



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELCA NO. 14 OF 2020**

**HENRY MWANGI KIMANI.....1<sup>ST</sup> APPELLANT**

**ERNEST KIMANI KARUMI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**CYRUS MWANGI WAINAINA.....RESPONDENT**

**(An Appeal from the award of the Provincial Land Disputes Appeals Tribunal made on the 22/1/2003)**

**JUDGMENT**

1. Being aggrieved by the decision of the defunct Provincial Appeals Committee sitting at Nyeri delivered on the 22/1/2003 in Maragua Land Disputes Tribunal (LDT) 31/2001, the 1<sup>st</sup> Appellant proffered 5 grounds of Appeal set out in the Memorandum of Appeal in HCCA No 104 of 2003 dated the 24/2/2003 in the following grounds that;

- a. The Tribunal erred in noting that a compromise had been reached when it was not the case and that the Appellant was not a party to it.
- b. The Tribunal erred in anticipating a decision in a pending succession case and considered Appellant has a share in the suit land in that case.
- c. The Tribunal erred in creating an agreement between the parties and set to enforce it when the parties had not agreed.
- d. The Appellant had not chosen any Manager of Kenya Tea Development Authority (KTDA) to set a price over his tea bushes.
- e. The Tribunal erred in entertaining the Appellants claims to title to land from the Respondent when it had no jurisdiction.

2. Equally being aggrieved by the decision of the defunct Provincial Appeals Committee sitting at Nyeri delivered on the 22/1/2003 in Maragua LDT 31/2001, the 2<sup>nd</sup> Appellant proffered 10 grounds of Appeal set out in the Memorandum of Appeal in HCCA No 76 of 2003 dated the 21/2/2003 and restated below;

- a. That the Provincial Land Disputes Tribunal erred in law holding the only issue for determination was Tea bushes on land parcel LOC.3/MUKURIA/674.
- b. That Provincial Land Disputes Tribunal erred in law failing to appreciate the fact that the Respondent held title to Land Parcel LOC.3/MUKURIA/674 under Customary Law Trust and for the Appellants.
- c. That the Provincial Lands Tribunal erred in law in failing to take into account that there was existing customary between the Respondent and the Appellants.
- d. That the Provincial Lands Tribunal erred in law in failing to consider that the Respondent claim over said Land Parcel Number LOC.3/MUKURIA/674 was statutory time-barred and that the Appellants had prescriptive rights over the land.
- e. That the Provincial Lands Tribunal erred in law holding that the Respondent was the sole owner of the aforesaid land taking into account the Appellants had adverse possession of the land and had already planted tea plants with the Respondent's knowledge.
- f. That Provincial Lands Disputes Tribunal erred in law in ordering the Appellants to sell their tea plants on the land to the Respondent.

g. That the Provincial Lands Dispute Tribunal misdirected itself in law by directly ordering Kenya Tea Developments Agency to facilitate the sale of tea bushes to the Respondent by the Appellant whereas such a direction could only be issued by a Court of law upon the filling of the Tribunal's award in Court.

h. That the Provincial Lands Disputes Tribunal misdirected itself at law in holding the Appellants had compromised their rights to the land upon counselling.

i. That the Provincial Lands Disputes Tribunal erred in law in giving itself the role of counselling parties to the dispute as this was ultra vires their statutory powers.

j. That the Provincial Land Dispute erred in law in failing to adjudicate on all the issues in dispute rather than they termed as the big issue.

3. On the 24/8/08 the two Appeals were consolidated for hearing and disposal simultaneously.

4. In response to the grounds of Appeal the Respondent filed the grounds of opposition dated the 23/1/2017 in which he challenged the jurisdiction of the High Court to hear and determine the Appeal. The Court in its Ruling delivered on the 10/7/2020 agreed with the Respondent but instead of dismissing the Appeal ordered that the Appeal be transferred to the Environment and Land Court for hearing and disposal.

5. On the 9/12/19 the parties in the Appeal elected to canvass the Appeal by way of written submissions.

6. The firm of Uvyu & Company Advocates filed written submissions for the Appellants on the 20/2/2020; the second Appellant filed on even date through the firm of Nganga Ngige & Company Advocates while the Respondent filed on the 22/6/2020.

7. Briefly the gist of the 1<sup>st</sup> Appellants submissions is that the suit land was family land held by their elder brother Benard Karumi in trust for himself and his two brothers, the Appellants. That Bernard subdivided the family land without their knowledge and consent and gifted the Respondent. He contends that the said transfer was illegal and unlawful.

8. Quoting section 25(2) of the Land Registration Act, the 1<sup>st</sup> Appellant submits that the Respondent holds the title in trust for the Appellants under customary trust. That the registration of the Respondent as owner was encumbered with a customary trust as an overriding interest.

