



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELCC NO. 102 OF 2017

(Formerly Nyeri HCC Appeal No. 201 of 2010)

ESTHER WAMBUI KIBUI.....APPELLANT

-VERSUS-

JANEFFER MUTHONI MUNGAI ALIAS

JENIFFER MUTHONI MWENDIA.....RESPONDENT

(Being an appeal from the Judgment of Hon.L.W.Gicheha, Senior Resident magistrate

(as she then was) in Thika CMCC No. 32 of 2005

delivered on 22nd September, 2005)

JUDGMENT

Introduction

1. This matter was reactivated on 22nd October, 2018 by a Notice to Show Cause (NTSC) why this suit (Hereinafter referred to as the appeal) should not be dismissed under Order 17 rule 2 (1) of the Civil Procedure Rules, 2010. Notably, on 29th October 2018 when the appeal came up for the Notice To Show Cause, learned counsel **Ms. Wambui**, holding brief for learned counsel, Mboha instructed by Mwihiya and Mutai company advocates for the appellant informed the court of the appellant's death. Consequently, leave was granted to the counsel to make an application to substitute the appellant within twenty one (21) days from that date. On 26th November, 2018, the intended application had not been filed and served as ordered hence at the request of the appellant's counsel, the court directed the parties to argue the appeal by way of written submissions.

Background

2. The genesis of this dispute was before the defunct Thika Land Disputes Tribunal (hereinafter referred to as "**the Tribunal**") where **Jeniffer Muthoni Mwendia**, the Respondent herein lodged a complaint to have a portion of **L.R No./Kiambu/Munyu/507** (Hereinafter referred to as "**the suit land**") allocated to her. The respondent was the wife of Mwendia Kibiu (Hereinafter referred to as deceased 1) and was living in the suit land which deceased 1 had inherited from his father Kibio Mwendia Kiribati (Hereinafter referred to as deceased 2).

3. The Appellant, **Esther Wambui Kibiu**, was one of the wives of deceased 1. She wanted the whole of the suit land allocated to her.

4. In its decision dated 7th July 2005, the Tribunal found that the Respondent was a daughter-in-law of the family of deceased 2. It therefore allocated her three (3) acres of the suit land. The Tribunal further found that since the Appellant had a bigger family and had taken care of deceased 2 before his death, she was awarded four (4) acres of the suit land. On 22nd September, 2005, the trial court entered judgment in accordance with the decision of the Tribunal

5. The Appellant was dissatisfied with The Tribunal's decision and filed an appeal before the then Central Province Land Disputes Appeals Committee, (Hereinafter referred to as the "**Appeals Committee**"). In its decision delivered on 28th October 2010, the Appeals Committee upheld the award of the Tribunal.

Grounds of appeal

6. Aggrieved by the decision of the Tribunal which was upheld on appeal and confirmed as Judgment by the trial court, the Appellant instituted the instant appeal. Her grounds of appeal are as hereunder:-

1. That the Appeals Tribunal erred in law and in fact in failing to find that Thika Municipality Land Disputes Tribunal did not have jurisdiction to deal with issues touching on title and or ownership of land parcel Kiambu/Munyu/507 registered in the name of the Appellant.

2. That the Appeals Tribunal erred in fact and in law in failing to find that the Respondent had irregularly and unlawfully subdivided land parcel Kiambu/Munyu/507 during the pendency of the appeal despite orders of the same appeals tribunal that status quo was to be maintained until the appeal was heard and determined.

3. That the Appeals Tribunal erred in law and fact in adjudicating on matters pertaining to land parcel Kiambu/Munyu/1668 the resultant subdivision of the suit land, Kiambu/Munyu/507 notwithstanding the fact that the subject property of the appeal was Kiambu/Munyu/507.

4. The Appeals Tribunal erred in law and in fact in failing to find that the subdivision of the parcel Kiambu/Munyu/507 by the Respondent was irregular and unlawful as the award by Thika Municipality Land Dispute Tribunal giving the Respondent three (3) acres of the subject property was null and void for not having jurisdiction to deal with issues touching on title and or ownership of land to make such an award.

5. The Appeals Tribunal erred in law and fact in making a finding in favour of the Respondent despite making a finding that the ruling and or award of Thika Municipality Land Dispute Tribunal had been varied.

7. On the foregoing grounds, the Appellant prayed that the award of the Tribunal and that of the Appeals committee be set aside. She sought cancellation of titles for land parcels Kiambu/Munyu/1668 and 1669, the resultant subdivisions of the suit land and that the same land to revert to the suit land in the name of the Appellant. She further prayed for costs of the appeal and the tribunals below.

