



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

Civil Appeal 118 of 1998

MAKUU KILOLE..... DECEASED

MEME MAKUU

NYALITI MAKUU APPELLANTS

VERSUS

NZIOKA MBWII DECEASED

MANGUU KYULULI

KALA NZIOKA RESPONDENTS

J U D G E M E N T

Before me is an appeal against the ruling of the District Magistrate I Uaani Court in L 123 of 1960 which is dated 22/10/98. The appeal is based on the amended Memorandum of appeal dated 25/11/98. The grounds upon which the appeal is brought are three fold. The appellant contends that the court had no jurisdiction to entertain the application because the claim relates to land and proceedings are governed by Section 13 (2) of the Land Disputes Tribunal Act and the proceedings are, therefore, a nullity. On the same ground of lack of jurisdiction, it is argued that the magistrate had no jurisdiction to review the decision of an appeal court. Lastly, it is claimed that the claim is time barred as it was over 12 years since the cause of action had arisen.

Mr Makundi, counsel for the Respondent opposed the appeal contending that the appeal was not time barred because the application dated 20/8/98 was filed in L 123/60 which was already before court.

He denies that there was any fresh hearing but that the parties agreed to have the deceased plaintiffs and defendants to be substituted and they further agreed to go back to the land to have the boundaries pointed out by the parties and boundaries were fixed and that the appeal is baseless.

The application dated 20/8/98 does not indicate under what provisions of law the court was being moved. The applicants Manguu Kyululi and Kala Nzioka were acting in person. The court exercised its discretion and ignored that anomaly and went ahead to hear the parties. A reading of the application clearly indicates that the application was brought under Order 23 of the Civil Procedure Rules for substitution of the parties and the 2nd prayer was for the court to move to the land in question to have boundaries replanted. They may have been brought under Section 3A of the Civil Procedure Act. This

application is expressed as filed in L123/60. However, the court has not seen any other proceedings filed in L123/60 save for this application. The affidavit in support of the application goes on to explain what transpired regarding the land in question since L123/60 was filed. That Judgement was given on 17/1/61 and a boundary fixed. There was an appeal lodged in Machakos Appeal No.31/61 in which Makuu Kilole's appeal was upheld. Another appeal No.20/62 was filed by the plaintiff and the court and District Officer drew a boundary and that it was confirmed a court of review in case No.13/63 on 30/4/64. Unfortunately the court has not been shown any of the above proceedings in the above quoted cases. The applicants in that application claimed that the boundary as confirmed in case No.13/63 was interfered with. It is my considered view that that is the case in which they should have filed this application of 20/8/98. There is no evidence that this application was filed in L123/60. Even if L123/60 existed, there had been subsequent orders made in the appeals that ensued and the applicants could not go back to the subordinate court where the first land case was filed. The application of 20/8/98 was completely misplaced and the magistrate had no business dealing with it. He could not interfere with a decision of a court sitting on appeal.

By 1998 when this application was filed, the Land Disputes Tribunal Act No.18 of 1990 was already in force.

The commencement date of that act was 1/7/91. Even if we were to assume that L123/60 was still pending in the lower court, Section 13 (1) of the Land Disputes Tribunal Act removed this case from the jurisdiction of the magistrate's court and it should have been discontinued and referred to the Land Disputes Tribunal. However, as earlier noted, there had been appeals determined in this matter and this matter should have just been referred to the last appeal court to interpret its order and have the boundaries pointed out as per its orders on 30th April 1964 instead of the District Magistrate's Court. Despite the fact that the parties agreed to substitute the parties and visit the land and redraw the boundary, that did not give jurisdiction to the magistrate to entertain the application.

I do agree with appellants that the magistrate lacked jurisdiction to entertain the application dated 20/11/98 and I hereby allow the appeal, set aside the orders of 22/10/98 with costs of the appeal to the appellants.

Dated at Machakos this 27th day of January 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE