



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 76 OF 2003

HENRY MWANGI KIMANI.....1ST APPELLANT

ERNEST KIMANI KARUMI.....2ND APPELLANT

-VERSUS-

CYRUS MWANGI WAINAINA.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 104 OF 2003

HENRY MWANGI KARUMI.....APPELLANT

-VERSUS-

CYRUS MWANGI WAINAINA.....RESPONDENT

(Being an appeal from the award of Nyeri Provincial Lands Disputes Appeals Tribunal delivered on 22nd January, 2003)

RULING

1. The dispute herein relates to the parcel of land known as **Loc 3/Mukuria/ 674** (“the suit property”). A background of the dispute is that the property known as **Loc 3/Mukuria/ 536**, originally family land belonging to Karumi Wainaina, was registered in the name of his son, Bernard Wainaina, who was the father to the respondent and a brother to the appellants.
2. Following registration, the appellants are said to have planted tea bushes on the property known as **Loc 3/Mukuria/ 536** with the permission of Bernard Wainaina but that subsequently, Bernard Wainaina divided the aforesaid property into two (2) portions: namely the suit property and the property known as **Loc 3/Mukuria/ 673**, the latter of which Bernard retained ownership.
3. Subsequently, Bernard gave the suit property to the respondent as a gift, by which point some of the tea bushes earlier on planted by the appellants had trespassed on the suit property, resulting in the dispute between the parties herein whereby the respondent sought to have the appellants’ tea bushes uprooted from the suit property.
4. The dispute was first heard before Kigumo Land Disputes Tribunal vide Tribunal Case No. 129 of 2001 lodged by the respondent and against the appellants. Upon hearing the parties, the Tribunal vide its ruling delivered on 4th September, 2001 made an award to the effect that the appellants be evicted from the suit property.
5. Subsequently, the 1st appellant lodged an appeal before the Provincial Land Disputes Appeals Tribunal in Nyeri (“the honourable tribunal”) vide Maragwa Tribunal Dispute No. 31 of 2001 seeking to have the award set aside and the suit property awarded to him.

6. In its award made on 22nd January, 2003 the honourable tribunal indicated that the appeal had been compromised by the parties.

7. The aforesaid award now constitutes the subject of the appeal, with the appellants putting forward the following grounds in their memorandum of appeal dated 21st February 2003:

i. THAT the honourable tribunal erred in law by holding that the only issue for determination was tea bushes on the suit property.

ii. THAT the honourable tribunal erred in law by failing to appreciate the fact that the respondent held a title to the suit property under customary trust law and for the appellants.

iii. THAT the honourable tribunal erred in law by failing to take into account that there was an existing customary trust between the respondent and the appellants.

iv. THAT the honourable tribunal erred in law by failing to consider that the respondent's claim over the suit property was statutory barred and that the appellants had prescriptive rights over the land.

v. THAT the honourable tribunal erred in law in holding that the respondent was the sole owner of the suit property taking into account the appellants had adverse possession of the land and had already planted tea plants with the respondent's knowledge.

vi. THAT the honourable tribunal erred in law in ordering the appellants to sell their tea plants on the land to the respondent.

vii. THAT the honourable tribunal misdirected itself in law by directly ordering Kenya Tea Development Agency to facilitate the sale of the tea bushes to the respondent by the appellants whereas such direction could only be issued by a court of law upon the filing of the tribunal's award in court.

viii. THAT the honourable tribunal misdirected itself in law in holding that the appellants had compromised their rights to the land upon counseling.

ix. THAT the honourable tribunal erred in law in giving itself the role of counseling parties to the dispute as this was ultra vires its statutory powers.

x. THAT the honourable tribunal erred in law in failing to adjudicate on all the issues in dispute rather than what they termed as the big issue.

8. In response to the grounds of appeal, the respondent filed the Grounds of Opposition dated 23rd January, 2017 in which he raised 13 grounds challenging *inter alia*, **the jurisdiction of this court** to hear and determine this appeal; the **competency** of the appeal by virtue of the fact that it was filed without leave of the court and that there has been no diligence in its prosecution; and that the grounds of appeal lack basis for the reasons that the suit property was given to the respondent as a gift *inter-vivos* and the principle of adverse possession cannot apply in the present instance.

9. From the record, it is apparent that both appellants and the respondent passed on in the course of the appeal, leading to substitution of their names with those of their respective administrators/personal representatives.

10. The parties thereafter filed written submissions on the appeal.

11. At this point and without going into the merits of the appeal, it is important to first address the crucial issue of **jurisdiction** which was raised by the respondent both in his Grounds of Opposition to the appeal and in his submissions. I note that this particular issue was not at all addressed by the appellants.

12. Briefly, the respondent is of the view that this court lacks jurisdiction to determine the appeal pursuant to the provisions of **Article 162(2)** of the **Kenyan Constitution, 2010** which reads as follows:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(b) the environment and the use and occupation of, and title to, land.”

13. The respondent also referred this court to the **Environment and Land Court Act No. 19 of 2011** which established the **Environment and Land Court (ELC)** to determine disputes relating to the environment and land.

14. It is the contention of the respondent that upon establishment of the ELC, the appellants ought to have applied for the appeal to be transferred to the said court for determination but did not. The respondent is of the view that be that as it may, this court ought to down its tools in respect to this appeal. Reference was made to the renowned case of **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited, (1989) KLR 1** where the court held that without jurisdiction, a court of law ought not to take any further steps in respect to a matter.

15. It is noted that the subject matter of the dispute is concerned with entitlement to land which in this case is the suit property. With the establishment of the ELC under **Article 162(2) (b)** of the **Constitution** and the subsequent enactment of the **Environment and Land Court Act, 2011 (“the Act”)**, all disputes relating to land and the environment are to be heard by the ELC. **Section 30(1)** of **the Act** goes on to provide that all related proceedings which are pending before any other courts or tribunals with competent jurisdiction will continue to be heard by the same courts until such time as the ELC becomes operational or as directions will be given by the Chief Justice or the Chief Registrar.

16. To that end, the Honourable Chief Justice issued practice directions dated 9th November 2012 published vide **Gazette Notice No.16268** pursuant to the provisions of **Section 30 of the Act**, thereby allowing the subordinate courts and the High Court to continue hearing any land or environment matters where hearing had commenced.

17. It is noted that in the present instance, the appeal was instituted in 2003. However, the appeal was not heard by the time the ELC was established in 2011. Parties filed submissions earlier this year by which time the respondent had already raised the jurisdictional issue.

18. Upon considering the above factors together with the fact that the appellants have not raised any opposition to the submission on jurisdiction by the respondent, I am of the view that it would be fair not to dismiss the appeal but to instead allow the court vested with jurisdiction to conclude the appeal.

19. In the end, I hereby make an order directing that this appeal be transferred to the Environment and Land Court for hearing and determination.

Dated, Signed and Delivered virtually via Microsoft Teams at Nairobi this 10th day of July, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the 1st Appellant

..... for the 2nd Appellant

..... for the Respondent