



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

MISC. APPEAL NO.16 OF 2017

JOEL KITHOKOI MUTHIANI.....APPELLANT

-VERSUS-

JOSEPH MATHEKA KITHOKOI.....RESPONDENT

AND

RUTH NGOVU KIMALE.....INTERESTED PARTY

JUDGEMENT

1. This is an appeal from the judgement and order of the Embu Provincial Land Dispute Tribunal Appeals Board/Committee dated 15th July, 2002 in Appeal Case No.42 of 2001.

2. From the record of appeal filed in the High Court at Machakos on 20th March, 2009, the Respondents claim was against the Appellant in Land Dispute No.16 of 2000 before the District Land Disputes Tribunal at Makueni involving Land No. Makueni/Mubau/271 was: -

“That you are the registered owner of the above land, and father to the claimant. That you married in accordance with the Kamba Customary Law to two wives viz late Esther Mwithi and Rael Mwelu. That you want to evict the children of the late Esther Mwithi from the above land. That the Claimant wishes to have the land divided into two equal parts in accordance with Kamba Customary Law and Auni Nthengo clan resolutions.”

3. In its award presumably delivered on the same day that the Tribunal sat on 14th March, 2001, the Land Disputes Tribunal held that: -

“Due to the above reason the Objector Joel Kithokoi should allow the sons of the first wife who are the Claimant use of his land at Nzueni land No.Makueni/Mubau/271 just as he has done with the children of the second wife.”

4. As was correctly captured by the Respondent’s Counsel in her submissions, the Appellant being aggrieved by the award of the Land Disputes Tribunal appealed to the Provincial Land Dispute Tribunal Board in appeal case No.42 of 2001 on a date that is not shown in the two records of appeal filed herein.

5. Upon hearing the appeal, the Provincial Land Dispute Tribunal Appeals Board delivered its judgement as follows: -

“In the few (sic) of the above findings we dismiss this case with costs. Therefore, the decision of the District Land Disputes Tribunal still stands. We further order that the sons of the first wife be included in the sharing of the land No.271.”

6. Further aggrieved by the judgment of the Embu Provincial Land Dispute Tribunal Appeals Board/Committee in Appeal Case No.42 of 2001, the Appellant filed this appeal where he raised the following grounds: -

1) That the Appeals Committee had no jurisdiction to deal with the matter as the subject matter did not lie under section 3(1) of the Land Disputes Tribunal Act, 1990.

2) That the Appeals Committee conferred on itself original jurisdiction and determined an issue which was not the subject of the appeal and as a result erred in law.

3) The Appeals Committee erred in law in basing their decision on the fact that the Appellant did not have witnesses before the District Land Tribunal.

7. The Appellant prays for this appeal to be allowed and the decision, judgement and order of the Embu Provincial Land Disputes Appeal Board/Committee dated 15th July, 2002 be set aside with costs.

8. At the outset, I wish to point out that the judgement of the Appeals Board/Committee was not delivered on the 15th July, 2002 as stated by the Appellant in his memorandum of appeal. The date of the delivery of the Appeals Board's/Committee's judgement is not indicated in the Board's/Committee's proceedings. 15th July, 2002 is when the proceedings of the Appeals Board/Committee were certified by the Magistrate as true copies of the original record.

9. Having made the above observations, I will now consider the submissions filed by the Counsel on record for the Appellant and the Respondent.

10. In grounds one and two of the appeal, the Counsel for the Appellant cited **section 3(1) of the repealed Land Disputes Tribunal Act 1990** (hereinafter referred to as the Act) which provided that: -

“Subject to all this Act all cases of civil nature involving a dispute as to: -

(a) The division of or determination of boundaries to land, including land held in common,

(b) A claim to occupy or work land,

(c) Trespass to land shall be heard and determined by a Tribunal established under Section 4.”

11. Arising from the above, the Counsel submitted that from the perusal of the proceedings before the provincial appeals board and those of the District Land Disputes Tribunal, it is clear that the suit property Makueni/Mubau/271 is registered. He went on to submit that the jurisdiction of the Land Disputes Tribunal was very limited under section 3(1) of the Act. The Counsel further pointed out that the dispute was between a father and son and as such the issue in question is family land. That since the Respondent claimed land because it belonged to his father, then this brings out the issue of trust. That section 3(1) of the Act never conferred jurisdiction to the Tribunal to order sharing of registered land. The Counsel pointed out that this is what the Tribunal in respect of the suit appealed from did. That the judgement of the Provincial Appeals Board was;

“in view of the above findings we dismiss this case with costs. Therefore the decision of the District Land Disputes Tribunal still stands. We further order that the sons of the 1st wife be included in the sharing of the land No.271.”

