



REPUBLIC OF KENYA

High Court at Embu

Civil Appeal 98 of 2011

DUNCAN KAMAU KIRIRO.....APPELLANT

VERSUS

JAPHET P. KIMOTHO..... RESPONDENT

J U D G M E N T

This appeal arise from the decision of the Nyeri Provincial Appeals Tribunal Case No. 21/2009 read to the parties on 7/7/2011. The grounds are as listed below.

- 1.The Provincial Land Disputes Appeals Tribunal erred when it gave a decision in a matter where none of the parties participated, nor gave any form of evidence.***
- 2. The Provincial Land Disputes Appeals Tribunal erred when it upheld the award of the Kirinyaga District Lands Tribunal, which matter had been heard in his absence , and where no evidence produced incriminated the him in any way.***
- 3. The Provincial Land Disputes Appeals Tribunal erred when it upheld the decision of the Kirinyaga Land District Tribunal, which award was not supported by the evidence of the District surveyor, who allegedly fixed the boundary between the disputed parcels of land.***
- 4. The Provincial Land Disputes Appeals Tribunal erred when it upheld the award of the Kirinyaga Land Disputes Appeal Tribunal which had awarded compensation that was not supported by any evidence.***

Counsels for the parties agreed to dispose of the appeal by way of written submissions. Ms. Rugaita for the appellant has in her submissions reiterated what is in the grounds of appeal. Her main argument is that the appellant was not given an opportunity to be heard both before the Lands Disputes Tribunal and the Provincial Appeals Tribunal. Secondly the compensation awarded was not supported by any evidence.

Mr. Okwaro for the respondent in his written submissions stated that the appellant did not move the court to certify that the appeal concerned a point of law. This was contrary to Section 8(8) of the Land Disputes Tribunal Act (now repealed). Therefore his appeal was incompetent and fatally defective. He also disputed that the appellant was condemned unheard as he had been served with notice to attend the Appeals board but he chose to to attend.

Its true that the appellant did not move the court to certify that the appeal involved issues of law. This is what was provided for in the now repealed Land Disputes Act. This appeal was filed on 9/8/2011. The Environment and Land Disputes Act 1990 became operational on 30/8/2011. On 25/9/2012 both counsels told this court that they had agreed to dispose of the appeal by way of written submissions. The counsel

for the respondent never pointed out that the certification that the appeal raised an issue of law had not been done. It was an oversight by both counsels and even the court.

Why was this provision made? To my mind it was meant to curb the unnecessary clogging of the high court with appeals when the court was already over stretched. This appeal is already filed and counsels have taken directions on how to proceed. They have filed submissions. Under Article 159(1)(d) of the Constitution this court is enjoined to look at the tenets of substantive justice without undue regard to technicalities.

The failure to move the court to make the certification mentioned above to me does not go to the root of the particular appeal. All the relevant material is before me and I do find that justice would demand that I do not dismiss the appeal on that technicality but proceed to hear and determine it on merit.

The record of appeal and the original records shows that this matter started at the Gichugu Lands Disputes Tribunal where the parties were

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None of the parties called witnesses. On 11/10/2006 when the matter proceeded to hearing Duncan Kamau Kiriro was not present. Instead one Livingstone Kiriro was present and was allowed to participate in the proceedings acting as the defendant. The reasons are not indicated as Livingstone was not acting as counsel or legal representative of the defendant. The Tribunal dealt with the boundary dispute and the boundary was reinstated in the absence of the defendant. The Tribunal went ahead to make awards of compensation for the felled trees etc.

his was completely outside the jurisdiction of the Tribunal. The mandate of the Tribunal was clearly set out in Section 3(1) of the repealed Act which provided as follows:-

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

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

And being aggrieved by the decision of the Tribunal the appellant moved to the Provincial Appeals Tribunal. The proceedings of that day show that Livingstone was again present and made it clear he did not have the authority of Duncan to appear for him.

Even the respondent opposed to the appearance by Livingstone. Strangely these proceedings on appeal are not dated. The date appears as part of the decision. After the stand off by the parties the Appeals Committee unanimously made the following decision.

“After carefully listening to the facts as stated before us we decided to uphold the Kirinyaga Tribunal Award that Duncan Kamau Kiriro meets the loss of trees that he destroyed in plot NGARIAMA/NGIRIAMBURU/593 (respondent)

130 trees @ 500 = 65,000

complainant full fees – 4,000

complainant survey fees – 35,000/=

This case was heard and determined on this 7th July 2011.

any aggrieved party may appeal after 60 days.

When and where was this appeal heard? Both parties were never heard. And what the Appeals Committee did was a real mockery of justice and cannot be allowed in the administration of justice.

My finding therefore is that the appellant was denied the right to be heard in both the Land Disputes Tribunal and the Provincial Appeals Committee. Breach of a right to natural justice is both an issue of law and fact. This was in fact a mistrial.

Secondly besides the issue of the mistrial the Tribunal lacked jurisdiction to make orders on compensation let alone deciding that the appellant damaged and cut down trees. Such acts of malicious damage are a criminal offence. The tribunal had no powers to deal with criminal offences.

Having made the above findings I allow the appeal and set aside the orders made by the Provincial Land Disputes Appeals Committee and the Kirinyaga/Gichugu Land Disputes Tribunal. Any dispute over the two parcels of land should

1. ***Be filed at the Environment and Land Court, Kerugoya High Court.***
2. ***Costs to the appellant; and***
3. ***The deposited costs to be released to the depositor.***

DELIVERED, SIGNED AND DATED AT EMBU THIS 3RD DAY OF MAY 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

**Mr. Okwaro for Respondent
Njue CC**