REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Civil Appeal 38 of 2008

FRANCIS MBURUGU MAKATHIMO ……. APPELLANT

VERSUS

RAEL KIRIGO MAKATHIMO ……..……. RESPONDENT

(An appeal from the judgment/Ruling/Order or award of Eastern Provincial Appeals Committee in the appeal No. 90 of 2007 dated 9th January 2008 and read in court to the parties on 4th February 2008 which judgment/order or award emanated and confirmed the Meru Central Land Disputes Tribunal award which was read in court as the LDT No. 18 of 2004 on 14th June 2004)

BETWEEN

RAEL KIRIGO MAKATHIMO …….....…….…. APPLICANT

FRANCIS MBURUGU MAKATHIMO……RESPONDENT

JUDGMENT

The respondent is the mother of the appellant. The respondent filed a claim before the Meru Central Dispute Land Tribunal in Tribunal Case No. 4 of 2004. In her claim, she alleged that the appellant at the time of demarcation of land took land that had been left for her by her late husband and combined it together with his and thereafter obtained title No. Ntima/Igoki/5735. The appellant responded to that claim by saying that both parcels of land now registered as parcel No. 5735 were given to him by his late father who was also the husband to the respondent. Tribunal made the finding:-

"Rael Kirigo Makathimo(respondent) to be given 0.48 hectares by Francis Japhet Mburugu Makathimo (appellant) from Ntima/Igoki/5735 which was legally hers."

The appellant appealed against that tribunal decision to the Eastern Province Appeals Committee being case No. 90 of 2006. The decision of the Appeals Committee was as follows:-

"After perusing the record of the tribunal and having heard the submissions from both sides, we concur with the decision of Meru Central District Land Tribunal Decision. This is because the respondent is a very old mother of the appellant who needs help from her children and who was left in the disputed land by her late husband and chased away by the appellant who is also her son and went to live with the youngest daughter who is not married. According to the customary law, she has a right to live in her husband's land."

The appellant was aggrieved by that finding and consequently filed this appeal. At this stage, I wish to deal with one issue which was raised by the respondent in her submissions. It was submitted on her behalf that the appeal was filed in contravention of section 8 (9) of the Land Dispute Tribunal Act. That section provides as follows:-

"9. Either party to appeal may appeal from the decision of the Appeals Committee to the High Court on point of law within sixty days from the date of the decision complained of."

The decision of the appeals committee in this matter was delivered on 9th January 2008. The section quoted

hereabove shows that sixty days begins to run from the date of the decision. That would mean that sixty days begun to be counted from the 10th January 2008. If there is doubt in my interpretation of that section, then section 57 (a) of the Interpretation and General Provisions Act Cap 2 would assist. That section provides:-

"In computing time for the purpose of written law, unless the contrary intention appears –

(a) A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done."

Accordingly, the 60th day was on the 10th April 2008. This appeal was filed on 1st April 2008. I am however of the view that the respondent had no right to raise the issue of the appeal being filed out of time because that issue was conclusively dealt with by the Hon. Mr. Justice Ouko in this matter. This is what the learned Judge had to say in his ruling:-

"From the computation I have set out above the appeal having been filed on 1st April 2008 I come to the conclusion that the appeal was filed within time."

That ruling to date has not been appealed against. Although the appellant filed some 8 grounds of appeal, in his submissions he only supported ground No. 7 which is to the effect:-

"The appeal committee erred in law by giving an ambiguous award partly confirming and partly reviewing the award."

By only submitting on this one ground, it is to be assumed that the appellant abandoned the other grounds of appeals. I find that I am in agreement with the appellant that the import of the Appeals Committee finding was to confuse the parties in this litigation. The Land Dispute Tribunal ordered parcel No. 5735 be subdivided and the respondent be given 0.48 hectares from the subdivision. The appeals committee both up held that decision and at the same time granted the respondent the right to live on the land. At the end of its decision, the appeals committee dismissed the appellant appeal. It would seem from their decision that they varied the tribunal's order and at the same time up held the same. The Land Dispute Tribunal Act Section 3(1) provides the jurisdiction of the Tribunal 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".

From the provisions of that section, it is clear that the tribunal can adjudicate on matters relating to the use of agriculture land but cannot order sub division and transfer of registered land. That being so, it is clear that the District Land Tribunal award of 25th May 2004 was ultra virus to the Land Dispute Tribunal Act. For the Appeals Committee to proceed to up hold what was ultra virus to the act was an error in law and accordingly this appeal does succeed. The appellant perhaps because the respondent is his mother in his appeal and his last prayer stated as follows:-

"It is proposed to seek from this Hon. Court orders that the decision and or award of Meru Central District Land Tribunal in their LDT Case No. 4 of 2004 and Eastern Province Provincial appeal committee case No. 90 of 2006 be set aside and be substituted with an order granting the respondent the right to occupy and work the said 0.48 hectares within land No. Ntima/Igoki/5735 for her whole life till her death."

That being the prayer and in view of my finding that the appeal does succeed, the judgment of this court is as follows:-

1. This Court orders that the decision and or award of Meru Central District Land Tribunal in their LDT Case No. 4 of 2004 and Eastern Province Provincial appeal committee case No. 90 of 2006 be set aside and be substituted with an order granting the respondent the right to occupy and work the said 0.48 hectares within land No. Ntima/Igoki/5735 for her whole life till her death.

2. There shall be no orders as to costs.

Dated and delivered at Meru this 2nd day of October 2009.

MARY KASANGO

JUDGE