



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 164 OF 2001

NEHEMIAH NDUMO GITAHU)

ALICE WANGARI NDUMO) APPELLANTS

VERSUS

AMOS WAMUYU)

JOHANA MAINA SIMON) RESPONDENTS

(Appeal from the Decision of the Provincial Land Disputes Appeals Committee Central Province

Case No. 18 of 2001 dated 31st of October 2001.)

J U D G M E N T

This is an appeal from the decision of the Provincial Land Disputes Appeals Committee, Central Province dated 31st October 2001. By that decision the appeals Committee upheld the decision of Nyeri Municipality Land disputes tribunal, the effect of which was that the appellants were trespassers to the parcel of land belonging to the 1st respondent and recommended their eviction.

In this appeal, the appellant has raised 8 grounds of appeal to wit;

“1. THAT the Honourable tribunal erred in law (and also in fact) in failing to note that parcel No. L.R. 8470/18 being registered in the names of Muchiri Waweru, Ritho Muita, Ndirangu Ndegwa and Omolo Surkwa all deceased, it had no jurisdiction whatsoever to deal with such property as the same could only be dealt with under the provision (sic) of the law of succession Act Cap 160 Laws of Kenya.

2. THAT the tribunal erred in law (and in fact) in failing to note that no transaction in land can be specifically performed without the granting of the mandatory land control board consents thereby rendering all he purported Awards by the tribunal upon which the 1st respondent claimed eviction a nullity in law.

3. THAT the Honourable tribunal erred in law (and in fact) in failing to note that under the law, trespass is not possible where the claimant is not a registered owner of land and or the appointed

administrator to the estate of the deceased owners of the land or otherwise in occupation of portion trespassed upon.

4. THAT the Honourable tribunal erred in law in failing to note that appellants herein were bonafide occupiers of the land resultant of rights accruing under a sale agreement thereby rendering the appellants herein by law, persons having interests on the land known by law, and occupation thereof lawful.

5. THAT the Honourable tribunal erred in law and in fact in failing to record and address itself to matters presented to it which in law amounted to failure to grant the appellants herein a fair and unbiased hearing and which is contrary to Natural Justice.

6. THAT the Honourable tribunal erred in law in purporting to put reliance on orders and decrees issued in cases where the appellants herein were not parties thereby in effect condemning the appellants herein unheard on those orders and decrees.

7. THAT the proceedings before the tribunal and the claim itself were all in contravention of Act No. 18 of 1990.

8. THAT the tribunal erred in failing to give the second appellant an opportunity to be heard.

In 1996, the 1st respondent by way of a miscellaneous civil application number 81 of 1996 caused a consent judgment to be entered in terms that he was entitled to 1 ½ acres of land parcel No. 8470/18 hereinafter referred as “*the suit premises*”. On 4th May 2000 in the Senior Principal Magistrate’s court Nyeri award case number 8 of 1998 the court’s executive officer was directed to sign the relevant documents to effect the transfer to the 1st respondent 1 acre out of the suit premises. It should be noted that the 2nd respondent had come into the case by way of substitution of the earlier administrator of the estate of **Mr. Omolo, Bernard Kangangi**. All in all therefore the 1st respondent was entitled to 2 ½ acres from the suit premises.

In or about 1997, the 2nd respondent found out that the appellants had encroached on the suit premises. It was then that he filed H.C. Misc. application number 27 of 1997 against the 1st respondent amongst others. She romped in the 1st appellant as a 3rd party. In the application he had sought an injunction against the defendants and the 3rd party. On 18th March 1997 **Osiemo J** recorded a consent order “**status quo be maintained until the land disputes tribunal files its decision in the subordinate court.....**”