The appellant's submissions

8. In her submissions dated 30th September, 2018, the Appellant argued that the Tribunal and the Appeals Committee lacked jurisdiction to adjudicate matters of ownership of title and therefore acted in excess of their mandate in proceeding to distribute the suit land. To buttress her submissions, she referred to the Court of Appeal decision in **Jotham Amunavi –v- The Chairman Sabatia Land Disputes Tribunal and another Civil Appeal No. 256 of 2002 (2016) eKLR**. To demonstrate that the actions were not within section 3(1) of the Land Disputes Tribunal, 2009 (1990). She relied on the decision of **Republic ex-parte Peter Nicholas Mautia –vs- Keumbu Land Disputes Tribunal & 2 Others [2016] eKLR** where the court held that the Tribunal acted in excess of its jurisdiction and as such the proceedings were a nullity.

9. Additionally, the Appellant relied on the decision in the case of **Republic –vs- Chairman Borabu Land Disputes Tribunal & 2 others ex-parte Florence Nyaboke Machani (2014) eKLR** where Samson Okongo J held that since the decision of the Tribunal was null and void, there was nothing that the Court could adopt as a judgment of that court.

The Respondent's submissions

10. The Respondent who appears in person vigorously challenged the appellant's arguments by her submissions dated 13th December, 2018. She submitted that the appeal was brought in bad faith and was frivolous because no substitution was done after the Appellant's death. She argued that the Appellant did not prefer any appeal against the award within the prescribed period of time and as such the court upheld the award and the orders were executed by the executive officer of the court for the subdivision of the suit land. She also argued that the tribunal's decision was proper since the Appellant's appeal to the Appeals Committee was dismissed. She claimed that the instant suit was a waste of judicial time as all the requisite issues had been adjudicated upon.

11. To demonstrate bad faith on the part of the Appellant, the Respondent made reference to the fact that the appellant filed the suit in the year 2010 and was served in 2018. She also reiterated that the Appellant had no capacity to sue after her death. The suit ought to have abated within 12 months pursuant to Order 24 rule 3 (2) of the Civil Procedure Rules, 2010. On that basis alone, she submitted that the appeal ought to be struck out for failing to meet the legal threshold.

12. The Respondent further argued that she had already acquired her title, **LR.No. Kiambu/Munyu/1668** for the three acres and so had the Appellant with respect to her four acres. She argued that the submissions by the Appellant that the Tribunal and the Appeals Committee lacked jurisdiction was misplaced. That in view of the fact that she participated in the process by lodging the initial complaint before the Tribunal and subsequently appealing to the Appeals committee, makes the Appellant's claim thereof inconsequential. The Respondent argued that the Notice to Appeal was received in court after the award was confirmed as judgment. She submitted that it was indolent of the appellant for failure to inform the court of her intention to appeal against the tribunal's decision and as such cannot purport to have the award nullified by the court about ten years down the line. The Respondent submitted that the Appellant's case is an afterthought. It is her contention that due process was followed to acquire the new titles and any technicalities before the Tribunal were curable by Article 159(2) (d) of the Constitution of Kenya, 2010. Thus, the Respondent prayed that the appeal be dismissed with costs.

Issues for determination

13. From the foregoing brief discourse, it is my considered view that what emerges for determination are the following issues:-

a) Was the jurisdiction of the Tribunal, the Appeals Committee and the trial court well exercised in view of the circumstances of this case and the relevant enabling provisions of the law?

b) Depending on the outcome of (a) above, what Orders should this court make?

14. This being the first appeal, the role of this appellate Court of first instance is well settled. In the case of **Kenya Power & Lighting Company Limited –vs- EKO & Another[2018] eKLR**, Joel Ngugi J based his decision on various authorities including **Mary Wanjiku Gachigi-vs- Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000, Anne Wambui Ndiritu-vs- Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000, Virani T/A Kisumu Beach Resort-vs- Phoenix of East Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002)** and set out the appropriate standard of review on matters coming before the High Court (read this court) on first appeal in the following terms;

a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before the court; and

c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

Analysis and Determination

15. I have carefully perused the record of appeal and given special attention to the proceedings of the Tribunal and that of the Appeals Committee. Jurisdiction is a pure question of law and as such it matters not that both parties submitted to the jurisdiction of the Tribunal and the Appeals Committee. The Appellant who contests jurisdiction has the right to do so and it is erroneous for the Respondent to submit that she participated in the Tribunal as well as Appeals Committee. Even in situations where parties consent to a court or tribunal and it is later found that the forum had no jurisdiction, all the proceedings would be a nullity ab initio as recognised by the Supreme Court of Kenya in the case of **Republic-vs-Karisa Chengo and two others Petition number 5 of 2015 (2017) eKLR**.

