REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO 568 OF 2000

NGUGI WAMWEA …….. APPELLANT

VERSUS

CATHOLIC DIOCESE OF MURANG'A

REGISTERED TRUSTEES…….....…..… RESPONDENT

JUDGMENT

In this matter, the suit parcel of land registration No LOC 1/Kiunyu /Kia Waihiga / T 4 was on 26th November 1998 transferred by the original registered owner, Ngugi Wamwea, to the Catholic Diocese of Murang'a

Registered Trustees the respondent in this suit who intended the land to be for the use of Kiawaihiga Catholic Church. The transferor was the appellant's father who had the intention of giving that land to the appellant but changed his mind to give the land to the respondent because an alternative piece of land to give to the appellant was available through the effort of the respondent.

At the time of the transfer of the suit parcel of land to the respondent, the appellant had deposited some building material on the land and started building a house but his father asked him to stop and instead move to the alternative parcel of land. The appellant did not stop. That is why the respondent filed this case in the Land Disputes Tribunal at Gatanga seeking to have the appellant move out of the suit parcel of land.

The Land Dispute's Tribunal at Gatanga granted the respondent's prayer. That decision was filed in the Chief Magistrate's Court at Thika as DOC NO 50 of 1999 and on 25th October 1999 the decision of the Land Disputes Tribunal at Gatanga was adopted by the Court in a judgment of the Court which, using the terms of the Tribunal's award,

Ordered that:

"*(a) Henry Wamwea Ngugi* do vacate plot number LOC

1/Kiunyu/KiaWaihiag/ T 4 within a period of 90 days from the date of judgment so that Kiawaihiga Catholic Church can proceed to develop the plot as it is rightfully theirs".

The Court's decree was subsequently extracted to that effect and in execution of that judgment, a notice to show cause was being issued to the appellant on 14th April 2000, when apparently it was decided to

stay the execution proceedings on realizing that the appellant, by his letter dated 5th November 1999, had appealed to the Provincial Land Disputes Appeals Committee. The date on which the appeal was filed is not specific as dates do not appear to be important to some of the people handling Land Disputes Tribunals proceedings. But it would appear by 8th November 1999 the appeal had been filed. Otherwise I will use the date 5th November 1999 in the appellant's letter, as the date the appeal was filed. But as the decision of the Land Disputes Tribunal at Gatanga is not dated, I refrain from labouring the issue whether the appeal had been filed within the prescribed period, an issue which the respondent has not raised anyway.

However, after that filing, the appeal was heard and the Provincial Land Disputes Appeals Committee upheld the decision of the Gatanga Land Disputes Tribunal. The appellant has therefore come to this Court on a second appeal. His claim is and has been that the suit parcel of land is his because it was given to him by his father and he has built there a house which he subsequently occupied.

From the evidence, while the appellant's father was satisfied with the alternative land which he gave to the appellant, that land having been found by the respondent so that land exchange could take place, the respondent also agreed to pay to the appellant an agreed sum of money as value of the house the appellant was building on the suit parcel of land.

But the appellant appears to have been always reluctant to vacate the suit parcel of land and therefore refused to accept the money. However the contract regarding the suit parcel of land, was between the father of the appellant and the respondent.

I am giving those facts only for the purpose of bringing out the history of these proceedings. Otherwise, this being an appeal from the Provincial Land Disputes Appeals Committee, subsections 8, 9 and 10 of section 8 of the Land Disputes Tribunals Act are mandatory that I confine my decision to matters of law. I should not make a decision on matters of fact, and customary law is, for the purpose of that Act, a matter of fact.

The appeal in this Court was filed by the appellant in person. He listed five grounds of appeal. But reading through them, they are grounds based on facts rather than law.

