



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C. 61 OF 2009

FORMERLY NYERI E.L.C 103 OF 2000

JOSEPH GATIA WAMBUGU.....PLAINTIFF

VERSUS

MURIUKI WAMBUGU.....DEFENDANT

JUDGEMENT

Introduction

1. Mr Joseph Gatia Wambugu, the appellant has appealed against the decision of the Central Province Lands Disputes Tribunal Appeals Committee award as adopted as a judgement of the Senior Resident Magistrate's Court at Kerugoya dated 16th May 2000 in civil case number 33 of 1998 between Muriu Wambugu (Plaintiff) v. Joseph Gatia Wambugu (Defendant). By virtue of the award the suit land reference number Ngariama/Thirikwa/413 was divided into two portions, one of which was awarded to the respondent (Muriuki Wambugu) and the other portion remained the property of the appellant.

2. The respondent has opposed the appeal and has therefore supported the decision of the Central Province Land Disputes Tribunal Appeals Committee.

A Summary of the Judgement Appealed Against:

3. The respondent as the claimant had filed a case against the appellant in the District Lands Disputes Tribunal claiming a portion of the suit land parcel number Ngariama/Thirikwa/413 which was owned by the appellant. It is important to note here that the appellant and the respondent are brothers. After hearing the evidence, the District Land Disputes Tribunal ordered the suit land to be divided into two portions. It awarded one portion measuring about 3 ½ acres to the respondent and the balance of that portion measuring about 5 ½ acres to be the property of the appellant.

4. The appellant who was aggrieved by the decision of the tribunal appealed to the Central province Land Disputes Tribunal Appeals Committee on 29th May, 2000. In his memorandum of appeal of that date, it is clear that he has appealed against the tribunal's award and the order of the magistrate, which adopted it as a judgement of the court.

5. He has listed two grounds of appeal in which he has attacked the decision of the Appeals Committee as being one that was made without jurisdiction in his first ground. In ground two, the

appellant has attacked the decision of the Appeals Committee as one that was arrived at in per incuriam.

6. Additionally, he has urged this court to allow the appeal and set aside the award. He has also urged the court to declare that the respondent was not entitled to any portion of the suit land parcel number Ngariama/Thirikwa/413 and that he be declared the absolute owner of the entire suit land. And finally, he has urged the court to award him the costs of this appeal and those in the Appeals Committee

7. As the suit was pending, the respondent applied for subdivision of his portion of land and according to the certificate of official search of 18th September, 2009. His parcel number Ngariama/Thirikwa/2070 was divided into the following portions:

1. Ngariama/Thirikwa/2071

2. Ngariama/Thirikwa/2072

8. The appellant also applied for the subdivision of his parcel of land number Ngariama Thirikwa/2069 with the result that eight (8) portions came into existence being parcel numbers 3044 to 3051. The certificate of official search is dated 8th August, 2011 is clear on this point.

The Case for the Appellant and His Submissions:

9. I have already indicated that the appellant has attacked the jurisdiction of the Appeals Committee. According to him, the Appeals Committee and the order adopted as judgement are not authorized by the Land Disputes Tribunal Act number 18 of 1990. In other words, the Appeals Committee did not have the jurisdiction to entertain the dispute relating title to land. Counsel for the appellant has also submitted that the adopting court did not have jurisdiction to adopt the award as a judgement of the court because the award was made by the Appeals Committee without jurisdiction.

10. In this regard, he referred to **Section 3 of the Land Disputes Tribunal Act number 18 of 1990** in particular **Section 3(1)** which states as follows:

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to:

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

(b) a claim to occupy or work land; or

(c) Trespass to land.

Shall be heard and determined by a Tribunal established under Section 4.

11. It is clear from these provisions that a tribunal is only authorized to entertain a dispute in relation to the division of land or the determination of boundary disputes in addition to a claim to occupy or work on land.

12. Finally, it is authorized to entertain disputes relating to trespass to land. Counsel therefore submitted that the Appeals Committee did not have jurisdiction to order for the subdivision of land parcel number Ngariama/Thirikwa/413. The reason being that in doing so, the Appeals Committee in confirming the award of its subordinate tribunal was thereby interfering with the title to the suit land. Counsel relied on several authorities of the High Court which I have perused.

