



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 175 OF 2001

ERASTUS NDUNGU THUNGU APPELLANT

VERSUS

MARY WAIRIMU (THUNGU) MBURURESPONDENT

J U D G M E N T

The Appellant and Respondent are brother and sister fighting over inheritance to their father's estate particularly a piece of land registration number LOC. 6/GIKARANGU/207 of approximately 11 acres. The land is registered under the Registered Land Act.

While the Appellant claimed that the Respondent was married and not entitled to inheritance from her father's estate, the Respondent's case was that she was divorced after the marriage the Appellant is talking about and that following her divorce, she returned to her parent's to home where she lives and should therefore have a share in her father's estate. Maragua Division Land Disputes Tribunal in case No. 198 of 2000 which the Respondent filed initially, agreed with the Respondent and decided that she inherits three out of the 11 acres the Appellant had inherited.

The Appellant appealed to the Provincial Land Disputes Appeals Committee, Central Province, in Appeal Case No. MARAGUA 1/2001. He lost the appeal as the Appeals Committee upheld the decision of Maragua Division Land Dispute Tribunal only reducing the award of three acres to two acres which the Appeals committee ordered the Appellant to transfer to the Respondent.

Although the decision of Maragua Division Land Disputes Tribunal was sent to the Principal Magistrate's Court Muranga for adoption, parties have told me that the adoption is yet to be ordered as proceedings in the court were stayed to await the outcome of this appeal. It was not made clear whether the decision of the Provincial Land Disputes Appeals Committee had also been forwarded to the court.

In any case, I will proceed under the presumption that the court had not yet adopted any of the awards. In this appeal the law requires the High Court to confine itself to questions of law only and customary law is, for the purpose of an appeal like this one, deemed to be a question of fact.

In the circumstances, of this case therefore the question of law to be considered is whether any of the two tribunals had jurisdiction to adjudicate on matters of title to land. The Provincial Land Disputes Appeals Committee stated in its decision for example:

“Finally the verdict of this case is that Erastus Ndungu Thungu must transfer

2 acres of land from Land No. MARAGUA 1/

2001 to his sister MARY WAIRIMU THUNGU and her 2 children – Moses Kamau and

Stanley Mathaka”.

Provisions of the Land Disputes Tribunals Act are that tribunals have no jurisdiction to adjudicate on matters of title. But looking at what Tribunals said in this matter, there is no doubt that they adjudicated on matters of title. Did the Appellant hold title of the suit parcel of land? It was clearly his case that he had obtained title through succession proceedings in which he petitioned for and obtained a grant of letters of administration. That was not disputed although the Appellant does not seem to have been keen to produce documentary evidence which was very important. Even before me when I asked to see the grant the Appellant could not produce one. Instead he showed me a photo copy of the certificate of confirmation of grant dated 4th April 1990. This makes it prima facie that he obtained the relevant grant.

By April 1990 the Appellant had a certificate of confirmation of grant which indicated that he was to be the sole proprietor of the suit parcel of land.

There is no dispute that the Respondent has not bothered to go into those succession proceedings being cause No. 236 of 1988 in the Senior Resident magistrate’s Court Murang’a.

That court having decided that the Appellant was heir to the suit parcel of land as the sole proprietor, where did the Tribunals get the jurisdiction to make a contradictory order for the sharing of the suit of land between the Appellant and the Respondent?

In law the issue of sharing was res judicata before the Tribunals which did not also have the jurisdiction to adjudicate on matters, not only of title to land but also on succession. In this matter the Land Disputes Tribunals are making a separate and independent order of the Respondent’s succession to a portion of the suit parcel of land and this they have no power to do. Their decision would have been acceptable if they only decided entitlement to inheritance for their decision to be used as part of evidence in a succession cause conducted by a competent court. In which case, the Respondent had to go, armed with that evidence, into the relevant succession cause. She cannot get what she wants outside the succession cause in which the Appellant obtained the grant confirmed on 4th April 1990.

From what I have been saying above, therefore, this appeal is allowed with costs to the Appellant.

Dated this 15th day of May 2003.

J.M. KHAMONI

JUDGE

Present:

Mr. Gichuki for Mr. Mwihi for the appellant.

Respondent in person.

Further Order:

Each party may obtain copy of this ruling on payment of the requisite fees.

J.M. KHAMONI

JUDGE

15/5/2003.