



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**H.C.C.CIVIL APPEAL NO.461 OF 2000**

**NJOROGE KURANGURI .....APPELLANT**

**VERSUS**

**GRACE NJERI NJOROGE & 3 OTHERS ..... RESPONDENTS**

**JUDGMENT**

This Appeal calls into question the jurisdiction of the Land Disputes Tribunal to sub-divide land, which has been duly registered and has a title issued under the Registered Land Act. Section 3(1) and (7) of the (The Act) The Land Disputes Tribunal Act are on the following terms.

**1. 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.**

3. Every claim shall be registered in register of claims to be kept by the Tribunal in the prescribed manner and the claims shall be numbered consecutively in each years according to the order of their institution. Mr. Ngare for the Appellant submitted that as the land in question in this dispute was registered under the Provisions of the Registered land Act the Appellant had an indefeasible title under section 28 of that Act, and that the amendment to section 159 of that Act does no more than confer jurisdiction on the Tribunal to exercise its jurisdiction under section 3(1) of the Act in accordance with recognized Customary Law but not to override the provision of the Registered land Act. He also on section 3(1) and (2) of the Judicature Act which in the following terms:-

“(1) The jurisdiction of the High Court, the Court of Appeal, and all Subordinate Court shall be exercised in conformity with –

(a) The Constitution;

(b) Subject thereto, all other laws, including the acts of Parliament of the United Kingdom cited in Part 1 of the Schedule to this Act, modified in accordance with part 11 of that Schedule;

(c) Subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrine of equity and the statutes of general application in force in England on the 12th August, 1997, and the procedure and practice observed in court of justice in England at

that date;

2. The High Court, the Court of Appeal and all subordinate Courts shall be guided by African Customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and it not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

In the instant case the Tribunal made orders which subdivided the land the subject matter of the dispute known as Land Parcel No.Loc.16 Ndakaini/423 and transferred a piece of land known as Land Parcel No. Loc.16.Ndakaini/358 to the Appellants son.

I have no doubt that what the Tribunal did was infirmity with the recognized customary Kikuyu law a matter which is peculiarly law applied gives rise to a right of appeal under section 8(8) and 9 of the Act I do not have to decide as no appeal is preferred in respect of the Tribunal decision on customary law.Whether it is a matter of fact or law many have to be decided in future.

The question is, does provision of the Act override or not the Provisions of the Registered Land Act in so far as they are inconsistent.

The inconsistencies arising are that under the Registered Land Act.

1. Section 28 gives an indefeasible Title to land Registered under that Act which effectively the Tribunal has destroyed.

2. Section 18 to 26 of that Act deals with the Maps Panels and Boundaries. Under those Provisions it is the Registrar who can cause section or blocks to be combined or varied or cause their boundaries to be varied (section 18(5) Section 21(2) and 4) are on the following terms:-

**21(2) Where any uncertainty or dispute arise as to the position of any boundary, the Registrar, on the application of any interested part, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.**

**4. No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section”**

and section 24 is in the following terms:-

**“(1) Any person who defeces, removes, injures or otherwise impairs any boundary feature or part of it unless authorized to do so by the Registrar shall be guilty of an offence and liable to imprisonment for a term not exceeding two months or to a fine not exceeding two thousand shillings or to both”.**

From this is could appear that only the Registrar under the Registered Land Act has power to alter boundaries and indeed if any other person did not unless authorized by the Registrar that person is guilty of a criminal offence.The Act gives power to the Tribunal “Involving a dispute as to the division of, or determination of boundaries to land”

“Land is defined to mean” agricultural land as defined in section 2 of the Land Control Act, whether or not registered under the Registered Land Act.”

On the face of it the Tribunal would appear to have power to make decisions relating to boundaries, and as provided for in section 3(7) of the Act in accordance with recognized Customary Law.

The Judicature Act provides that jurisdiction of court shall be exercised in conformity with the constitution and thereafter is priority to written laws. Both the Act and the Registered Land Act are written laws.

The matter however depends on the powers granted by Parliament to the Tribunal. Does its jurisdiction under section 3 1(a) extend to the revocation of an owner's title to land and the transfer of it or part of it to another person.

I would refer to Halsbury Laws of England 3rd Edition volume 36 at page 413 where at para.627 it is stated:

**“ Statutes affecting vested private rights. Unless it is clearly and unambiguously intended to do so, a statute should not be construed so as to interfere with or prejudice established private rights under contracts (g) or the title to property (h), or so as to deprive a man of his property without his having an opportunity of being heard (i). In particular, an intention to take away property without giving a legal right to compensation for the loss of it is not to be imputed to the legislature, unless that intention is expressed in unequivocal terms (k). This rule applies a fortiori to the construction of a statute delegating legislative powers (i) Similarly, if a right of entry on to private premises is to be conferred by statute, it must be expressed in plain terms (m)”**

In my view the intention of the legislature is not sufficiently clear to enable a Tribunal to make the land order it made in this case. If the Respondents have a legal right to part of the land then they are entitled to bring proceedings in the courts to uphold such rights, in which event the courts can make such orders as they think fit to give effect to their decision. In the result I hold that the Appellants' indefeasible title cannot be altered by the Tribunal and as such allows the Appeal to stand aside the orders of the subordinate court with costs to the Appellant.

Dated and delivered at Nairobi this 13th day of February 2002

**P.J. RANSLEY**

**COMMISSIONER OF APPEALS**