



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO.531 OF 2000**

**MBOGO MWATHI ..... APPELLANT**

**VERSUS**

**JOHN CHEGE MBOGO ..... RESPONDENT**

**J U D G E M E N T**

This dispute was originally filed at Gatanga Divisional Land Disputes Tribunal as case No. 2 of 2000 over parcel of land numbers LOC 16/KIMANDI-WANYAGA/82, 79 AND 231 registered in the names of the appellant and two others, namely Mwathi Mbogo, Mbogo Mwathi and Gichihi Mwathi, who were also the defendants in the tribunal case.

Mbogo Mwathi is the registered owner of the parcel known as LOC 16/KIMANDI/WANYAGA/81 which does not appear to be one of the plots in dispute but it is now the subject of this appeal as a result of the decision of the Provincial Land Disputes Tribunal Committee in appeal No. 13 of 2000.

The respondent claimed a share of the suit plots at the said Divisional Land Disputes Tribunal on the grounds that when he was born, he found the appellant and his co-defendants had been registered on the property of his grandfather and that since he was brought up by the appellant he was the proper person to show him his portion.

The respondent, the appellant Mbogo Mwathi and his codefendants testified and called witnesses. At the end of the day, the tribunal of two members and the chairman decided as follows:-

***“John Chege Mbogo to be given 10 acres out of land parcel LOC 16/KIMANDI - WANYAGA/231 the property of Mbogo Mwathi. The cost of the transactions to be met by John Chege Mbogo”.***

This award was filed in court on 8th May, 2000 and read to the parties on 23rd June, 2000.

The appellant Mbogo Mwathi who apparently was the owner of the parcel of land LOC 16/KIMANDI-WANYAGA/231 was not satisfied with the decision of the Gatanga Divisional Land Disputes Tribunal he appealed to the Provincial Land Disputes Appeals Committee through his son Daniel Kamau Mbogo through a power of attorney sworn on 12th July, 2000.

In the process of hearing this appeal, one Lucy Wanjiru was introduced as a second appellant. She had not been a party to the case at the Divisional Land Disputes Tribunal, nor was she called as a witness to make her claim there; and I cannot tell under what provision of the Land Disputes Tribunal Act – No. 18 of 1990 she was enjoined as the appellant.

Though the Gatanga Divisional Land Dispute Tribunal case was between the claimant John Chege Mbogo, Mbogo Mwathi; Gachuhi Mwathi and Mwathi Mbogo, the appeal

turned out to be between Mbogo Mwathi and Gachihi Mwathi. I do not know where this arrangement came from as I think the appeal should have been between Mbogo Mwathi and John Chege Mbogo, who had actually won the case at the Divisional Land Disputes Tribunal level!

Be that as it may, the Provincial Land Disputes Appeals Committee heard the appeal on 30th August, 2000 and received statements from Daniel Kamau Mbogo and Geoffrey Gachihi. John Chege the beneficiary of the Divisional Land Disputes Tribunal's decision did not testify; though Gachihi alleged that Mbogo Mwathi was given extra land as trustee of the second wife's grand daughters, one of whom was not married but had given birth to John Chege.

The elders made the following observations on the appeal:-

***“From the evidence adduced by the parties it is true that Mbogo Mwathi was given extra land so that when John Chege grows up, he could share some land to him. The clan also in their meeting of 25 th March, 2000 was of the opinion that Mbogo Mwathi should share 10 acres to Chege but then the acreage in the official documents is less than 50 acres as alleged by the clan”.***

Then came the following award:-

***“In the circumstances, the Provincial Land Disputes Appeals Tribunal has set aside the award of Gatanga Land Disputes Tribunal Land Title No. LOC 16/KIMANDI/WANYAGA/81 of 4 acres of Mbogo Mwathi should be cancelled and the same transferred to John Chege Mbogo within 60 days from the date of this verdict. John Chege to meet the costs of the transaction”.***

There was also this order:-

***“The executive officer of Thika Principal Magistrate's Court to sign the documents to cause the transfer and issuance of the necessary certificates” The aggrieved party to appeal in the High Court on a point of Law with 60 days”.***

I do not understand how land parcel No. Location 16/KIMANDI/WANYAGA/81 was dragged into this award because when John Chege Mbogo filed his statement of claim, he wanted a share of LOC 16/KIMANDI/WANYAGA/79,82 AND 231.

Then when the Divisional Land Disputes Tribunal at Gatanga made its decision it gave Chege 10 acres out of LOC. 16/KIMANDI – WANYANGA/231 not 81 as the Appeals Committee came to decide.

There had been no application either at the Divisional or Appeals levels to amend the claim to include plot number LOC 16/KIMANDI/WANYAGA/81 hence this addition was a serious error on the part of the Appeal's Committee.

Apart from this, Section 3(1) of the Land Disputes Tribunal Act, No. 18 of 1990 gives jurisdiction to Land Disputes Tribunals in all cases of a civil nature involving disputes 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,***

I must confess I have never understood what the jurisdiction in Section 3(1)(b) of the Act entails but certainly it cannot include a stranger coming round to occupy and/or work on someone else's land

whether registered or not. This would be an act of sheer trespass or forcible entry or detainer. And can this jurisdiction apply to registered land or what kind of land is involved here?