9. The 2<sup>nd</sup> Appellant submitted that the land comprised family land measuring 12 acres which was registered in the name of his elder brother Bernard under customary trust. That the Appellants planted tea on their undivided respective portions measuring 4 acres each. That in 1981 Bernard subdivided the land and gave his son, the Respondent, a portion namely parcel No Loc.3/MUKURIA /674 (the suit land) which comprised of the land that the Appellants had planted their tea. That the transfer was secretly done without their consent.

10. Further the 2<sup>nd</sup> Appellant submitted that the Appellate tribunal erred in limiting itself to the issue of the tea bushes and omitting to determine how the land was acquired by the Respondent. That under the Kikuyu customs which all the parties belonged, the Appellants had the right to occupy and cultivate the lands. That the Respondents claim of trespass was time barred as the Appellants had acquired prescriptive rights over the land. The land was transferred to the Respondent in 1981 and the proceedings in the District Land Tribunal were instituted in 2001. Further, the 2<sup>nd</sup> Appellant argued that the Tribunal had no mandate to order for the sell of the tea bushes to the Respondent, a decision that he termed biased against him and his co-Appellant. That in ordering the KTDA to value the tea bushes, the Appellate tribunal misdirected itself and exceeded its jurisdiction. That the 2<sup>nd</sup> Appellant did not compromise his rights in any way and faulted the tribunal for suggesting that there was a consent to sell the tea bushes by the parties while there was none.

11. The Respondent on the other hand submitted that the Appellate tribunal did not have powers to adjudicate on points of law raised by the Appellants to wit; customary trust; prescriptive rights and adverse possession. That in any case neither the Appellate tribunal nor the District Land Dispute Tribunal had powers to so determine the above issues that are akin to title in land and therefore ultravires its powers as set out in Section 3(1) of the Land Dispute Tribunal.

12. The background of this Appeal is that the Appellants and Bernard Wainaina Kirumi are sons of Karumi Wainaina. Benard is said to have been the eldest of the three sons. The Respondent is the son of Bernard who died in 1983.

13. In the course of the hearing of the Appeal/case, the original Appellants and the Respondent died and were substituted by their legal representatives with the exception of the 2<sup>nd</sup> Appellant. The 1<sup>st</sup> Appellant was substituted by consent on the 24/1/2017 with Rachel Wanjiru Mwangi, Milka Wangechi Mwangi, Charles Kimemia Mwangi and Beatrice Mugechi Mwangi. The Respondent was substituted by Michael Maina Mwangi. It therefore follows that the Appeal by the 2<sup>nd</sup> Appellant abated on account of non-substitution.

14. According to the record the land parcel LOC.3/MUKURIA/536 measuring 5.06 Ha or 12.5 acres was registered in the name of Bernard Wainaina Karumi on the 6/6/1962. On the 18/5/1981 the said title was closed upon subdivision of the land into parcels Nos. LOC.3/MUKURIA/ 673 and 674 both of which were registered in his name. On the 18/5/81 parcel No LOC.3/MUKURIA/ 674 became registered in the name of the Respondent by way of a gift while parcel No LOC.3/MUKURIA/673 was retained in the name of Bernard.

15. It is commonly acknowledged that following the registration of the land in the name of Bernard the Appellants are said to have planted tea bushes on parcel LOC.3/MUKURIA/536 with the permission of Bernard but after the subdivision it is said that some of the tea bushes were found to have been located on parcel LOC.3/MUKURIA/674 registered in the name of the Respondent consequent of which the Respondent filed suit on 4/10/1986 vide RMCC No 234 of 1986 -Thika. The Respondent sued the Appellants seeking an order of removal of

the Appellant's tea bushes on his land as well as orders restraining them from trespassing on the suit land.

16. The 1<sup>st</sup> Appellant vide a statement of defence dated the 6/11/1986 admitted to have planted 2000 tea bushes on the suit land which was a resultant subdivision of the original parcel LOC.3/MUKURIA/536 and contended that there is a pending succession cause in the Court with respect to parcel LOC.3/MUKURIA/673.

17. On the 28/5/2001 by consent of the parties, the suit was referred to the District Land Tribunal Maragua for arbitration and each party was to elect two elders for purposes of hearing the case.

18. After hearing the case the LDT, Maragua panel of elders visited the suit land and observed from the abstract of title that parcel LOC.3/MUKURIA/674 was registered in the name of the Respondent while LOC.3/MUKURIA/673 in the name of Bernard; that there was tea planted by the Appellants on the suit land. The tribunal determined that the Court should enforce the eviction of the Appellants from the land because the Appellants had their own land and that they should not demand anything from the Respondent. The judgment in the matter was entered on 29/10/01 as per the adoption orders in Thika SPMCC D.O 74/01.

