



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL 554 OF 2000**

JOE MWANIKI MWANGI & 2 OTHERS .....  
....APPELLANT

VERSUS

HENRY MUKORA MWANGI & ANR .....RESPONDENT

**JUDGMENT**

The appeal herein, is against the decision of the Provincial Land Disputes Appeals Committee Nyeri dated 30<sup>th</sup> August, 2000.

One Mwangi Gichina died in 1958 leaving behind 3 wives and 201.5 acres of land.

The allegation giving rise to the dispute subject to this appeal is that in cause of distributing this land to the 3 houses, Charles Gichina Mwangi from the first house allocated to himself 15 acres more than what was allocated to the other houses.

That 3 sons from the last house went to Gatanga Divisional Land Disputes Tribunal to challenge Charles and his brothers ownership of the 15 acres and asking that those acreages be shared by the 3 houses equally.

That the Gatanga Divisional Land Disputes Tribunal ruled that indeed the 15 acres should be shares equally amongst the 3 houses.

In the meantime, Charles had been sued in Thika Civil Case No. 305/91 by his brother Henry claiming half share of the 15 acres and that the court had ordered Charles to share with his brother the 15 acres equally and that this had already been done.

So when the Gatanga Land Disputes Tribunal's decision was appealed against by Charles and his brother Henry to the Provincial Land Disputes Appeals Committee, it read through the proceedings of previous cases on the dispute and declared that the Gatanga could not have heard the dispute as the same was resjudicata.

This is why the appeal was lodged to this court in a memorandum of appeal which listed 3 grounds of appeal; namely that the Appeals Committee erred in ruling that the case was resjudicata and that it had no jurisdiction to hear it, that the Committee did not correctly apply the doctrine of resjudicata, that previous proceedings referred to by the Committee in their ruling had no relationship to the matter before it.

The appeal was heard by this court on 24<sup>th</sup> June, 2002 when counsel for both parties submitted on it.

Counsel for the appellant said the appeals committee was wrong in holding that the case was resjudicata when there was no pending litigation between the same parties.

That the appeal before the Provincial Land Dispute Tribunal Committee was not heard on merit.

According to counsel, the Committee should have stayed proceedings until the High Court and/or Court of Appeal completed the case/appeal before them. He prayed that the appeal be allowed with costs.

Counsel for the 1<sup>st</sup> respondent opposed the appeal. He stated that out of the whole piece of land left by the deceased only 75 acres of it were registered in the name of the respondent but intended for his mother's house. That it was to be distributed between his mother, Kanyi, his brother and himself.

That he transferred 30 acres to his brother leaving 45 acres to himself. That then the mother filed a suit at Thika Magistrate's Court (CC No. 97 of 1971) claiming 15 acres thereof saying it belonged to her as the eldest wife. The case did not succeed.

That after the death of Kanyi, 1<sup>st</sup> respondent Henry instituted suit No. 305 of 1991 at the Resident Magistrate's Court at Thika to claim half share of the 15 acres saying his brother could not own the 15 extra acres alone and the court decided in his favour so that each of them got 37½ acres.

That out of this decision Appeal (HCCA No. 128 of 1992) was lodged which went up to the Court of Appeal (C.A. 180 of 1999).

The decision of the Court of Appeal appears to have been that this matter be sent back to the High Court for hearing *de Novo* but that by this time the 15 acre piece of land had already been sub-divided and each of the respondents had already obtained title to his 37½ acres of land.

According to counsel, the 2<sup>nd</sup> respondents title to 37½ acres was a first registration and that the subject matter had already changed. He, therefore, had nothing to give to the appellant.

That even if the Appeals Tribunal had not applied the doctrine of resjudicata it would still have decided the matter in favour of the second respondent.

That even if the Appeals Tribunal had sent back the matter to the Divisional Tribunal it would have been a waste of time as the result would have been the same.

He prayed for the appeal to be dismissed with costs.

Mr. Wandaka for the 2<sup>nd</sup> respondent also opposed the appeal and adopted submissions of the counsel for the 1<sup>st</sup> respondent except that, according to him, the 15 extra acres of land belonged to the 2<sup>nd</sup> respondent as the eldest son of the deceased.

He submitted that demarcation in the area was done in 1958 and the claim made 41 years later, this breaching Section 13(3) of the Land Disputes Tribunal Act because the appellant's claim was time barred.

Counsel agreed that the suit was res judicata since the matter still pending in the High Court.

That the matter should not have been filed at the Land Tribunal when the court was handling the same dispute.

That a suit filed 40 years after the land was shared out offends public policy.