As regards Section 3(1) (a) of the Act, and so far as I understand it, the tribunals are meant to confine themselves to disputes relating to boundaries. But here again we have section 21 and 22 of the Registered Land Act Cap. 300 which vest jurisdiction to the Land Registrar's to resolve disputes relating to boundaries and even to fix them. This jurisdiction does not seem to have been divested from the Land Registrars to the Tribunals by Act No.18 of 1990 hence there are now two conflicting legislations on the same matter in existence.

In my opinion, Land Registrars are better placed to handle boundary disputes relating to registered land since they have the relevant sketches, maps and other data relating to the respective areas in their offices.

Moreover, Section 4 of the Registered Land Act (ibid) is explicit by providing that:-

***“Except as otherwise provided by this Act, no other written law and no practice or procedure relating to Land shall apply to land registered Under this Act so far as it is inconsistent with this Act”.***

This provision ousts the jurisdiction of Land Tribunals in deliberating and resolving disputes as to boundaries.

And even if one were to say the intervention of the Tribunals in boundary disputes was intended to enhance recognized customary laws, there is one school of thought which tends to suggest that prior to the registration of parcels of land under the Registered Land Act, the same were and/or are subject to the Land Adjudication process where every land holder's interest was/is identified and registered in the adjudication register which later formed/form the Land Register under Section 11(2A) of the Registered Land Act.

If I am right in this thought, then what is this recognized customary law under section 3(7) of the Land Disputes Tribunal Act all about? Moreover, the case of *Obiero v Opiyo and Other* [1972] E.A 227 ruled that registered parcel of land cannot be subject to customary law rights since these are extinguished on registration and that if the legislature intended that rights of a registered proprietor were to be subject to rights of any other person under customary law, nothing could have been easier than it to say *son Esiroyo vs Esiroyo & Another* [1973] E.A 338 and P.390.

At the same time I also find the Tribunal's jurisdiction over trespass to land complicated. Parties complaining of trespass to their land have the task of proving that they have good titles to the lands the subject of the trespass or that they have gone to the tribunal within 12 years from the date the cause of action arose.

In most cases I have come across like the present one, the claimant, John Chege, was claiming an interest in registered lands – LOC 16/KIMANDI/WANYAGA/82,79 and 231 hence raising the issue of title to land – See Section 11(2A), 30(g) and 126(1) of the Registered Land Act.

But the Tribunal had no power to adjudicate over the issue of title to land since this jurisdiction is vested in the High Court and/or the Resident Magistrate's court, depending on the pecuniary value of the subject matter – see Section 159 of the Registered Land Act.

Carrying out the orders of Gatanga Land Disputes Tribunal and that of the Provincial Land Disputes Appeals Committee would result in the rectification of the register which would go against the spirit of Section 143 of the Registered Land Act when conditions set in that section for such order to be made were not shown to exist in this case.

The dispute to the Gatanga Divisional Land Disputes Tribunal was not over boundary or trespass but

over a portion of the above mentioned lands registered in the names of Gachihi Mwathi, Mbogo Mwathi and Mwathi Mbogo in 1961.

These proceedings in the Tribunal were instituted in the year 2000 well over 39 years later, which to me offends the provisions of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

In the case subject to this appeal, the elders both at the divisional and appellate levels awarded the claimant John Chege either 10 or 4 acres from either LOC. 16/KIMANDIWANYAGA/ 231 or LOC. 16/KIMANDI-WANYAGA/81 under the pretext that Mbogo Mwathi held those portions in trust for the said John Chege, but here to the Land Disputes Act – 18 of 1990 does not vest jurisdiction in them to adjudicate over disputes relating to trusts.

The interpretation of “elders” in Section 2 of the Act means:-

***“Persons in the community or communities to which the parties by whom the issue is raised belong and who are recognized by custom in the community or communities as being, by virtue of age, experienced or otherwise, competent to resolve issues between the parties”.***

From the experience I have had in this type of cases, either on appeal or by way of judicial review, the elders who sit on these land disputes do not seem to measure up to the above description. They do not depict a sense of maturity and experience expected of them. It would, for example, be expected of them to understand that cases of land with titles do not come within their scope of authority, yet 95% of cases handled either on appeal or by way of judicial review relate to titled parcels of land.

Moreover, I am not quite sure complicated cases, as I feel land cases are, can be handled by laymen without some legal counsel. No wonder then that Tribunals arbitrate over cases of land in which they have no authority, or without any slight idea of the existing land laws in this country, hence the numerous appeals and/or applications for judicial review arising from their decisions’.

Given all these observations, I have lots of doubts whether the Land Disputes Tribunal Act can still stand the test in land law in Kenya – unless the elders manning them are advised that their role is mainly to try and reconcile parties disputing over such lands and not sit as courts taking evidence from litigants.

I allow this appeal and set aside the decision of the Provincial Land Dispute Appeals Committee. But since the parties are close relatives, I order that each party bears his/their own costs of the appeal.

Delivered and dated this 12th day of February, 2002.

**D.K.S AGANYANYA**

**JUDGE**