13. Furthermore, counsel submitted that the Appeals Committee arrived at its decision in per

incurium. He referred to the case of ***Anyasi Olusese and another v. The Standard Limited and another***, being ***Nairobi High Court Civil case number 1869 of 1993***. According to that case, a decision arrived in per incuriam is one that is handed down in ignorance or forgetfulness of the existence of some relevant binding authorities or statutes. Such a decision loses its binding authority. It means that the attention of the court was not drawn to the relevant authorities or statutes which were binding on the court that rendered the per incuriam decision.

14. On this basis, counsel submitted that the decision of the Appeals Committee does not have the force of law because it was in contravention of the statute. Counsel also submitted that the respondent was not entitled to any portion of the appellant's suit land.

15. In his further submissions, counsel for the appellant urged the court to do substantive justice without undue regard to technicalities in terms of Article 159(2)(d) of the 2010 Constitution. He pointed out that the act of ordering the subdivision of the suit land was unlawful and therefore it was a nullity. Furthermore, counsel also submitted that he is aware that a court of law does not make orders in vain. According to him, the respondent should not be allowed to hide behind the clock of the subject matter being non-existent.

16. In this regard, he submitted that equity suffers no wrong without a remedy and that no man shall be allowed to benefit from his wrong doing. He equally pointed out that equity detests unjust enrichment. He cited the Court of Appeal decision in the case of ***Macharia Mwangi Maina and 87 others v. Davidson Mwangi Kagiri (2014) eKLR*** in support of his submission. He also cited the case of ***Mbugua Njuguna v. Elijah Mburu Wanyoike and another (2004) eKLR*** in which the court invoked its inherent powers to revoke subdivisions of land that had taken place when litigation was pending in court.

17. Counsel for the appellant also cited the case of ***R. v. Kabiyet Land Disputes Tribunal and another (2014) eKLR*** which according to him stands for the proposition that the action of the adopting magisterial court is merely administrative in nature. In other words, the adoption lacks the judicial character of a court of law.

18. Finally, he urged the court to invoke its inherent powers under Sections 3A, 1A and 1B of the Civil Procedure Act in order to do justice to this case. He therefore urged the court to allow the appeal and award the costs of the appeal to the appellant.

The Case for the Respondent:

19. The respondent initially appeared and made submissions in person. He supported the award of the Appeals Committee and the order adopting the award as a magisterial court judgement in the Kerugoya Senior Resident Magistrate's court civil case number 15 of 1997. According to him, the suit land belongs to his father and therefore the subdivision of the suit land was proper. He says that he is still cultivating his portion of the land, which he has subdivided among his three children.

20. Furthermore, he urges the court to review the case which has taken a long time to complete since it was filed way back in 1988. He also submitted that the appellant held the suit land as a trustee for himself and the respondent. He further urged the court to uphold the decision of the Appeals Committee and the order adopting it as a judgement of the court.

21. In respect of costs, he urged the court not to make any orders as to costs because he was unable to hire an advocate to represent him in this case. Interestingly, the respondent was able to secure the services of counsel who filed further written submissions. According to the respondent's counsel, the suit land number Ngariama/Thirikwa/413 which is the subject matter of this appeal does not exist because it was subdivided into the following two portions:

1. Ngariama/Thirikwa/2071.

2. Ngariama/Thirikwa/2072.

22. It was her submission that this appeal cannot succeed because the subject matter of the appeal is no longer in existence and for that reason, it must fail without costs being ordered in favour of the respondent.

23. It is her further submission that the subdivision of the suit land into two portions was in furtherance of the award by the Appeals Committee which the magisterial court adopted as its judgement. According to counsel, the appellant was satisfied with the award of the Appeals Committee and that is why he also subdivided his portion of the suit land into eight portions. This she says is confirmed by the certificate of official search dated 8th August 2011.

24. She has also submitted that a court of law does not issue orders in vain because in this case, the subject matter ceased to exist fifteen years ago from 2001. She has also stated that even if the appeal was to succeed, the judgement cannot be executed as the subject matter of the appeal does not exist. She has further stated that there was inordinate delay on the part of the appellant in filing and prosecuting this appeal.

25. Finally, she has stated that the appellant did not file a certified copy of the decree or order appealed against as required by **Order 42 Rule 13(4)F**. The record of appeal was not prepared properly. Even on that score alone, the appeal should be dismissed with costs to the respondent.

The Applicable Law:

26. The law that applies to this case is in relation to the jurisdiction of the Land Disputes Tribunal to entertain a dispute involving title to land. In this regard, counsel for the appellant submitted that the Land Disputes Tribunal lacked jurisdiction to order for the subdivision of the land into two parcels and by awarding one parcel of land to the respondent. He pointed to Section 7 of the repealed Land Disputes Tribunal Act as a basis of his submission.

27. In support of his submission, counsel relied on the ***Court of Appeal judgement in Joseph Marakweri Lelei and another v. Rift Valley Land Disputes Appeals Committee*** and this being ***civil appeal number 82 of 2004 (at Eldoret)***. According to the Court of Appeal in that case, the Land Disputes Tribunal lacks jurisdiction to entertain a dispute relating to title to land. That court went further to state that the tribunal in that court acted in excess of its jurisdiction and therefore its decision was null and void.

28. Finally, that court stated that the Principle Magistrate had jurisdiction to read the tribunal's award and adopt same as its judgement in terms of ***Section 7 of the Land Disputes Tribunal Act***. It is clear from that case that a Land Tribunal is not authorized to entertain disputes involving title to land as in the instant case.

29. Furthermore, it is clear from the Court of Appeal in the decision of the above case that the adopting court had jurisdiction to adopt the award as its judgement once it was forwarded to it. The act of adopting the award is an exercise of that court in its judicial character. Mr Andande submitted that: ***“we are not appealing against the adopted decision as the adopting court's role was merely administrative in nature. This can be inferred from the case of Republic v. Kabiye Land Disputes Tribunal & another (2014) eKLR.”*** This submission is not correct for a number of reasons.

30. Firstly, the language of ***Section 7(1) and (2) of the repealed Land Disputes Tribunal Act, no. 18 of 1990***, directs the tribunal chairman in mandatory terms to cause the decision of the tribunal to be filed in the magistrate's court. And once it is filed, the magistrate's court is directed in mandatory terms to 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 under the Civil Procedure Act.

31. It is therefore clear from the provisions of Section 7 that it is the act of adoption of the decision of the tribunal, that gives the decision the legal validity. The adoption makes it a judgement of that magisterial court. Having become a judgement of that court, a decree shall issue that is signed and sealed by the court. Thereafter, the decree is enforceable as provided for by the Civil Procedure Act.

32. It is therefore clear from the foregoing paragraphs that the act of adopting the decision (or award) of the Land Disputes Tribunal, be it the District Land Disputes Tribunal or the Provincial Land Disputes Tribunal Appeals Committee, is not an administrative or ministerial act. It is a judicial act that results in a civil judgement from which a decree is extracted, signed and sealed. Thereafter, the decree is executed like any other decree of the civil court.

33. It follows from the foregoing that counsel's submission that the act of adopting the tribunal's decision (or award) by the magistrate's court, is merely administrative in nature, is not correct. If that were the position in law, no judgement and no decree would result from the act of adoption by the magistrate's court.

34. The provisions of Section 7 of the repealed Land Disputes Tribunal Act are couched in mandatory language. They leave no discretion in the magistrate's court in the process of adopting the decision.

35. However, I do not see any danger arising from the lack of discretion in the adopting magisterial court. The reason for this is that once the court has adopted the decision (or award), it becomes its judgement. An aggrieved party is given a right of appeal to the High Court on points of law in terms of Section 8(9) of the Land Disputes Tribunal Act, which is exercisable within sixty days.

36. Furthermore, an aggrieved party may also apply for review under Order 45 of the 2010 Civil Procedure Rules if no appeal is lodged against the resulting judgement.

37. The other law applicable in this case is the issuance of an order which cannot be executed after circumstances have changed between the filing of the suit and its disposal on appeal. In this regard, the *Court of Appeal in Mbugua Njuguna v. Elijah Mburu Wanyoike and another* (2004) eKLR is applicable.

38. In that case, the Court of Appeal held that a subdivision of the suit land therein which was carried out in contravention of a court order was set aside. The reason given therein was that there was in force a court order to preserve the suit land until further orders were made.

39. The respondent's action in subdividing the land was held to be illegal. The court then proceeded to revoke the subdivision of the land and restored the suit land to its original position.

40. The rule that a court should not issue an order in vain is a sound principle. In the case of *R. v Director General of East African Railways Corporation, Ex-parte Kaggwa (1977) 654 KLR*, the Kenya High Court held that a court should only issue orders that are effective and which can be implemented. In that case, the High Court declined to issue an order because the respondent was not capable of implementing it.

Issues for Determination:

41. In the light of the findings of the Land tribunal and submissions of counsel, I find the following to be the issues for determination:

1. Whether or not the Central Province Land Disputes Tribunal Appeals Committee had jurisdiction to entertain the dispute in relation to the suit land.

2. Whether or not this court should grant the orders sought.

3. Who should pay for the costs of this suit.

Evaluation of the Findings and the Law

42. I have considered the award of the Appeals Committee and its adoption as a judgement of the magisterial court together with submissions of both counsel. I find that the award of the Appeals Committee was without jurisdiction. The committee did not have the jurisdiction to entertain the dispute because it involved interfering with the ownership of the suit land reference number Ngariama/Thirikwa/413, which was registered in the name of the appellant. It therefore acted ultra vires in ordering that the suit land be divided into two portions, one of which they awarded the respondent with the remaining part being awarded to the appellant.

43. In the circumstances, the order to subdivide the suit land was null and void. This is clear from the provisions of **Section 3 (1) of the Land Disputes Tribunal Act** which gives a tribunal power to entertain the following:

3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to:

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

(b) a claim to occupy or work land; or

(c) Trespass to land.

Shall be heard and determined by a Tribunal established under Section.

44. Furthermore, I find that the subdivision by the respondent of the parcel of land that was awarded to him was intended to defeat the ends of justice. It was done during the pendency of these proceedings. According to the **Court of Appeal in Macharia Mwangi Maina and 87 others v. Davidson Mwangi Kagiri, supra**, a court is entitled to apply the equitable remedy of tracing in order to give effect to the demands of justice.

45. The authority of that court is sound law and is applicable to this case. It therefore follows that the respondent's actions of subdividing the land into two portions reference number Ngariama/Thirikwa/2071 and Ngariama/Thirikwa/2072 was unlawful. I bear in mind that there was no order stopping such course of action.

46. However, the history of this case which was filed way back in 1988 in the magisterial court at Kerugoya and then its being referred to the District Land Disputes Tribunal by the Court, which then adopted it as a judgement of the court on 16th May 2000 indicates the intensity with which the parties have pursued their legal remedies. It seems that an attempt to settle the matter out of court failed according to the proceedings of 23rd July, 1996 and 7th November 1996 in Kerugoya Senior Resident's Magistrates Court.

47. After the adoption of the award, there was an application for stay of execution of that order which was dismissed on 3rd July 2000.

48. Following that dismissal, the appellant filed an appeal at Nyeri being Misc Civil Application number 103 of 2000 which in turn was transferred to High Court at Embu being Misc Civil Application number 61 of 2009. In total, the case has taken 27 years in the courts of law, which delay is a matter of public concern. This case shows the necessity of providing an advocate to the lay panel of elders to assist and advise them on matters of law throughout the proceedings. This is the practice in military courts(courts martial), which should be adopted. Additionally the tribunals

should have as their chairpersons advocates who should have both the deliberative and casting vote. It seems that this practice was used by the colonial government (see the case of *Momanyi Nyaberi v Onwonga Nyaboga, Court of Review Application No. 5 of 1953*, reported in *The Law of Marriage and Divorce in Kenya*, by Eugene Cotran, Vol. 1 of Reinstatement of African Law, 1968 at page 182). This I believe will reduce delays like the one experienced in the instant case.

49. The appellant is an old man and he personally urged this court to bring this litigation to an end.

50. In order to give effect to the ends of justice, I hereby revoke the subdivision of the parcel of land number Ngariama/Thirikwa/2070 into the resulting portions being reference number Ngariama/Thirikwa/2071 and Ngariama/Thirikwa/2072 and restore the original title Ngariama/Thirikwa/413.

51. It therefore follows that the orders to be made in this case will not be in vain.

Verdict and Disposal Order

52. In the light of the foregoing matters, I hereby make the following orders:

1. The subdivision of the original suit land into land parcels numbers Ngariama/Thirikwa/2071 and Ngariama/Thirikwa/2072 in the name of the respondent is hereby cancelled.
2. The original suit land reference number Ngariama/Thirikwa/413 is hereby restored fully to the appellant.
3. There will be no orders to costs as the appellant and respondent are brothers.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this.....
5th ... day of **MARCH, 2015**

In the presence of Mr Andande for the appellant and Msholding brief for
Ms Fatuma for Respondent.

Court clerk Mr. Muriithi.

Right of appeal under Section 66 Civil Procedure Act explained to the parties.

J.M. BWONWONGA

JUDGE