



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 93 OF 2013

MURIITHI NYAGA APPELLANT

VERSUS

JAMES P. WAMBUGU RESPONDENT

(BEING AN APPEAL FROM THE AWARD OF THE PROVINCIAL LAND DISPUTES APPEAL COMMITTEE AT NYERI IN APPEAL CASE NO. 18 OF 2010)

JUDGMENT

The Appellant (**MURIITHI NYAGA**) and the Respondent (**JAMES P. WAMBUGU**) are brothers. The Appellant's land parcel No. BARAGWE/GUAMA/2 shares a boundary with the Respondent's land parcel No. BARAGWE/GUAMA/1929. The parties had a dispute over their common boundary which the Respondent filed at the then **GICHUGU LAND DISPUTES TRIBUNAL** (the Tribunal) being case No. 39 of 2009. After hearing both parties and their witnesses, the Tribunal made the following award:

"IT IS HEREBY ORDERD THAT

- 1. The portion of land utilized by the complainant in this case JAMES P. WAMBUGU measuring $\frac{3}{4}$ acre to be reversed back to the defendant MURIITHI NYAGA forthwith.***
- 2. The boundary beacons erected by the then District Surveyor and Land Registrar to remain as a common boundary and to be respected by both parties.***
- 3. The tea bushes should be tendered by the defendant in this case MURIITH NYAGA.***
- 4. It is also ruled that the status quo should be maintained.***
- 5. If any party alters the boundary features should be imprisoned for 6 months and meet the expense of reinstating the boundary again.***
- 6. Each party to meet its own costs.***
- 7. No costs as to this suit.***
- 8. Any aggrieved party to appeal within 30 days"***

Aggrieved by that award, **JAMES P. WAMBUGU** filed an appeal at the then **PROVINCIAL LAND DISPUTES APPEALS COMMITTEE** at NYERI (the Appeals Committee) which, after hearing both parties, made the following award:

“The Tribunal having listened to both parties, having perused through all the documents available, the bounder (sic) having existed from 1957 which is more than 50 years, the parties have leaved (sic) in the suit parcels for the same period, this tribunal award is that the Kirinyaga District Surveyor to correct the RIM (Registered Index Map) between boundary BARAGWI/GUAMA/2 and 1929 to confirm with the existing boundary and visit the suit bounder (sic) and straightened (sic) the same. Costs awarded to the Appellant according to the advocate remuneration order.

The Respondent to pay the Appellant any costs that would have been incurred when the dispute started.

60 days right of appeal”.

The Appellant through the firm of **WANJIRU WAMBUGU & CO. ADVOCATES** then moved to the **HIGH COURT IN NYERI** and filed **CIVIL APPEAL No. 135 of 2011** which was subsequently transferred to this Court.

In the appeal, the following eight (8) grounds of appeal were raised:

- 1. That the Provincial Tribunal Nyeri erred in law when it issued an award that was not dated.*
- 2. That the Tribunal erred in law when it included extraneous issues which were not reflected in the Gichugu District award or its own proceedings.*
- 3. The Tribunal erred when it gave an award which was ambiguous.*
- 4. The Tribunal erred when it awarded costs to be in accordance with the Advocates remuneration order.*
- 5. The Tribunal erred in law when it failed to reflect in its award either the submissions or evidence presented before it but instead proceeded to only give its findings.*
- 6. The Tribunal had no jurisdiction to give the orders that it did.*
- 7. The award of the Provincial Land Disputes Appeals Committee was a nullity in view of Section 9 of the Land Disputes Act 18 of 1990.*
- 8. That the Tribunal failed in law to comply with Section 8 of the Land Disputes Tribunal Act.*

The Appellant therefore seeks that the award of the Provincial Land Disputes Appeals Tribunal be set aside and costs of the appeal be paid to him.

The appeal was canvassed by way of written submissions which have been filed by the firm of **WANJIRU WAMBUGU & CO. ADVOCATES** for the Appellant and **IKAHU NGANGAH & CO. ADVOCATES** for the Respondent.

I have considered the appeal and submissions by counsel. The reference to Tribunal in the memorandum of appeal can only be in reference to the Provincial Appeals Committee established under **Section 9 of the repealed Land Disputes Tribunal Act** because no appeal could lie to the High Court directly from the decision of the Tribunal by dint of the provisions of **Section 8 (1) of the repealed law**. Secondly, under **Section 8 (9)** of the repealed law, such an appeal could only be on points of law.

I shall begin with ground No. 4 of the memorandum of appeal which questions the Appeals Committee’s award of costs to the Respondent **“according to Advocates Remuneration order”**. It is clear **from Section 27 of the Civil Procedure Act** that costs follow the event but are always at the discretion of the Court or Tribunal. That discretion must however be exercised judicially and in my view, among the

factors that a Court or Tribunal must take into account is the relationship of the parties, their conduct and the subject. In disputes involving families, it is prudent to make no order as to costs so as not to set them up any more against each other. In this case, the parties are brothers and neighbours. An order that each meets their own costs would serve the interest of justice. Ground No. 4 of the appeal therefore succeeds.