16. At the Tribunal and the Appeals Committee, the Appellant did not contest ownership or the Respondent's entitlement to inherit the estate of deceased 1. She was only dissatisfied with the fact that she was not given a bigger portion of the land. Her dispute on jurisdiction thus emanates from the mode of division of the suit land. The Million Dollar question is whether the appellant's contest regarding jurisdiction is valid in the first place. Is it an afterthought raised by her in absolute bad faith as a means to defeat the rights already accrued to the Respondent?

17. It is trite law that Jurisdiction of a court or a tribunal flows from either the Constitution or statute or both; see **Samwel Kamau Macharia and another-vs-Kenya Commercial Bank and two others (2012) eKLR**.

18. The jurisdiction of the Tribunal is set out under **Section 3(1) of the Land Disputes Tribunal Act, 2009 (1990)** (now repealed) which provides 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; or

(c) Trespass to land, shall be heard and determined by a Tribunal established under section 4 (emphasis added)

19. It is pretty clear that the dispute that was before the Tribunal according to the proceedings was in respect of the **division and occupation of the suit land**. The Tribunal did no more than subdivide the suit land between the Appellant and the Respondent. It gave reasons for its award which in my view were and are satisfactory.

20. **Section 8** of the said repealed Act provides for appeals from the decision of the tribunal thus: -

Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

21. Similarly, the Appeals Committee did nothing more than to uphold the decision of the Tribunal. It declared that it had no jurisdiction to deal with the dispute because titles had already been issued pursuant to the Tribunal's decision. Therefore the Tribunal did not adjudicate on the question of title or ownership of the suit land. The trial court entered judgment in accordance with the decision of the Tribunal as commanded by Section 7 (2) of the Repealed Act.

22. From my reassessment of evidence on record, I find no fault in the way the Tribunal and the trial court dealt with the dispute. They did not overstep their mandate as conferred by sections 3(1)(a) and 7 (2) of the Land Disputes Tribunals Act. The Appellant failed to lodge an appeal as provided for under Section 8 (9) of the Repealed Act and has conveniently shut her eyes to all the prescribed procedure to introduce

grounds of appeal including the question of title and ownership of the suit land that are far fetched from the original dispute before the Tribunal. To that extent, ground 1 of the appeal fails.

23. Equally, ground 2 fails on the basis that there was nothing irregular about subdivision of the suit land. The application to maintain the status quo was filed long after subdivision and essentially there was nothing to stay.

24. The other grounds raised in this appeal inevitably fail upon determination of the first two grounds.

25. I therefore do find and hold that the subsequent adoption of the Tribunal's award by the trial court on 22nd September, 2005 was competent and merited.

26. A separate issue that I must address before I make final orders is the application by counsel for the Appellant for substitution of the Appellant after her demise. Indeed the intended substitution did not take place. **Order 24 Rule 3(2)** of Civil Procedure Rules provides as follows:-

3. "(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time. (Emphasis laid)

27. There was no explanation by learned counsel for the Appellant why an application for substitution of the Appellant was not filed and served as directed by this court. There was further no explanation why it took the Appellant close to ten years to appeal the decision of the trial court. She did not seek judicial review of the decision. Since she failed to pursue any of those options, she cannot be allowed to seek a non-existent third avenue.

28. In the premises, I find the Appellant indolent for the inordinate delay and even without considering the merits of the Appeal, the suit abated after the Appellant was not substituted within one year as required by the law. The decision of the Tribunal as adopted by the trial court is steadfast. In any case, it was the court that awoke the parties herein from slumber to prosecute this appeal. I only took the liberty of addressing the substantive issues in the appeal due to the provisions of **Article 159(2)(d)** of the Constitution of Kenya, 2010 which enjoins this court to determine cases without undue regard to technicalities as well as the concept of **Overriding Objective** which confers on this court considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder.

29. The upshot is that this appeal is want of merit. Accordingly, I dismiss the same.

30. On costs, I am guided by the proviso to **Section 27 (1) of the Civil Procedure Act (Cap 21)**, the peculiar circumstances of the appeal and the relationship between the parties in this dispute. Each party shall bear her own costs in this appeal and the trial court as well as those in the appeal committee and the tribunal below.

Dated and signed at Migori this 21st day of April 2019

G.M.A ONGONDO

JUDGE

Delivered, SIGNED and Dated in open court at Thika this 14th day of JUNE, 2019

L.N.GACHERU

JUDGE

In the presence of

1. M/s Olouch holding brief for M/s Wambui for appellant
2. Jeniffer Muthoni –Respondent present in person
3. Lucy – Court Assistant