Following the court orders giving the 1st respondents 2 ½ acres of the suit premises as aforesaid the 1st respondent sued for the eviction of the appellant from portions of the suit premises they occupied and which the 1st respondent claimed belonged to him vide the court orders aforesaid and following the survey. The dispute was however referred to arbitration by the Nyeri Municipality land disputes tribunal as aforesaid. From the record it appears that when the tribunal assembled to hear the dispute the 1st appellant walked out on the tribunal after the tribunal had turned down his request to enjoin 5 people in the proceedings who he claimed had some interest in the dispute. The tribunal’s reasoning was that each of those 5 people should lodge their separate claims. The tribunal also noted that the 2nd appellant who was the wife of the 1st appellant had failed to attend the proceedings for no apparent reason. The tribunal then proceeded to hear the dispute the absence of the appellants notwithstanding. At the end the tribunal ruled “**..... We all recommend that Mr. Nehemiah Ndumo Gitahi and Mrs. Alice Wangari Ndumo vacate the two and a half acres in LR 8470/18 bordering LR 8470/9 which Mr. Amos Wamunyu bought from Tabitha Wanjiru Omolo and Benard Kangangi and Johana Maina respectively.....**” This award did not go down well with the appellants. They instantly lodged an appeal against it as already stated with the Provincial Land Disputes Appeals Committee, Central Province. On this occasion the 1st appellant participated fully in the proceedings and submitted. The 1st respondent replied. Having carefully weighed the appeal, the appeals committee upheld the decision of the Nyeri municipality land disputes tribunal in toto. Further the appeals committee, after hearing the evidence adduced by both

parties, decided that due to trespass contrary to section 3(1) (c) of Act 18/90 action should be taken as follows:-

“1. Nehemiah Ndumo and his family and other persons residing and occupying the 1½ acres of land sold to Amos Wamunyu by Tabitha Wanjiru Omolo on land No. 8470/18 Nyeri Municipality be evicted immediately with his property and agents severally

2.

3.

4.”

It is against this decision that this appeal was lodged in this court by the appellants.

When the appeal came up for hearing it was agreed by the respective parties that the same be heard by way of written submissions. The said written submissions were subsequently filed which I have carefully read and considered.

Essentially the issue between the appellants and the respondents is who between them had a better claim to the suit premises. The appellants are of the view that their claim to the suit premises is superior because they took possession of the same before the 1st respondent. On the other hand the 1st respondent is of the view that his is superior based on court orders and or decrees aforesaid.

My take on this is that the 1st respondents claim to the suit premises is well founded. He was awarded 2½ acres of the suit premises on the basis of valid court proceedings and decrees and or orders that ensued therefrom. It is admitted that in some of those court proceedings the appellants were not parties. However that alone does not invalidate the court orders and decrees aforesaid. The appellants had opportunity to challenge the said orders and decrees elsewhere or in other forums. They did not and have not done so to date. That being the case the court orders and decrees vesting 2½ acres into the 1st respondent remain valid today as they were when they were first issued. And until they are overturned and or set aside on appeal or review they remain valid and must be respected and acted upon. It matters not that there was no consent of the land control board to the transaction. It matters not that the alleged sale was not reduced into writing as required by law and it matters not that the sale may have been in contravention of the law of succession Act. These are the grounds that would have been used by the appellant to impugn the orders/decrees aforesaid or the 1st respondent’s title to the suit premises.

Tabitha Wanjiru Omolo testified that she had been lent money by the 1st appellant and when she failed to repay, the 1st appellant occupied the portion of the suit premises which now belong to the 1st respondent. Of course the 1st appellant claims to have bought the same. However he was unable to prove with cogent evidence such purchase. Just as in the case of the 1st respondent, no consent of the land control board was tendered.

The moment the 2½ acres out of the suit premises vested into the 1st respondent in accordance with the law, the appellants immediately became trespassers liable to eviction. It matters not therefore that they are in occupation of the suit premises and or took possession of the same much earlier than the respondents. They may have entered the suit premises with the consent of **Tabitha Omolo**. However that portion of land in their occupation no longer belongs to **Tabitha Omolo** now. By operation of law it belongs to the 1st respondent. The appellants are thus trespassers. In my view both the tribunal and Appeals Committee were right in reaching the decisions they made.

The appellants cannot be heard to complain about breach of natural justice for having been condemned unheard. The 1st appellant was given an opportunity to be heard. However he walked out on the tribunal when it turned down his request to have some 5 people enjoined in the proceedings. His wife, the 2nd

appellant though aware of the proceedings failed to turn up for unexplained reasons.

For all the foregoing reasons, I see no merit in this appeal. Accordingly it is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 7th day of May 2009

M. S. A. MAKHANDIA

JUDGE