

The evidence of Samuel Maluki before the land disputes tribunal was to the effect that once upon a time, he with other people went to clear and make claim on certain virgin parcels of land at a place called Imwaamba. He went to the World War II presumably, returned and the new settlers moved about again. He himself left his

land which he had on several occasions given some people to cultivate and returned to his original home area at Matulu. One person whom Maluki allowed to till his land was Kasyoka Kanuku. It is not said at this point if he is a relative of Mbuvi Kanuku the applicant herein. But Maluki told the panel that when asked to cease using his land, Kasyoka complied. Also one Kalungu acted likewise then:

“Meanwhile Mbuvi came to me and requested me to allow him to use my old shamba that I had left at Imwaamba and I allowed him to do so. I told him not to construct his home inside the land but use it (only) as 10 a shamba. When I gave him that piece of land to till my children were not happy with me.”

The children of Maluki quarrelled with Mbuvi over his use of the land. The matter got before the elders. It got before the local assistant chief where Mbuvi told Maluki that:

“..... the land was not mine because I had been given it by Kalungu.”

Maluki got upset and the matter ultimately ended before the tribunal where he:

“..... now wanted the court to assist him by telling Mbuvi to leave my hand completely..... (and) he should stop using it.....”

Maluki was cross examined by Mbuvi and also the tribunal. On the issue of boundaries he said that his land which had an old homestead and shamba to his east lay the land of Musembi Mwaniki. To the west was Mutua Kalungu. The south side had Kalungu Kanuku while Munyithya and another Kalungu had their land parcels to 30 his northern side. Maluki even promised to take an oath (local) on this account. That Mbuvi was still using the whole land Maluki allowed him to use save for a little extension over the fence to the east.

Mbuvi on his part told the tribunal that he inherited his land from his mother and Maluki only came there later. He asked for land to build and clear a shamba and Kasyoka Kanuku gave him. That Mbuvi had 3 homesteads on his land and he buried his daughter there. He planted there banana and mango trees. Mbuvi was emphatic:

“Maluki has never given me any land. He is the one who met me there..... I am asking the court to part me with Maluki.”

Mbuvi denied that the land belonged to Maluki or that Maluki left an old homestead there but that there was a path between Mbuvi’s land and the one Maluki was given to live on. Mbuvi was also ready to swear an oath in regard to about that land he claimed.

Maluki’s witness Musembi Mwaniki told the tribunal that Maluki once allowed him to use his land; he gave it back and:

That during the time he used Maluki’s shamba there was no complaint from anybody at all. Mwaniki knew both Maluki and Mbuvi – his- (not said)-in-laws.

There were other witnesses either saying that the land belonged to Maluki or Mbuvi (via his mother Mutave). Other witnesses e.g. Kalii Munyao testified that the land belonged to Kalungu Kanuku. That the tribunal drew a sketch map of land holdings in the area indicating Maluki’s as well as Mbuvi’s homesteads. They drew a boundary running north-south between the 2 litigants and said in their judgement that:

“..... both parties had each a portion of land in the area. Thus the complainant Mr. Maluki Kityambyu owned the western side while the objector Mr. Mbuvi Kanuki owned the eastern side of the disputed land.”

Other orders and directions were made by the panel and this court was told that both parties appealed to the Provincial Appeals Committee at Embu.

Now the question is: Did the tribunal decide a matter of the boundary as under S.3 of the Land Disputes Tribunals Act or was it arbitrating over ownership – an aspect tribunals have no authority to sit on? It is not doubted that the tribunal sat for long and listened to much evidence. It did what it considered justice in the matter by drawing a boundary between the two litigants herein. Had that been what the panel was told to consider indeed its decision appears just and fair. But regrettably the evidence points to each party asking for the whole land the other is claiming.

From the extracts above while Maluki asked the tribunal to get Mbuvi to leave his land completely Mbuvi on his part asserted that Maluki did not give him any land and it was time the two were separated for good on this disputed land.

From this court’s best understanding of the case before the land disputes tribunal it concerned OWNERSHIP of land – the whole of it. No issue of boundaries featured – and so when the tribunal determined the dispute on a boundary it was not only dealing with an entirely differently subject but also would have been acting outside its jurisdiction had it determined whether it was Maluki or Mbuvi who owned all the land in issue. It did the latter and that was outside its mandate.

In sum the orders as prayed are granted. The tribunal’s decision in issue is quashed by order of certiorari.

Each party to meet its own costs.

Orders accordingly.

Delivered on 16th May 2001.

J. W. MWERA

JUDGE