Issues which were never raised when proceedings were in Tribunals and Provincial Land Disputes Appeals Committee are raised for the first time on appeal in this Court. In ground number one, for example, the appellant never told the Tribunal at Gatanga or the Provincial Land Disputes Appeals Committee that the members there were not gazetted and did not therefore adduce any evidence there to prove that allegation. But he has come to this Court where for the first time he is raising that issue without evidence, at a stage where he is not entitled to adduce fresh evidence, and he expects the Court to act on mere allegation and agree with him. As the maker of the allegation, the burden was upon him to adduce evidence before the Gatanga Tribunal and the Provincial Land Disputes Appeals Committee so that this Court could now act on that evidence, as mere allegation in this Court will not do. It is not the duty of this Court to go and look for the relevant gazette notices to bring them in the evidence in this matter. It is the duty of the appellant as that was a matter of fact to be established or proved by the appellant, in the Tribunals, before this Court could be called upon to apply the relevant law. Similar reasoning applies to ground number two where the appellant now alleges that the Provincial Land Disputes Appeals Committee should have been chaired by the Provincial Commissioner Nyeri. Relevant Kenya Gazettes for Nyeri are there and it was the duty of the appellant to produce them to show those who were adjudicating that they had no authority to do so without the chairmanship of the Provincial Commissioner, Nyeri. I would then have picked it from there on law. Ground number three the issue of compensation for the appellant's house; ground number four the issue of valuation at current rate; and ground number five the issue of a binding agreement between the parties in this appeal; all constitute matters of facts which section 8 subsections 8, 9 and 10 do not permit me to go into in this appeal.

However, Mr Kahuthu, the advocate for the appellant came up on the basis that he is arguing all the grounds together. But all he submitted on was a ground on lack of jurisdiction which is not in the grounds of appeal.

As Mr Macharia, the advocate for the respondent did not object, I left Mr Kahuthu to submit on the issue of lack of jurisdiction. His submission was that the subject matter of this case is a contract or an agreement for sale of land and that therefore the Provincial Land Disputes Appeals Committee as well as the Gatanga Land Disputes Tribunal had no jurisdiction to entertain and hear this case. He argued that a contract is not one of the matters those bodies are empowered to hear. He seemed to know that any contract of sale which was there was between the respondent and the father of the appellant but he would go on to talk as if the same contract was also between the respondent and the appellant. Mr Macharia could not agree although wavering and unclear until I pinned him down to the provisions of the Land Disputes Tribunals Act, particularly section 3 (1) to make him come out with a statement that the respondent was alleging trespass against the appellant.

From what has been brought to my attention therefore, the fundamental question of law which I should decide in this appeal is whether the Provincial Land Disputes Appeals Committee, and by extension, the Gatanga Land Disputes Tribunal had jurisdiction to entertain, hear and decide this case.

Section 159 of the Registered Land Act, (cap 300) Laws of Kenya, as read with section 3 (1) of the Land Disputes Tribunals Act, make clear the jurisdiction of Tribunals and Land Disputes Appeals Committees under the Land Disputes Tribunals Act. Disputes over title to land are not within the jurisdiction of Tribunals and Land Disputes Appeals Committees. It can also be said that disputes over contracts are not under that jurisdiction.

This is what section 3 (1) of the Land Disputes Tribunals Act says:

“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;

(c) trespass to land, shall be heard and determined by a

Tribunal established under section 4”.

Land Disputes Tribunals and Provincial Land Disputes Appeals

Committees hardly like to work within limits of their jurisdictions and parties, by law not permitted legal representation, go before the Tribunals and Provincial Land Disputes Appeals Committees without caring to know there are limits to exercising jurisdiction, and battle their respective cases up to the end before the losers go to the High Court, where representation by advocates is permitted, to inform the Court that “they have suddenly realized” there are limits in exercising jurisdiction and that where they first went, the Land Disputes Tribunals and Provincial Land Disputes Appeals Committees who handled their cases had no jurisdiction to adjudicate in disputes over title to land and that “because the opposite sides won”, they, the losers, want all those proceedings nullified because of lack of jurisdiction on the part of Land Disputes Tribunals and Provincial

