



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 4 OF 2017

PAULINE NJAMBI KIRERU.....APPELLANT

VERSUS

AGNES WAKIO KARANI.....1ST RESPONDENT

PAUL KIRERU KARANI.....2ND RESPONDENT

(An appeal from the judgment of the Hon D A Orimba, SRM, Kangema issued on the 15/9/2011)

JUDGMENT

1. This is an appeal arising from the orders of the Hon D. A. Orimba SRM, Kangema on the 15/9/2011. The Appellant being aggrieved, proffered grounds of appeal as summarized as; the learned magistrate erred in law and fact in confirming findings of a tribunal which had no jurisdiction to determine a dispute on land; the tribunal was not properly constituted in accordance with the Land Dispute Tribunal Act; the decision was based on fabricated proceedings in which the Appellant did not participate; uncorroborated evidence; the tribunal had no jurisdiction to determine ownership of registered land.

2. The Respondents were served through substituted services but they did not file any response. The appeal is however unopposed. I shall proceed to determine it on its merits.

3. The background of this appeal stems from the Land Dispute Tribunal proceedings in 26/2011. The Appellant is the mother in law of 1st Respondent and the grandmother to the 2nd Respondent. All parties are therefore related. In the Land Dispute Tribunal proceedings the Respondents sought a share of the land on behalf of her husband and father respectively. The Respondents are the wife and son of the late Lawrence Kinyari Kireru who was the son of the Appellant and Kireru Kinyari. The 1st Respondent pleaded with the elders that the Appellant would allow her to occupy the land and tilt it so as to bring up her children on the said land. The suit land LOC14/KAIRO/79 is registered in the name of Kireru Kinyari, deceased as absolute owner. After the death of Lawrence Kinyari Kireru they were evicted from the suit land and their houses demolished. After the deliberations of the elders, it was decided that the Respondents were entitled to inherit part of the suit land and should be allowed unconditionally to occupy that portion that belonged to the late Lawrence Kinyari Kireru. The Land Dispute Tribunal award was finally adopted by the Court on the 15/9/2011 as follows;

“It is hereby ordered and decreed that;

- a. Both Plaintiffs are legally entitled to inherit part of the land parcel No LOC14/KAIRO/79 and should unconditionally be allowed to occupy the portion that belonged to Lawrence Kinyari Kireru alias Kariuki Kireru.
- b. The family should immediately file succession cause for the parcel of land to facilitate legal ownership of individual parcels.
- c. Each party to bear its costs of the suit
- d. Any aggrieved party has 30 days right of appeal. Should any party prove uncooperative at any stage, the Court Executive officer should do it on behalf of the party”.

4. The Appellant filed written submissions which I have read and considered. I shall deal with the issues as raised in the Memorandum of Appeal.

5. The Appellant submitted that the Land Dispute Tribunal Act did not donate jurisdiction to the elders to determine the matter in respect to land under the Registered Land Act.

6. Section 3(1) of the Land Dispute Tribunal Act states as follows;

“(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”.

7. In this case the issue at hand was occupation to land. From the proceedings in the tribunal the Respondents sought to be allowed to occupy and cultivate the portion of the land that belonged to their husband and father. To my mind the elders did not stray from their mandate as defined in Section 3(3) above. The Land Dispute Tribunal decreed that the parties should file succession proceedings so that the beneficiaries to land may be established. It is the finding of the Court that the Land Dispute Tribunal had jurisdiction to determine the dispute. I find no fault on the part of the Hon Magistrate and I hesitate to disturb his decision. This ground fails.

8. In respect to the issue whether the elders were properly constituted, the dispute was disclosed to have been heard and the award signed by 9 members including the chairman. Section 4 of the Land Dispute Tribunal Act (repealed) states;

“There shall be established a tribunal, to be called the Land Disputes Tribunal, for every registration district. (2) Each Tribunal shall consist of— (a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and (b) either two or four elders selected by the District Commissioner from a panel of elders appointed under Section 5. 5. (1) The Minister shall, by notice published in the Gazette, appoint a panel of elders for each registration district.

9. The Appellant has not explained under what circumstances the panel of elders was not properly constituted. That said the Court notes that the panel had 9 members in total, which is in excess of the 3 or 5 provided in law. The Applicant has not however shown the prejudice that she suffered in the dispute being heard and determined by a panel in excess of quorum. It would have been fatal if the number was below that stipulated in the then repealed Act. This ground fails.

10. As to whether the proceedings were fabricated, the proceedings confirm that the Appellant participated in the case and called witnesses to corroborate her case. She also cross-examined the Plaintiff/Respondents. The Respondent was present when the award was read out. The allegations of fabrication appear to be an afterthought. The Respondent never raised this issue at the tribunal and later before the magistrate who adopted the award. Neither did she file an appeal before the Provincial Appeals Committee either. This ground fails.

11. The magistrate’s decision to adopt the award has been faulted on the grounds that the tribunal did not have jurisdiction and that the Respondents’ evidence did not corroborate his case. The adoption may not be set aside since the provisions of Section 7 and 8 of the repealed Act provided that the magistrate Court shall adopt the award Such jurisdiction has been interpreted to be limited to adoption without further leeway to set aside review or vary the award of the tribunal.

12. However in this case the adoption of the award on the 15/9/2011 is found in error in law since the Land Dispute Tribunal Act had been repealed following the commencement of the Environment and Land Court Act on 30th August 2011 in effect repealing the Land Dispute Tribunal Act No. 18 of 1990. I concur with the decision in the case of **Masagu Ole Koitelet Naumo v Principal Magistrate Kajiado Law Courts & another [2014] Eklr** where an award was adopted on 14th August, 2013 by which time the Land Disputes Tribunal Act, No.18 of 1990 had been repealed by section 31 of the Environment and Land Court Act that, Odunga J held thus :

”..... Apparently there was no saving provision for proceedings which were either pending hearing before the Tribunal or adoption before the Courts. Accordingly, by repeal of the Land Disputes Tribunal Act, No.18 of 1990, no Court could purport to exercise any powers thereunder. In adopting the award on 14th August, 2013 (after enactment of Section 31 of the Environment and Land Act)

Further that

“While the Land Disputes Tribunal Act, No.18 of 1990 existed the learned Magistrate had no option but to adopt the award but by the repeal of the said Act that jurisdiction no longer existed. In other words with the repeal of the Land Disputes Tribunal Act went the jurisdiction of the Magistrate’s Court to exercise any jurisdiction thereunder and the Respondent ought not to have entertained the application effective from the date of the said repeal since the jurisdiction to adopt the award emanated from the said Act without which no such jurisdiction existed. The Respondent had no blanket power to exercise jurisdiction at large as it were and in vacuo”

13. In this case the Court adopted the award on 15/9/2011 when the Act had already ceased to exist and thus there was no jurisdiction or ground to adopt the award. The adoption was outside the life of the Land Dispute Tribunal Act. This ground is upheld.

14. In the end the appeal succeeds on one ground. It is allowed with no orders as to costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 16TH DAY OF SEPTEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Nderitu HB for Kariithi for the Appellant

1st and 2nd Respondents – Absent

Kuiyaki and Njeri, Court Assistants