is against 2 decisions i.e. that of the Appeals Committee and the Tribunal. It was submitted that the appeal has already been overtaken by events as the suit land has already been alienated to a 3rd party following the execution of the award. It was submitted that the issue of locus standi not having been raised during the hearings before the tribunal and the appeals committee the same could not be raised for the first time during the hearing of this appeal.

I have carefully considered the submissions that have been raised on technical issues.

The applicant has included in the record of appeal copies of the proceedings and award of both the land Disputes Tribunal and the Appeals Tribunal. In my view this satisfies the requirements of Order XLI rule 8B (4) (f) of the Civil Procedure Rules.

On the submissions that the appeal is an abuse of the process of the court as it is against two decisions. It is evident that this appeal is actually a second appeal after the appellant's first appeal was unsuccessful. That means that the appellant is dissatisfied not only with the results of the first appeal which is directly leading to this 2nd appeal but he is also dissatisfied with the original judgment which led to the first appeal. The appellant is therefore dissatisfied with both the award of the Tribunal and that of the Appeals Tribunal and is directly and indirectly appealing against both awards. The appeal is therefore properly before the court.

Under section 7 (1) & (2) of the land Dispute Tribunal Act, the Tribunal is empowered to file its decision in the magistrate's court and the court is obliged to enter judgment in accordance with that decision. This does not however take away the rights of any party who is dissatisfied with the award of the Tribunal to appeal to the Appeals Committee as provided under section 8(1) of the land Disputes Act nor does it take away the further right of appeal to the High Court provided under section 8 (9) of the land Disputes Tribunal Act.

A party who opts to execute the judgment of the Tribunal before the losing party exhausts his rights to appeal does so at his own risk and cannot use the execution as an excuse to defeat the appeal. I therefore overrule the objection that the appeal has already been overtaken by events.

As regards the substance of the appeal, it is evident from the proceedings of both the Land Disputes Tribunal and the Appeals Committee that the subject matter of the dispute was title to land known as Loc. 19/Nyakianga/1362 which the appellant is alleged to have sold to the Respondent's deceased father. The dispute was therefore not within the jurisdiction of the Tribunal as provided under section 3 (1) of the land Disputes Tribunal Act. The orders made by the Tribunal and the Appeals Tribunal for the appellant to transfer Loc. 19/Nyakianga/1362 to the Respondent was null and void as the same was made without jurisdiction.

Further I concur with the submission that the Respondent not having been appointed an administrator of his deceased father's estate, he had no locus standi to pursue the claim on behalf of his father. Although the issue was not raised in the lower court, this is a point of law which this court cannot ignore.

I would have allowed this appeal, nevertheless it is evident that this appeal is incompetent as it was filed after the 60 days provided for an appeal under section 8(9) of the land Disputes Tribunal Act. Although a miscellaneous application was filed by the appellant vide miscellaneous application No. 132 of 2001, the applicant has not been able to exhibit any leave granted by the court pursuant to that application nor have I on my own accord been able to get any such order for leave. In the circumstances the appeal is incompetent and is accordingly struck out and dismissed.

I made no orders as to costs.

Dated signed and delivered this 5th day of December 2006.

H. M. OKWENGU

JUDGE