The Counsel relied on the case of **Joseph Malakwen Lelei and another vs. Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR** where the Court of Appeal stated thus: -

“Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a Trust in favour of a party, which in essence was the basis of the 3rd Respondent's claim.”

The Counsel further cited the case of **Republic vs. Chairman Kiharu Land Disputes Tribunal [2007] eKLR** where the High Court held thus: -

“The Tribunal has no authority to compel the father to share his land to his children during his time unless he does so willingly. As he has changed his mind the Tribunal cannot compel him to do so as the sons have no rights that can be enforced by a court of law.”

12. As for ground three, the Counsel referred to **section 143 of the Evidence Act Chapter 80 of the Laws of Kenya** which provides that: -

“No particular number of witnesses shall, in the absence of any provision of the law be required for proof of any fact.”

13. Arising from the above the Counsel pointed that the Objector before the Land Disputes Tribunal was the Appellant in this appeal who testified as the sole witness and as such it cannot be said that he did not have witnesses.

14. On the other hand, the Counsel for the Respondents submitted that the Respondent's claim before Makueni District Land Disputes Tribunal was that: -

“the Appellant's sons from the 1st wife be allowed to use the Appellant's land No.Makueni/Mubau/271 ...”

15. The Counsel went on to submit that the Tribunal heard and allowed the claim. That when the Appellant's appeal before the Eastern Provincial Appeals Committee was also dismissed, the Land Disputes Tribunal's award was upheld.

16. It was further submitted that the question which arises from the appeal, and which if answered will determine the three grounds of appeal is, whether Makueni Land Disputes Tribunal had jurisdiction to entertain the claim before it. That if the said Tribunal had jurisdiction to determine the Respondent's claim to use land so did the Appeals Committee.

17. Regarding jurisdiction of both the Tribunal and the Appeals Committee, the Counsel referred to section 3(1) of the Act. The Counsel

pointed out that the Respondent's claim squarely lies within the aforementioned section 3(1). The Counsel went on to submit that the matters that were canvassed before both the Tribunal and the Appeals Committee and determined by the two entities were the Respondent's right to occupy and use/work the land. That there was no claim for title, and the said Tribunal and Appeals committee did not make any decision on sub-division or transfer of the Appellant's title.

18. The Counsel further submitted that the Appellant never denied that his other children worked and occupied the same land. The Counsel was of the opinion that having addressed ground one of the appeal and anchored it on the law then in operation, the other two grounds are not shown to be drawn from the dispute proceedings before the Land Disputes Tribunal and the Appeals Committee and thus they have no basis. The Counsel pointed out that indeed ground 3 is on matters of fact and not law.

19. The Counsel further termed the case law cited by the Appellant as not relevant to the facts of the appeal therein and concluded by urging the court to find that the appeal has no merit and proceed to dismiss it with costs to the Respondent.

20. The Counsel of the Respondent also submitted on **sections 7(1)(2) 8(1)(8)(9) and (10)** of the Act.

Section 7(1) of the Act provided as follows: -

“The Chairman of the Tribunal 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 before the Tribunal.”

Section 7(2) provided that: -

“The court shall enter Judgement in accordance with the decision of the Tribunal and upon Judgement being entered, a decree shall issue and shall be enforceable in the manner provided for in the Civil Procedure Act.”

Section 8(1) provided that: -

“Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the province in which the land which is the subject matter of the dispute is situated.”

Sections 8(8) provided that: -

“The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.”

Section 8(9) provided that: -

“Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of.”

Proviso: -

“provided no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.”

Section 8(10) provided that: -

“A question of customary law shall for all purposes of this Act be deemed to be a question of fact.”

21. The aforementioned Sections deal with the requirement of the Chairman of the Tribunal to cause the decision of the Tribunal to be filed in the Magistrate's whereupon the Court was obligated to enter judgement in accordance with the Tribunal's decision. They also provided the period within which appeals from the Tribunal were to be filed before the Appeals Committee, the decision of the latter being final on questions of fact.

22. However, either party could appeal to the High Court on a point of law within 60 days from the date of the decision complained of provided that a judge of the High Court had certified that issue of law (other customary law) was involved.

