



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 86 OF 2001**

**KIMANGU GATHENDU .....APPLICANT**

**VERSUS**

**MWANGU GATHENDU & ANOTHER .....DEFENDANTS**

**RULING**

Litigation herein relate to a dispute over parcels of land known as LOC 19/RUATHIA/338, LOC 19/KIAMWAMBOGO/26 and LOC 19/RUATHIA/1182.

It originated at Mathioya Divisional Land Disputes Tribunal where the respondents demanded portions of parcels LOC 19/RUATHIA/338, LOC 19/KIAWAMBOGO/26 and LOC 19/RUATHIA/1182 arguing that these two had been registered in the appellants' name in trust for himself and other members Gathendu family. The respondents are step brothers of the appellant. The appellant came from the first house (Wambui Gathendu) while the respondents were from the second house (Wanjiku Gathendu).

Land Parcel number LOC 19/Rwathia/338 measures 6.1 acres while LOC 19/KIAWAMBOGO/26 measures 4.4 acres. LOC 19/RWATHIA/1182 measures 3 acres.

The respondents alleged these parcels of land belonged to their father Gathendu Kamangu who passed away in 1941.

The appellant, on the other hand, while accepting that LOC. 19/RUATHIA/338 originally belonged to his father, he said he had bought 3 acres to add thereto to make 9.1 acres, and that on subdividing the same he had given the respondent's house 3 acres while his mother's house retained 6.1 acres.

That he had bought LOC 19/KIAMBOGO/26 and that LOC. 19/RUATHIA/1182 was occupied by the respondents.

The divisional Land Disputes Tribunal heard this dispute and made the following award:-

**Wambui's house**

LOC.19/KIAMBOGO/26 measuring 4.4 acres

A portion of LOC.19/RUATHIA/338 3.1 acres

Kamangu Gathendu to get 4.5 acres

Samuel Miro Gathendu to get 3.0 acres      7.5 acres

**Wanjiku's house**

LOC. 19/RUATHIA/1182      3 acres

A portion of LOC 19/RUATHIA/338      3.0 acres

Mwangi Gathendu to get      3.0 acres

Duncan Murai Gathendu to get      3.0 acres

6.0 acres

The appellant was not satisfied with the decision of the divisional land dispute tribunal and he appealed to the Provincial Land Disputes Appeals committee which upheld the decision of the Divisional Land Disputes Tribunal, hence the present appeal which has listed eleven (11) grounds of appeal. It was filed on 15th March, 2001.

Precisely these are that the Provincial Land Disputes Appeal Committee failed to correctly record the appellants grounds of appeal; that it based its decision on incorrect and distorted proceedings which decision is illegal for lack of jurisdiction, that it failed to recognize that parcels of land LOC 19/RUATHIA/338 and LOC. 19/KIAMAMBOGO/26 were first registration and that these titles are indefeasible, that it failed to recognize that once the parcels of land were registered customary law rights were extinguished; that the proceedings before the Provincial Tribunal were barred by operation of law and so forth. This appeal has not been heard.

The appellant, in the meantime, made an application in this court on 2nd April, 2001 for stay of execution of the orders of the Provincial Land Dispute Appeals Committee.

This appeal was placed before honourabl Justice Amin on 23rd October, 2001, (since retired) who made these remarks in the form of a ruling resulting from submissions on a preliminary objection made on the application on 29.5.2001:

***“On hea ring the application before me and the preliminary objection made on consideration of the application, the subject of the appeal and the preliminary objection, in light of the submissions made by the learned counsel for both the parties appellant and the r espondent, I find that since no judgement has so far been entered against the appellant there is no basis, in my view, to grant a stay at this stage of the proceedings.***

***The application at this stage of the proceedings is for an appellant (applicant) to en ter judgement in terms of the award of the Provincial Land Disputes Appeals Committee (P.D.A) Tribunal.***

***In this courts view it is a procedural matter, a step necessary to conclude a chapter of litigation. The process of appeal is subsequent provision of law emanating from the decision of the court below, a right of appeal and consequently a proper stage for an application for the stage if desired.***

***As there is no judgement against the appellant it is consequently premature to issue such order as sought at this stage”.***

This is the ruling intended to be reviewed by the appellants application dated 7th November, 2001.

