



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PROBATE AND ADMINISTRATION
CIVIL APPEAL NO. 404 OF 2000

PETER GICHUHI MWANIKIAPPELLANT

VERSUS

AUGUSTINE MUCHIRI GATUNURESPONDENT

J U D G M E N T

Augustine Muchiri Gatumu (the respondent herein) was originally allocated land known as Escarpment/Kinale/1740 by the District Administration in Kiambu during 1992.

He subdivided this land with the approval of Divisional Land Control Board into three (3) portions in 1997 – numbers, Escarpment/Kinari/2694, 2695 and 2696 and he transferred L.R. Escarpment/Kinare/2694 to one Peter Njoroge Mbugua.

The respondent, however, filed a land dispute No. 16/20/259 before the Lari Land Disputes Tribunal on 10.2.1999 to claim that one Peter Gichuhi Mwaniki (the appellant) had encroached on and was developing his parcel of land number Escarpment/Kinari/2695. He requested the tribunal to evict the said appellant from his said land.

The appellant testified that it was him who was allocated plot number Escarpment/Kinare/1740 in 1988 and that since then he had lived on and developed it.

The panel ruled on 25.5.99 in favour of the appellant and the respondent was dissatisfied with this decision and lodged an appeal to the Provincial Land Disputes Appeals Committee. The Committee heard the appeal on 7th October, 1999 when the two parties made submissions thereon. It was adjourned to 15th June 2000 during which period the District Surveyor was expected to appear before the Committee in order to assist in the dispute between the parties. It would appear the Committee met the District Surveyor who produced to it certain documents or records for perusal. The Committee then remarked:-

“After perusing the records that were produced by the Surveyor who had kindly made some research in Kiambu Lands Registry, etc, it transpired that AUGUSTINE MUCHIRI GATUMU who had the relevant documents was proved to be the rightful owner of the land No. ESCARPMENT/KINALE/1740 and not PETER GICHUHI MWANIKI”

The appeals Committee then made the following award:-

“The Appeals Committee after hearing the evidence adduced by the parties concerned and after perusing the documents produced by the District Surveyor before the Appeal’s Committee, the

Provincial Appeals proved beyond reasonable doubt that the land belongs to AUGUSTINE MUCHIRI GATUMU in view of being in possession of the requisite Title Deed and GREEN CARD respectively. Under the circumstances the land number ESCARPMENT/KINALE/1740 rightfully belongs to the Appellant AU GUSTINE MUCHIRI GATUMU without question. Peter Gichuhi Mwaniki should therefore vacate the land with his properties and he has been given two months from 15.6.2000 to 15.8.2000 during which time he must make the necessary arrangements to vacate from land No. ESCARPMENT/KINARE/1740 and the deadline is 16.8.2000 failing which he will be evicted according to law. Any aggrieved party may appeal to the High Court within 60 days on a point of law.. ORDER The Executive Officer, in S.P.M. Law Court Kiambu is requested to sign the necessary documents to enforce the decision of the Appeals Committee to the effect that the Land No. ESCARPMENT/KINALE/1740 belongs to AUGUSTINE MUCHIRI GATUMU and therefore PETER GICHUHI MWANIKI should vacate the land in question within 2 months with effect from 15.6.2000. Deadline is 16.8.2000 failing which he should be evicted according to law”

This is the decision against which the appellant appeals to this court listing 5 grounds of appeal in the memorandum of appeal filed herein on 16th August, 2000.

These grounds are that the Committee erred and misdirected itself in declaring that the original land parcel number Kinale/Escarpment/1740 belonged to the Respondent which declaration was made without jurisdiction and in excess of jurisdiction conferred on the Committee by the Land Disputes Tribunal Act, (Act No. 18 of 1990), that the said Committee erred in law in allowing fresh evidence by an alleged District Surveyor; that the Committee further erred in failing to avail the unknown and the unnamed District Surveyor to the appellant for cross-examination; that the Committee erred in law in relying on a Surveyor rather than the Registrar as provided by Section 3(10) of the Act and that the panel was not legally constituted as by law provided and contravened the provision of Section 9(2) of the Land Disputes Tribunal Act (No. 18 of 1990).