Land Disputes Appeals Committees who decided the cases. These are parties who never raise objections on the ground of lack of jurisdiction on the part of Land Disputes Tribunals and Provincial Land Disputes Appeals Committees who entertain, hear and decide every dispute relating to land taken before them (Tribunals and Appeals Committees) lack of jurisdiction notwithstanding. Of course the successful parties before Land Disputes

Tribunals and Provincial Land Disputes Appeals Committees hardly concede, even where they should, that there was lack of jurisdiction on the part of Land Disputes Tribunals and Land Disputes Appeals

Committees and the whole situation becomes a good reflection of how irrational our society behaves so that it is the fluent, the flowery languaged, the loud mouthed, the seet speaker, the orator, the cunning and

the likes, who wins the day in the public eye however irrational he may be.

In this matter there was never a contract between the appellant and the respondent concerning the transfer of the suit parcel of land to the respondent. The contract was between the father of the appellant and the respondent. The father of the appellant entered that contract as the lawful and absolute registered owner of the suit parcel of land under the Registered Land Act since the 22nd day October 1963 and may have been bearing in mind the fact that at the time of that registration, and it was a first registration which section 143 (1) of the Registered Land Act is all about, an easement was also entered on the same land register stating.

“Reserved for Kiawaihiga Catholic Church”.

Although subsequent to that registration, the appellant’s father had permitted the appellant to start building in the suit parcel of land on the basis that the appellant was to inherit the suit parcel of land, that conduct on the part of the appellant’s father did not bar the appellant’s father from changing his mind in order to give the respondent a better interest in the land than a mere easement which the respondent had through its constituent church, Kiawaihige Catholic Church, to give the respondent a legal title to the land, and he did so not having decided to disinherit his son, the appellant. On the contrary he did so through a contract which ensured that the appellant got an alternative and bigger parcel of land elsewhere.

The appellant was aware of all that as his father, now deceased, told him to stop building in the suit parcel of land and as a result an element of cash compensation to the appellant for the value of the structures the appellant had already put on the land, was included in the sale contract between the appellant’s father and the respondent. It has been said the appellant subsequently refused to take that money although the respondent honoured the contract and gave the money. But his father the sole absolute owner of the suit parcel of land had already lawfully transferred the land to the respondent who was as a result entitled, not only to possession but also to occupation of the suit parcel of land. Not only did the respondent acquire the legal title but the respondent also acquired the right to occupy and work that land. On the other hand the appellant, on refusal to give vacant possession, became a trespasser notwithstanding that he had refused to take the compensation money he was given as his refusal to take that money did not confer any legal interest in the suit land to the respondent.

When therefore the respondent filed this case in Gatanga Land Disputes

Tribunal seeking vacant possession against the appellant so that Kiawaihiga Catholic Church could proceed to develop the suit piece of land, the Tribunal had jurisdiction under section 3 subsection (1) (b) and

(c) of the Land Disputes Tribunals Act, to hear and determine that case and subsequently the Land Disputes Appeals Committee Central Province, had jurisdiction under the same provisions of the law to hear and determine the resultant appeal.

I should have rested this judgment here but there is another aspect of this appeal which I feel constrained to highlight. That aspect is the handling of the Tribunal’s or Appeals Committee’s decision by a Magistrate’s Court.

The term “Magistrate’s Court” is defined in section 2 of the Land Disputes Tribunals Act as follows:

“Magistrate’s Court means the Resident Magistrate’s Court or a District Magistrate’s Court”.

Section 7 (1) of the Land Disputes Tribunals Act therefore states:

“The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate’s Court together with any depositions or documents which have been taken or proved before the Tribunal”.

Subsection (2) of the same section adds:

"The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act".

Then comes section 8 (1) which seems to ignore the existence of section 7 aforequoted. Section 8 subsection (1) states:

"Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated".