Ground No.1 of the memorandum of appeal takes issue with the fact that the award of the Appeals Committee was not dated. I have looked at the award and although it is signed, it is correct that the same is not dated. **Order 21 Rule 3 of the Civil Procedure Rules** makes it mandatory that a judgment “***shall be dated and signed***” in open Court by the Judge. In **LIKHANGA**

SHIKAMI & ANOTHER VS ILLIANA INGASIALI REGINA & ANOTHER C.A CIVIL APPEAL No. 28 of 2007, the Court held that a judgment which is not signed is a nullity and refused to accept the suggestion by counsel that failure to do so was not fatal and was a mere technicality that could be cured by **Article 159 of the Constitution**. It must be remembered, however, that the Appeals Committee established under **Section 9 of the repealed Land Disputes Tribunal Act** was not sitting as a Court and therefore in my view, it could not be expected to strictly apply the provisions of the **Civil Procedure Act and Rules**. Such a Committee acts as a special tribunal similar to the Minister hearing an appeal under the **Land Adjudication Act** and as was held by the Court of Appeal in **TIMOTHEO MAKENGE VS MANUNGA NGOCHI 1978 K.L.R 53 (1979) e K.L.R.**, no such duty as is laid down for the hearing of civil suits by Courts is prescribed in respect of the Minister. I take the view that the same position applies during the determination of appeals by the Appeals Committee established under the **repealed Land Disputes Tribunal Act**. I therefore find that the failure by the Appeals Committee to date the award is not fatal. That ground of appeal therefore fails.

Ground 2, 3 and 5 of the memorandum of appeal can be considered together. They allege that the Appeals Committee considered extraneous issues, made an ambiguous award and failed to reflect therein the submissions and evidence presented before it. Those are strictly matters of fact. This Court is obliged to consider only matters of law. In any case, I see no ambiguity nor extraneous matters in the award and again, guided by **TIMOTHEO MAKENGE** (supra), I find that the Appeals Committee was not obliged to record any submissions made by the parties. What **Section 8 (7) of the repealed Land Disputes Tribunals Act** required of the Appeals Committee was to give an opportunity to the parties to be heard and thereafter determine the appeal. There is no suggestion that the parties were not heard. Indeed the award itself reads as follows:

***“The Tribunal having listened to both parties, having perused through all the documents available*”**

Those grounds of appeal are dismissed.

Ground 6 questions the jurisdiction of the Tribunal to make the orders that it did. This was a boundary dispute and under **Section 3 (1) of the Land Disputes Tribunals Act**, the jurisdiction of the Tribunal is set out as follows:

- (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”***

Both the Tribunal and Appeals Committee directed the parties to abide by the boundary that had been determined by the District Surveyor. The appeal on the ground of lack of jurisdiction is clearly without merit and must fail.

Ground 7 of the appeal is to the effect that the award of the Appeals Committee was a nullity in view of **Section 9 of the repealed Land Disputes Act**. That provision provides as follows:

9 (1)“The Minister shall establish for each Province a Land Disputes Appeals Committee which shall consist of –

(a) a Chairman appointed from time to time by the Provincial Commissioner from the panel of elders appointed by the Minister by notice published in the Gazette for purposes of appeals under this Act; and

(b) such persons, not being less than five, appointed by the Minister

(2) For the purposes of hearing appeals from the Tribunal in the Province for which the Committee is constituted, the Committee shall sit in a panel of three members and in such places as may be determined by the Provincial Commissioner”.

It is not clear how the above provision was flouted, if at all, in respect to **sub-Section (1)**. In respect to **sub-Section (2)**, the Appeals Committee consisted of the following three (3) members:

1. PETER MATHWE KAMAU- Chairman

2. JAMES G. GUTU - Member

3. ESTHER W. JIMNA - Member

The composition of the panel was therefore in accordance with the law. That ground of appeal also fails.

Finally, ground 9 of the appeal is to the effect that there was no compliance with **Section 8 of the repealed Land Disputes Tribunals Act**. Again, it is not demonstrated to what extent there was non-compliance with that provision which basically provides for the right of appeal from the Tribunal’s decision within thirty (30) days, the format of the appeal which is to be registered in the register of appeals and the procedure for hearing the appeals. That ground also fails.

Ultimately therefore, save for the order of costs, this appeal has no merits and I make the following orders:

1. The appeal be and is hereby dismissed.

2. Each party to meet their own costs both here and in the Tribunals below.

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018

Judgment delivered, dated and signed in open Court at Kerugoya this 2nd day of February 2018

Mr. Njage for Mr. Ngangah for Respondent present

Ms Kimotho for Ms Wanjiru Wambugu for Appellant present

Appellant present

Respondent present.

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018