19. Aggrieved by the above decision, the Appellants appealed to the Provincial Land Dispute Appeals Committee vide Maragua No 31 of 2001 where the Appellants sought to set aside the award and that the suit land be awarded to the Appellants. In its decision dated the 22/1/2003 the Appellate tribunal's award was;

“the big issue here is the tea bushes which are on Cyrus land. The Appellant will have land when plot No LOC.3/MUKURIA/673 under Bernard is shared under succession. All the same both parties have now compromised after counselling that;

a. Henry Mwangi will sell his tea bushes to Cyrus Mwangi- the tea is already on Cyrus land.

b. The price for selling the bushes shall be determined by KTDA.

c. The issue of succession for plot 673 is already in Court”.

20. The powers of the Land Dispute tribunal are set out in section 3(1) of the said repealed Act as 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.

21. The issue before the District Tribunal was trespass of the Appellants onto the Respondent's land. It is commonly acknowledged that the Appellants with the permission of Bernard planted and tended tea bushes on the suit land which the Respondent argued was extinguished when the land was transferred to him. The Appellants have faulted the Appellate tribunal for failing to determine issues of title to land, that is to say that they are entitled to the land by customary trust.

22. In the case of **Mbogo Mwathi - Vs- John Chege Mbogo, Civil Appeal No.531 of 2000**, the Court held that: -

“Land Disputes Tribunals do not have jurisdiction to adjudicate on matters involving registered land and they cannot award cancellation or rectification of a title.”

23. The issue that was before the District Land tribunal was trespass to land which was within the powers of the tribunal as set out in Section 3(1) of the repealed Act.

24. Section 8 of the Land Dispute Tribunal Act provides for Appeal by an aggrieved party of the decision of the Land Tribunal to the Provincial Appeals whose decision is final on the issues of facts and no Appeal shall lie therefrom.

25. Section 9 of the said Act provides 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.

26. In this Appeal the grounds 1-4 of Appeal by the 1<sup>st</sup> Appellant are all based on facts which is not permissible on a second Appeal. The said 26. grounds are therefore dismissed for being incompetent.

27. With respect to the 5<sup>th</sup> ground it is on record that the Appellate tribunals singled out the key issue for determination as the tea bushes on the Respondent's land. There is no evidence that the Appellate tribunal determined the issue of title to land.

28. With respect to grounds 1-3 of the 2<sup>nd</sup> Appellants grounds of Appeal, it is to be noted that the issue of tea bushes on the suit land was a matter of fact. Customary trust is both an issue of fact and the law. This issue is best determined after the taking of evidence on trial. The provisions of Section 3(1) did not empower the tribunal to determine issues of customary trust. None was determined.

29. Under grounds 6, 7, 8 and 9 of Appeal, the Appellants have faulted the Appellate tribunal for holding that the tea bushes should be sold to the Respondent. I must state that the Appellants did not find it necessary to include the proceedings of the Appellate tribunal in the record of Appeal making it difficult for the Court to appreciate the arguments of the parties on Appeal and the basis of the award arrived at by the Appellate tribunal. This is a serious ground which renders the Appeal incompetent.

30. Having said that it is on record from the Appellate tribunal's award that the parties compromised/consented to the award after being counselled by the tribunal. Whether there was a compromise or not is in my considered view an issue of fact which cannot be entertained by

the Court. In any event the law is clear with respect how a consent may be challenged. It may be set aside on grounds akin to those of impugning a contract. The Appellants have not taken this route. In any event the issue of sale of tea bushes did not affect the right to title to land which the tribunal had no power to determine.

31. With respect to grounds 4 and 5 of the Appeal, the Court notes that statute bar and adverse possession are issues of law. That said in view of the absence of the proceedings of the Appellate tribunal, the Court is unable to determine if these issues were raised on Appeal. Even if they were raised, they were not determined by the Appellate tribunal in its award. It restricted itself to the issue of the tea bushes. It did not have the power to determine the two issues of law however well placed they may be in the eyes of the Appellants.

32. The Appellant challenges the award arguing that the tribunal did not have power to order sale of the tea bushes and further direct that KTDA facilitates the sale. The Court may note the award did not affect the rights in the land nor was there an attempt to enforce the sale of the land. Otherwise, the tribunal Court have exceeded its jurisdiction aforesaid. The parties were bound by the consent and there was nothing ultravires or unreasonable in the actions of the Appeals Committee.

33. The grounds of Appeal and the proceedings before the Appeals committee have not been availed before this Court, it is thus difficult to question the determination of issues before that forum.

34. On the basis of the evidence placed before the Court it is the conclusion of the court that the Appeal is disallowed. It is dismissed with costs to the Respondent payable by the 1<sup>st</sup> Appellant.

35. **It is so ordered.**

**DATED, SIGNED & DELIVERED ONLINE THIS 26<sup>TH</sup> DAY OF NOVEMBER 2020.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Ms. Waiyua HB for Mr. Uvyu for the 1<sup>st</sup> Appellant

2<sup>nd</sup> Appellant: Absent

Ms Waigwa for the Respondent

Njeri: Court Assistant