According to counsel for this respondent, his client was not served with the statement of claim hence, no claim was made in so far as this respondent was concerned, hence proceedings against him were a nullity since no party should be condemned unheard.

Counsel submitted that there was no provision for the Tribunal to revoke titles to land.

That this appeal offended the proviso to Section 8(a) where a certificate should be issued to show the appeal to this court is on a point of law.

Counsel stated that the matter should not be sent back to the Provincial Land Disputes Appeals Committee but instead the appeal should be dismissed with costs.

These are the submissions made before this court by counsel for both parties for consideration and decision.

Though the record herein is not complete due to lack of records of some previous proceedings in this dispute, what comes out clearly is that when the late Mwangi Gichina's land was sub-divided and shared out to his three (3) wives Charles Gichina Mwangi, 2<sup>nd</sup> respondent herein, got 15 acres on top of his 30 acre share.

This acreage was the subject of a dispute between the said 2<sup>nd</sup> respondent and his mother Kanyi, in Senior Resident Magistrates Court Civil Case No. 97 of 1971 at Thika.

Kanyi had wanted the 2<sup>nd</sup> respondent's land sub-divided so as to give her 15 acres thereof as hers since she was the eldest wife of the deceased.

Full proceedings and judgment of that case are not available. But an extract from the judgment in Thika Resident Magistrate's Court Civil Case No. 305 of 1991 show that the court in Civil Case No. 97 of 1971 ruled that there was "no need to sub-divide the land in any more parts".

By that time, the second respondent's piece of land was Loc 16/Kigoro/197.

It was the same land subject of Civil Case No. 305 of 1991 in which then the 1<sup>st</sup> respondent wanted 15 acres exercised therefrom and half thereof given to him. Judgment in that case was delivered on 14<sup>th</sup> April 1992 and the 1<sup>st</sup> respondent awarded 7½ of the 15 acres extra which the 2<sup>nd</sup> respondent had awarded himself.

As it has come out, an appeal was lodged to the High Court in High Court Civil Appeal No. 128 of 1992 whereupon a "ruling" was delivered on 29<sup>th</sup> October, 1997.

This ruling was appealed against to the Court of Appeal in Civil Appeal No. 180 of 1999. The appeal was allowed on 12<sup>th</sup> May 2000 on ground that there was no provision in the Civil Procedure Rules which permits the court to hear an appeal by way of written submissions. The Judges of Appeal R.O. Kwach, A.B. Shah and M. Ole Keiwua then directed that H.C.C.A. No. 128 of 1992 be heard *de novo*.

There is no record in this appeal file that this has been done. Even if it has, the doctrine in Section 7 of the Civil Procedure Act only applies where parties in the previous case are the same as in the subsequent case.

This was not the position in the Provincial Committee's Appeal which is the subject of this appeal. In the Magistrates Court Case which has ended in the Court of Appeal, the litigants were brothers from the house of Kanyi disputing over the 15 acre portion of the second respondent's land while the case subject to this appeal involves the sons of the last house of the deceased and those of Kanyi, the first wife. Though, therefore, the subject matter of the dispute in the case is the same, the doctrine of resjudicata was not applicable.

At the time the Gatanga Divisional Land Disputes Tribunal deliberated over this dispute, the first respondent's land was No. Loc. 16/Kigoro/1871 and Loc. 16 16/Kigoro/1870 belonged to the 2<sup>nd</sup> respondent. According to the Tribunal proceedings, the Registration of these parcels had been done way back in the 1960s.

The proceedings show that the appellants wanted 7½ acres out of each of the above parcels shared equally amongst the three houses of the deceased and that order was made by the Tribunal.

As one can easily see, the claim by the appellant's did not relate to a boundary dispute, trespass to land or a claim to work on land which claims Section 3 of the Land Disputes Tribunal of 1990 permits the Tribunal to handle.

The appellant's case before the Tribunal related to the subdivision of titled parcels of land and hiring therefrom 15 acres for sharing to 3 houses of the deceased.

This was in breach of Section 159 of the Registered Land Act, Chapter 300 Laws of Kenya.

The Gatanga Land Disputes Tribunal had no jurisdiction to deal with this dispute and even if the Provincial Land Disputes Appeals Committee had not dismissed the appeal on the principle of resjudicata, the reason I have given herein before could as well have disposed of the appeal in the same direction.

In the circumstances, there can be no reason, or a good one for this court to remit this matter before the same Appeals Tribunal for further action.

That the Appeal's Committee should have stayed proceedings before it to await the decision in HCCC No. 128 of 1992 does not provide an answer to this dispute.

I dismiss this appeal with costs.

Delivered this 17<sup>th</sup> day of July, 2002.

**D.K.S. AGANYANYA**

**JUDGE**