Section 8 has ten subsections and no where in that section is the existence of section 7 acknowledged; so that while under section 7 the Chairman of a Land Disputes Tribunal which has decided a land dispute is mandatorily required, and left free to immediately, cause the decision of the Tribunal be filed in a Magistrate's Court and the Court is mandatorily required, and also left free, to immediately enter judgment in accordance with the decision of the Tribunal and issue the relevant decree; the party aggrieved by the same Tribunal's decision is, under section 8, given thirty days within which to appeal from the decision of the Tribunal. The aggrieved party can take some time to prepare his papers for his intended appeal and file his appeal even on the thirtieth day. But the successful party anxious to reap the fruits of the decision of the Tribunal does not care to wait for the thirty days to expire. He will therefore urge the Chairman of the Tribunal to cause the decision of the Tribunal be filed in a magistrate's court and there being no restraint, the Chairman will oblique and upon such filing of the decision, the magistrate's court will act. Section 7 puts it in mandatory terms that the Chairman shall cause the filing and the Court shall enter judgment. No waiting period.

In this case, for example, the decision of Gatanga Land Disputes Tribunal was filed in the Chief Magistrate's Court at Thika and that court proceeded to enter judgment on 25th October 1999 and a decree was issued to be enforced under the provisions of the Civil Procedure Act before the appellant filed his appeal in the Land Disputes Appeals Committee on 5th November 1999. The Land Disputes Appeals Committee heard and decided that appeal and now the appellant has appealed to the High Court against the decision of the Land Disputes Appeals Committee.

It is this appeal before me and from what I gathered from the learned counsel for the appellant, the view is that there is no need to bring in this appeal the record of what has gone on in the Chief Magistrate's Court at Thika because this appeal has nothing to do with what went on in the Court as section 8 of the Land Disputes Tribunals Act does not say anything about what goes on in a magistrate's court. Mr Kahuthu is not alone in taking that line of thinking.

Parties always go to the High Court on appeal ignoring to put before the High Court, in addition to the other relevant record filed, proceedings which may have gone on in a magistrate's court- where the decision of either the Tribunal or the Appeals Committee may have been subsequently filed; and surprisingly some parties will try to suppress any such information so that it does not reach the High Court. They want to keep the information out of the High Court.

With all due respect, that is not proper. Let all that information come before the Appellate Court as it is part of the decision of the Tribunal or Appeals Committee for where such a decision has been adopted by the Magistrate's Court in accordance with the provisions of the Land Disputes Tribunals Act, that adoption makes the decision of the Tribunal or the decision of the Land Disputes Appeals Committee, a decision of the Magistrate's Court and as a result the decision of the Tribunal or the Appeals Committee, in law, ceases to exist as a separate entity challengeable alone. Where such a decision of the Court exists therefore, what is the propriety of appealing against the mother decision of the

Tribunal or the mother decision of the Appeals Committee alone when in law, that decision has been over taken by, and has become, a decision of the Magistrate's Court? Does that not result into inconsistent court decisions, one from a magistrate's court not appealed against and therefore existing and the other one from the High Court? Strictly looking at section 8 without more as Mr Kahuthu maintains, is a

magistrate's court decision not a decision of a court of law? Is it to be ignored?

It seems to me that the Legislature in enacting the Land Disputes Tribunals Act assumed that everybody acting under that Act was going to be a keen lady or gentleman who, if chairman or successful party, would not run to a magistrate's court to file a Tribunal's decision or an Appeals Committee's decision before the expiry of the time allowed by section 8 for filing appeals, and if aggrieved party, would ensure that she or he filed and served relevant appeals within the time allowed by section 8 and further that once an appeal has been filed and served, no party would move a magistrate's court for judgment in accordance with the decision appealed against.

Unfortunately that assumption is not turning out to be the reality.

Fortunately however, for the parties in this appeal because from what I have said about the jurisdiction of the Land Disputes Appeals Committee in this matter, my judgment will not be inconsistent with the judgment of the Magistrate's Court in the matter although the two judgments will remain as two separate and independent judgments, the one in the Magistrate's Court not having been challenged in this Court in this appeal. To conclude: this appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 17th day of June, 2003

J.M. KHAMONI

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JUDGE