Counsel for both parties appeared before court on 28th January, 2002 to submit for or against the application.

Riitho for the applicant stated that the appellant came to the High Court within 60 days of the ruling of the Provincial Appeals Committee and that the Judge overlooked Section 8 of the Land Disputes Tribunal Act.

That there is no provision for going back to the lower court after the Provincial Appeals Committee has heard the appeal hence an error on the part of the Judge misinterpreting the provisions of the law as no judgement is required after the dispute has been deliberated by the appeals committee.

Counsel for the respondent opposed the application because it does not come under the ambit of Order XLIV rule 1(b) of the Civil Procedure Rules.

That the only recourse open to the applicant was to appeal.

It is counsel for the respondent who had raised a preliminary objection to the application for stay of execution pending appeal which has already been lodged. He is the one who suggested that there was no judgement to warrant an order of stay.

Then here he suggests the applicant's recourse is to go for appeal! How does he feel lodging in court an appeal on top of another appeal?

Section 7 of the Land Disputes Tribunal provides for the procedure of making the tribunal award the judgement of the court and it is the Chairman of the Divisional Land Disputes Tribunal who 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 thereat.

The court, in turn, shall enter judgement in accordance with the decision of the Tribunal and upon such judgement being entered a decree shall issue and be enforced in the manner provided for under the Civil Procedure Act.

An appeal then lies to the Provincial Land Disputes Appeals Committee within 30 days of the date of the decision – See Section 8(1) of the Act;

But there are no provisions as to stay of execution pending appeal or any application at the Magistrate's court for, setting aside the Tribunals ruling.

Neither are there provisions in the Act as to stay pending appeal after the committee makes its decision though there is a provision for appeal to the High court on a point of law only.

In the case subject to this appeal, after the appeals committee made its award – dismissing the appeal, it made the following order:-

***“The Executive Officer at Muranga SRM’s Law Courts is requested to sign the necessary documents to facilitate the transfer of the above mentioned land in accordance with the distributions indicated in land LOC 19/KAMBOGO/26 and LOC 19/RUATHIA/338 appearing in “A” above.***

***Similarly in B above to transfer the land LOC. 19/RUATHIA/1182 and a portion of land in LOC. 19/RUATHIA/338***

**(a) Mwangi Gathendu to get LOC 19/RUATHIA/1182 – 3 acres**

**(b) Duncan Murai to get from a portion of LOC. 19/RUATHIA/338 – 3 acres.**

***In the circumstances arrangements should be made to issue necessary title deeds to the parties concerned accordingly. Government surveyor should be involved in this process together with District Registrar of Land.***

What is this, if not sufficient intimation that the process of execution to implement the tribunal decision should proceed!

There is no provision under the Act as to what should happen with the decision of the Divisional Land Disputes Tribunal while the appeal proceeds at the Appeals Committee but may be since the file in the matter would be sent to the committee, the execution could await the outcome of the appeal so that the matter does not anod from the court.

But a crude litigant could still cause the matter to go to the court even though the appeal is going as there is no machinery or provision for stay at that level.

And now that the appeals committee has directed the Executive Officer at Muranga S.R.M's court to proceed with execution inspite of it giving the appellant 60 days to appeal, how does counsel for the respondent's want the former to move, if not to shut him out of doors of justice!

This court cannot close its eyes to these realities and to support the respondents in the quest to deny the appellant his right to the status quo which he very much deserves.

He has shown sufficient cause, though not analogous to those provided by Order XLIV rule 1 of the Civil Procedure Rules, why the order of Honourabe Judge Amin, should be reviewed.

There is obviously a danger of titles previously issued to the appellant being cancelled and new ones issued in line with the appeal committee's decision which would cause more complications should the pending appeal succeed.

I allow the application and set aside the order of 23rd October, 2001 and replace it with one granting stay of execution of the Provincial Appeal's Committee decision dated on 8th February, 2001 pending the hearing and determination of the appeal. There shall be no order as to costs of this application.

These shall be the orders of this court.

Delivered and dated this 7th day of February, 2002.

**D.K.S AGANYANYA**

**JUDGE**