23. The Counsel was of the view that since not all is shown in the two (2) records of appeal filed by the Appellant, the original record in Makueni Resident Magistrate's Court LDTC No.4 of 2001 may contain important documents/correspondence and proceedings which may guide the Court in noticing the flaws in the Appellant's appeal.

24. I have looked at the original record in Makueni Resident Magistrate's Court LDTC No.4 of 2001. There is a letter from the District Commissioner Makueni dated 10th April, 2001 forwarding the original proceedings and award of the Tribunal to the court. The said letter is not stamped by the court to indicate when it was received by the court but of importance to note is that it indicates that the case was held on 14th March, 2001. There is also form 1 being an application to file appeal against the decision of the District's Tribunal. At the top right

corner of the document there is a stamp of the Provincial Commissioner Eastern Province with an endorsement by hand indicating the date of 05th May, 2001. The date endorsed in hand may connote the date when the appeal before the Appeals Committee was lodged but the issue would require thorough interrogation which may not be feasible at the moment. The same was forwarded to the Resident Magistrate's Court Makueni on 14th May, 2001 as can be seen from the receiving stamp of the court. It seems to me that there were unsatisfactory procedural lapses in the matter but of importance to note is that the appeal from the District Land Disputes Tribunal to the Appeals Committee was filed within 30 days of the decision.

25. The proceedings of the Appeals Committee do not indicate the date when the Committee heard the appeal and made its judgement. However, a copy of the Appeals Committee's proceedings and judgement were received at the Resident Magistrate's Court Makueni on 05th July, 2002 as is indicated by the court's stamp for receiving documents.

26. There is also a memorandum filed on 27th August, 2002 at the High Court at Machakos in Civil Appeal No.90 of 2002. It indicates that it is an appeal against the judgement of the Embu Provincial Land Disputes Tribunal Appeals Board/Committee dated 15th July, 2002 in Appeal Case No.42 of 2001 (Embu). As earlier on indicated in my judgement, the 15th July, 2001 is when the Appeals Committee's proceedings were certified by the Magistrate. One cannot therefore say with certainty when the appeal was determined but it seems to me that the appeal from the Appeals Committee to the High Court was filed within sixty days but that remains a guesswork. Be that as it may, the issue for determination herein boils down to one issue namely whether or not the Appeals Committee had jurisdiction to deal with the matter under section 3(1) of the Act. That is a question of law. I find the authority referred to me by the Appellant where the parties were **Joseph Malakwen Lelei & Another vs. Rift Valley Land Disputes Appeals Committee and 2 others [2014] eKLR** relevant to the instant appeal.

27. While dealing with the issue of jurisdiction in the authority referred to me, the Court stated thus: -

*“On the issue of jurisdiction, we note that the law in this issue is settled and we do not need to belabor it. **Section 3 of the Land Disputes Tribunal Act (repealed)** gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only ...”*

The Court went on to state that: -

“Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a Trust in favour of a party”

28. In the instant appeal, it is clear that in case No.16 of 2000 Makueni District Lands Disputes Tribunal ordered the Objector who is the Appellant herein to allow his sons of his late first wife (Respondents) to use the Appellant's land. Nowhere did it order him to involve his sons in the sharing of land parcel number 271. It is also clear that while dismissing the Appellant's appeal and upholding the District Lands Disputes Tribunal, the Appeals Board/Committee in its judgement ordered the Appellant to include his sons in the sharing of the aforementioned land. The word “**share**” was not included in **section 3(1)** of the Act.

29. In Concise Oxford English Dictionary, Twelfth Edition, the word “**share**” is defined as “*part or a portion of a larger amount which is divided by a number of people.*”

30. By ordering that the sons of the first wife to be included in the sharing of land No.271, it is clear that the Appeals Board/Committee acted without jurisdiction. In my view, therefore, the appeal has merit. I, therefore, proceed to set aside the judgement of the Provincial Land Disputes Tribunal Appeal Board in appeal case number 42/2001 and substitute it with the award of Makueni District Lands Disputes Tribunal delivered on 14th March, 2001 and adopted as the judgement of the Court on 19th March, 2002 in the Resident Magistrate's Court at Makueni in LDTC case No.4 of 2001.

31. From the foregoing, it is clear that the Appellant and the Respondent are father and son and in order to promote family cohesion, it is only fair that each party bears his own costs. I, therefore, order that each party to bear his costs.

Signed, dated and delivered at Makueni via email this 21st day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi