REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.116 OF 2010

EVANS RUNJI KATHINTHI.....APPELLANT

VERSUS

PHINEAS NJIRU SANDIKA.....RESPONDENT

[Being An Appeal From The Award Of Eastern Provincial Land Disputes Appeals Committee]

J U D G M E N T

This appeal was filed at Embu as Civil Appeal No. 126 of 2009. When it was transferred to Meru, it became Civil Appeal No.116 of 2010.

The Appellants' Memorandum of Appeal has the following grounds:

1. **the Provincial Land Disputes Appeals Committee erred in Law and fact by awarding 5 acres to the Respondent and making the court to award the same.**

2. **That the decision of the Eastern Provinical Land Disputes Committee has no support of evidence.**

3. **That the Eastern Provinical Land Disputes Appeal Committee had no jurisdiction to deal with the matter as presented to it and the decision of the committee made has no legal backing.**

4. **That the appellant craves leave to amend, add to or omit any of the grounds listed herein.**

The appellant gave a short history of the dispute. He said that in 2006 the respondent filed a claim against him under the provisions of the Land Disputes Tribunals Act No. 18 of 1990 (now repealed) alleging the appellant's unlawful occupation and tresspass to an undemarcated parcel of land measuring 5 acres located at Kamwimbi/Kiaritha area in Meru South District. The dispute was registered as Meru South Land Disputes Tribunal No. 02/06. The parties and their respective witnesses were heard and the locus in quo was visited in the presence of the parties and their witnesses. On 23.3.2006, the tribunal made its award in favour of the Appellant which was pronounced on 2.4.2008 by the Court at Chuka in LDT case No. 27 of 2006.

The respondent appealed to the Eastern Provinical Appeals Committee at Embu and his appeal was registered as Appeal No.32B/2008, Meru South. The Committee heard the appeal and on a date which is not stated in the proceedings found and ruled, into alia, that: “Phineas to keep 5 acres. Evans to keep 40 acres.” The respondent claims that the Chairman did not append his signature to the written proceedings, findings, as well as the ruling. The respondent contends that this was contrary to the provisions of

Section 3(8) of the then Land Disputes Tribunal's Act, No. 18 of 1990.

Regarding grounds 1 and 2 of the Appeal, the appellant argues that the decision to award 5 acres to the respondent was made on an account of error of fact and law and that there was no evidence to support the decision. He opined that the Provincial Appeals Committee completely disregarded the evidence of the parties in the L.D.T case, which tribunal had the opportunity of hearing the parties, their witnessses, observing the demeanour of the parties and their witnesses and visiting the locus in quo.

The appellant submitted that the Provincial Committee granted the respondent orders or reliefs which he had not sought and zeroed in on prayer 5 in the grounds of appeal in the Memorandum presented to the Provincial Committee which sought a "KAURUGU (traditional oath)" to prove ownership. The appellant used this ground to argue that the Land Disputes Tribunal lacked jurisdiction to hear and determine cases of a civil nature.

The appellant then argued that the Appeals Committee contravened the mandatory provisions of section 3(8) of the repealed Disputes Tribunals Act, No. 18 of 1990 in that no reasons were given as to why the Appeals Committee arrived at its decision, there was no summary of issues, the decision was not dated and that one member of the tribunal, the Chairman did not sign the decision.

Finally, the appellant argued that the Provincial Appeals Committee had flouted the law by hearing the dispute afresh instead of reconsidering the evidence tendered by the parties in the L.D.T. the appellant urged the Court to be persuaded by the case of Meru Catholic Diocese (Magundu Parish Priest and Lawrence Gitonga Njeru (High Court Civil Appeal No.106 of 2008 at Meru).

The respondent countered that Section 8(8) and (9) of the repealed Land Disputes Tribunal Act provided that an appeal can lie only on a point of law and that a finding by the Provincial Appeals Committee on an issue of fact should be final and no appeal should lie therefrom. He argued that the appellant had not adhered to these provisions.

The respondent proffered that ground 1 was too general, did not demonstrate a pure point of law and did not specifically point out on what legal basis the Appeals Committee had erred. Regarding ground 2, the respondent said that the decision of the Appeals Committee was supported by adequate evidence and pointed out that the Committee made inquiries to clarify uncluear issues regarding the evidence adduced at the LDT and made a decision in favour of the respondent. The respondent also submitted that as the respondent's claim was based on both occupation and trespass, the Appeals Committee had requisite jurisdiction as mandated by Section 3(1) (b) and (c) of the repealed Land Disputes Tribunals Act.

The respondent further submitted that the appellant, contrary to law, departed from his pleadings without apposite amendment by introducing new issues purportedly basing this departure on ground 4 of his Appeal. He argued that the alleged non compliance with the requirements of Setion 3(8) of the Land Disputes Tribunal Act was an oversight which did not prejudice the appellant and which was merely technical. Regarding the claim that the Appeals Committee had heard the dispute afresh, the respondent denied this assertion and reiterated that the Committee only obtained clarification of only a few areas. It was further submitted that it would be a travesty of justice to require the Committe to stick to the evidence adduced at the LDT without prodding the parties further for necessary clarifications. It was opined, for the respondent by his advocate, that doing so would be putting technicalities ahead of substantive justice contrary to the spirit of Article 159 (d) of the Constituton.

I have considered the submissions of the parties. I think, as the respondent suggests, that ground 1 of the appeal is rather general. The submissions are, however, clearer. Regarding ground 2, I am of the opinion that the Appeals Committee was provided with some evidence by both the respondent and the appellant. Both asked the questions they felt important to their side. Indeed the Appeals Committe found both the respondent and the appellant truthful.

Regarding ground 3 of the Appeal, I find that the Appeals Committee had jurisdiction to deal with the dispute as the DLT whose decision was being challenged had summarised the issues to be decided as

occupation to land and tresspass to land.

Having perused the proceedings of the Provincial Committee, I find that the issue of "Kaurugu (traditional oath) to prove ownership" was not given any consideration by the Provincial Committee. It, therefore, did not as alleged by the appellant hear evidence of the type suggested by the appellant which to him was beyond the jurisdiction of the Committee. I also find that the Provincial Committee did not hear the dispute afresh. It merely asked questions to clarify some matters. The appellant and the respondent were allowed to present their cases and questioned each other. I find that the case of Meru Catholic Diocese (Magundu Parish Priest) and Lawrence Gitonga Njeru (op.cit) is not relevant to the circumstances of this case.

I now wish to allude to the submission by the respondent that a finding of fact by the Provincial Appeals Committee shall be final and no appeal should lie thereform. I agree with him that the decision of the Appeals Committee is final on any issue of fact and no appeal should lie therefrom from any Court. This is clearly spelled out in Section 8(8) of the Land Disputes Tribunals Act.

I now turn to the appellant's submisison that the Appeals Committee Contravened the mandatory provisions of Section 3(8) of the repealed Land Disputes Tribunals Act in that:

(a) No reasons were given as to why the Appeals Committee arrived at the said decision

(b) The decision did not have a summary of the issues.

(c) The decision was not signed by one member of the tribunal.

Section 3(8) of the Land Disputes Tribunal's Act reads as follows:

"the tribunal shall give reasons for its decision, which shall contain a summary of the issues and the determination thereof, and which shall be dated and signed by each member of the Tribunal".

With due respect to the Appellant, Section 3(8), op. Cit, applies to proceedigs in Land Disputes Tribunals only. The appellant would be correct if he was complaining about a dispute handled by a Land Disputes Tribunal. In the present case, the complaint is against proceedings before an Appeals Committee. I note that the respondent has submitted that non compliance with the requirements of Section 3(8) of the Land Disputes Tribunals Act would amount to an oversight of a technical nature not deserving denial of the fruits of justice to the respondent.

With respect to matters before Appeals Committees, the operative section is section 8(7) which reads: "After giving each party an opportunity to state its case, the Appeals Committee shall determine the appeal giving reasons for its decision".

It is my view that it would be good practice for an Appeals Committee to summarise issues, give reasons for its decision, pronounce its unequivocal determinaiton, date it and have it signed by each member of the appeals Committee. This view cannot be actualized as the Land Disputes Tribunals Act has already been repealed. This is only my personal view and it will have no bearing on my decision regarding this Appeal.

I find that section 8 (7) of the Land Disputes Tribunals Act is unequivocal that an Appeals Committee shall determine the appeal and give reasons for its decision. Regarding the issue of procedural technicalities, I wish to be guided by the case of **James Muriithi Ngotho Vs Judicial Service Commission (Misc application No.316 of 2012, Nirobi High Court**). The applicant sought leave to institute Judicial Review proceedings for orders of Certiorari to move to the high court for quashing letters of dismissal sent to him. He wanted the court to deem the statutory limitation of 6 months contained in the Law Reform Act as a procedural technicality which the court could avoid by exercising its discretion as bestowed under Article 159(2) (d) of the constitution. The court held that the 6 months limitation period required by section 9 (3) of the Law Reform Act was not a procedural technicality but a

statutory requirement imposed by substantive law which would not be deemed a procedural technicality capable of being avoided under Article 159(2)(d). The court opined that Article 159(2) (d) was meant to avoid injustices arising out of minor procedural lapses or technicalities in the course of proceedings. I agree with this view.

This is how the conclusion of the proceedings were handled.

"Findings

The appellant and respondent are truthful.

Ruling

Phineas to keep the 5 acres. Evans to keep the 40 acres."

Two members Daniel Mukolo and Sofia Ndegwa appended their signatures. The Chairman, Mr. Biriri, did not sign.

It is quite clear that this part of the proceedings was handled in a very casual manner. The most egregious omission was the absence of reasons for the decision of the Appeals Committee as mandatorily required by section 8(7) of the repealed Land Disputes Tribunals Act. I find that this is not a procedural technicality. It is a mandatory statutory provision. I wish to opine that this court cannot arrogate upon itself the role of creating new law. That is the role of the legislature.

In the circumstances, I allow the appeal and award costs to the appellant.

It is so ordered.

Dated, signed and delivered in Open Court at Meru this 3rd day of March 2014 in the presence of:

Cc. Daniel

Akwalu h/b Muia nwanzia for Respondent

Firm of Kaberia Arimba for Appellant – Absent.

P. M. NJOROGE

JUDGE