



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. APPEAL NO. 199 OF 2008**

**MUNZIKU KIIO .....1<sup>ST</sup> APPELLANT**

**MUSAU KIMEU .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**DANIEL KIMONYI NDINGU .....RESPONDENT**

**(Being an Appeal from the Judgment/Findings of Eastern Provincial Land Appeals Committee, in its Land Appeal Case No. 51 of 2008, dated 7<sup>th</sup> October, 2008)**

**JUDGMENT**

1. The Appellants have challenged the Award that was made by the then Eastern Provincial Land Appeals Committee in Land Appeal Case No. 51 of 2008 dated 7<sup>th</sup> October, 2008. In their Memorandum of Appeal, the Appellants have averred that the Appeals Committee erred in law when it heard an Appeal against the Award of the Makueni Land Disputes Tribunal that had been merged with the Judgment of the court in Kilungu Resident Magistrate's Court.
2. The Appellants have further contested the Award of the Appeals Committee on the ground that the Committee determined the Appeal out of time; that it determined a matter that was *res judicata* and that the Committee erred in law when it failed to take note of the proceedings in Criminal Case Number 39 of 2000. Finally, the Appellants averred that the Committee erred by denying the Appellants an opportunity to adduce their evidence and that the Committee erred in law in ordering the sharing out of the 1<sup>st</sup> Appellant's land between the 1<sup>st</sup> Appellant and the Respondent.
3. In her submissions, the Appellants' advocate submitted that the Appellants purchased the suit land on 24<sup>th</sup> February, 1990 from three persons; that when a dispute arose between the Appellants and the Respondent, it was referred to the District Commissioner who decided the dispute in his favour and that the Respondent was convicted in Kilungu District Magistrate's Court's Criminal Case No. 39 of 2000 for malicious damage to property.
4. Counsel submitted that when the Respondent filed a dispute in Makueni Land Disputes Tribunal Case Number 001 of 2008, the dispute was decided in favour of the Appellants and that the Respondent filed an Appeal to the Eastern Provincial Appeals Committee ninety (90) days after the decision of the Land Disputes Tribunal; that the Appeal should have been lodged within thirty (30) days and that the Land Disputes Tribunal did not have jurisdiction to deal with the dispute in the first place.
5. The Respondent's counsel on the other hand submitted that the law allowed the Respondent to file an Appeal to the Appeals Committee within thirty (30) days of the date of the decision; that the parties were aware of the Award after the same was read to them by the Magistrate on 18<sup>th</sup> June, 2008 and adopted it as a Judgment of the court and that the Appeal was filed within time.
6. Counsel submitted that the issues that the Appeals Committee handled were different from the issues in Kilungu Civil Case No. 7 of 2000 and Criminal Case No. 39 of 2000 and that the Appeal before the Committee was therefore not *res judicata*.
7. Section 8(9) of the Land Disputes Tribunals (*repealed*) provides that appeal may from the decision of the Appeals Committee to the High Court (ELC) on a point of law within sixty (60) days from the date of the decision complained of. This being a second Appeal, the court can only determine matters of law that arise in the Appeal, and not matters of fact. Consequently, the only points of law that this court can deal with are two: firstly, whether the Appeal that was filed with the Provincial Appellate Committee was statute barred and secondly, whether the dispute that was filed before the Land Dispute Tribunal was *res judicata*. The court also has the mandate of determining if indeed the Appellant herein was never heard by the Appeals Committee, and whether the Tribunal had the requisite jurisdiction to deal with the dispute.
8. The record before me shows that the Respondent herein instituted a dispute in Makueni Land Disputes Tribunal in Case No. 001 of 2008 against the Appellants.

9. After hearing the parties, and visiting the site, the Tribunal found that it is the Appellants who were entitled to the suit land. In its Award of 9<sup>th</sup> April, 2008, the Tribunal advised any party that was aggrieved with the decision to lodge an Appeal with the Provincial Land Disputes Appeals Committee. The Respondent lodged an Appeal against the decision of the Tribunal in the then Eastern Provincial Land Appeals Committee

10. From the documents in the Record of Appeal, it is not clear the date that the Respondent herein lodged the Appeal. The copy of “Form 1” is so faint to the extent that this court was unable to determine the date that it was signed or received by the Appeals Committee. However, from the receipt that was issued by the Provincial Commissioner, Eastern Province, it would appear that the Respondent herein lodged the Appeal on 11<sup>th</sup> July, 2008, which is the date that he paid for the filing of the Appeal. This position has been confirmed by the advocates for the parties in their respective submissions.

11. Both the Appellants’ and the Respondent’s advocate are in agreement that the Appeal was supposed to be filed in the Appeals Committee within thirty (30) days of the date of the decision appealed from. According to the Respondent’s counsel, the thirty (30) days started to run from the day that the Magistrate adopted the Award of the Tribunal, which was on 18<sup>th</sup> June, 2008. On the other hand, the Appellants’ advocate submitted that the thirty (30) days started to run from the date the Tribunal made its Award. Section 8(1) of the Land Disputes Tribunal provides as follows:

**“Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty (30) 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.”**

12. The above provision clearly shows that the decision being appealed against is that of the Tribunal and not the Judgment of the Magistrate. The time within which time starts running is from the date the Award was made, and not otherwise. Consequently, it is erroneous for the Respondent to argue that time started running as from 18<sup>th</sup> June, 2008 when the Magistrate adopted the Award and not 9<sup>th</sup> April, 2008 when the Award was made by the Tribunal. Consequently, by the time the Respondent lodged the Appeal with the Appeals Committee on 11<sup>th</sup> July, 2008, thirty (30) days had already lapsed. The Appeal was therefore filed out of time and cannot stand.

13. Although the Appellants have argued that the matter which was before the Tribunal and the Appeals Committee was *res judicata*, I have come to the conclusion that it was not. I say so because in Kilungu Civil Suit No. 7 of 2000, the Respondent herein sued the 1<sup>st</sup> Appellant for general damages for the oath that was administered cursing him. The said matter had nothing to do with the issue of ownership of the suit land. Kilungu Criminal Case Number 39 of 2000 on the other hand was a criminal case and not a civil dispute for recovery of land.

14. The Appellants’ Appeal therefore succeeds on one ground: that the Appeal that was filed in the Appeals Committee by the Respondent herein was filed out of time.

15. For those reasons, I allow the Appellants’ Appeal in the following terms:

**a. The Eastern Provincial Land Appeals Committee’s Judgment in Land Appeal Case No. 51 of 2008 is hereby set aside.**

**b. The costs of this Appeal to be paid by the Respondent.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

**JUDGE**