Counsel for the parties appeared before this court on 25th June 2002 to present and/or oppose this appeal. Counsel for the appellant was concerned about the decision of the Committee to allow the District Surveyor to assist in this appeal rather than the Land Registrar. That in any case, the appellant was not given an opportunity to cross-examine the said District Surveyor. Counsel also complained that the Committee was not properly constituted as it was not known whether the Secretary to it was also a member. He prayed that the appeal be allowed with costs. Counsel for the respondent opposed the appeal and said that the land was and is still registered in the name of the respondent.

That the tribunals heard from the respondent and perused the documents he produced and were satisfied he was the rightful owner of the land.

That the appellant had no documents to prove he was the owner of the land. That the tribunal had jurisdiction to make the declaration it made about who was the rightful owner of the land and that this was a case of trespass to land. Counsel stated that there was nothing in the Land Disputes Tribunal Act prohibiting the Tribunal from taking fresh evidence and that even then the appellant did not attempt to apply to the Committee to avail the District Surveyor for cross examination.

According to counsel, the panel was properly constituted and that while the respondent was the registered proprietor of the suit land, the appellant was a squatter thereon. That no fraud was alleged against the respondent and no claim by way of adverse possession and that at the time of the deliberations of the dispute by the tribunal, land No. Escarpment/Kinale/1740 did not exist. He prayed for the dismissal of the appeal with costs. When the respondent took his dispute to the Divisional Land Disputes Tribunal, he wanted the appellant to vacate his land known as Escarpment/Kinale/2695. He said he had earlier been allocated land No. Escarpment/Kinale/1740 in 1992 and had applied for its subdivision in 1997 and 3 plots had been hived out of it, nos Escarpment/Kinale/2694, 2695 and 2696. He again applied to the Land Board of the area and transferred land No. Escarpment/Kinale/2694 to Peter Njoroge Mbugua while retaining plot numbers 2695 and 2694. He produced title to plot number Escarpment/Kinale/2695 which he complained that the appellant was wrongfully occupying.

This meant at the time of this litigation in 1999 land number Escarpment/Kinale/1740 did not exist and I do not understand how the Lari Divisional Land Disputes Tribunal came to rule over a non-existing land as belonging to the appellant.

And of course when the Provincial Land Tribunal Appeal's Committee dealt with the appeal they did so under mistaken view that the land in dispute was Escarpment/Kinale/1740.

This was an error – And even if the appeal had proceeded on the proper suit land it was also an error for the Committee to consider evidence of documents handed to it by an alleged District Surveyor in private and whom neither party was given an opportunity to cross-examination. This, no doubt caused a miscarriage of justice to the appellant. It is not correct to say there is nothing in the Land Disputes Tribunal Act which prohibits tribunal from taking fresh evidence when it is clear the Appeal's Committee never took fresh evidence in the real sense of the word. The tribunal adjourned proceeding in order to get assistance from the District Surveyor and when it resumed, it alleged it had received some information from the said Surveyor after he made a research at the Lands office Kiambu. You cannot call this fresh evidence. In this dispute the respondent was actually saying the appellant had settled on his parcel of land Escarpment/Kinale/2695 without any colour of right. That infact the appellant had trespassed onto his land hence he wanted the Tribunal to order the appellant to vacate his said land.

If, therefore, the Tribunal had proceeded to make orders on the parcel of land claimed by the respondent, I would easily have ruled that it had the requisite jurisdiction to handle this dispute and to make the requisite orders.

In the circumstances of this case (appeal) though, I have pointed out various committed by either the Divisional Land Tribunal as well as the Provincial Land Dispute Appeals Committee and that I would allow this appeal and direct that the dispute be reheard afresh at the Lari Divisional Land Disputes Tribunal by a different panel of elders.

Each party to bear his own costs of this appeal.

Delivered and dated this 26th day of July 2002.

D.K.S. AGANYANYA

JUDGE