



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 125 OF 2014

(Formerly Nyeri HCCA No. 109 of 2011)

DIFATHA KIAMA CIUGI.....APPELLANT/DECEASED

-VERSUS-

WINFRED KAARA NGIGE.....1ST RESPONDENT

CHRISTOPHER KIAMA NGIGE.....2ND RESPONDENT

AND

CATHERINE WANJIKU THAMU.....1ST APPLICANT

EDITH NYAWIRA KARANJA.....2ND APPLICANT

JUDGMENT

1. This appeal relates to an award of the Provincial Appeals Committee (Central) made on **13th July, 2011** in claim No. Kirinyaga Central 5 of 2010-Difatha Kiama Ciugi vs. Teresiah Wangari Ngigi.

The award appealed from was that: -

“.....:-

(a) Difatha Kiama Ciugi and his daughters share 2.3 acres namely:

- 1. Catherine Wanjiku Thamu**
- 2. Florence Wangithi Kiama**
- 3. Esther Wangui Kiama**
- 4. Edith Nyawira Kiama**

(b) Teresia Wangari Ngigi and her 4 sons to get a share of 2.3 acres....”

2. Aggrieved by the aforementioned award/decision, the appellant (Difatha Kiama Ciugi) appealed to this court on the following grounds: -

1. The Tribunal had no jurisdiction to hear and determine the dispute preferred before it;
2. The Tribunal made an illegal decision;
3. That the Tribunal erred by ordering distribution of her land to one child in disregard of **Sections 27 and 28** of Registered Land Act

4. That the Tribunal failed to appreciate that she was the absolute registered proprietor of the suit property.

3. The appeal was disposed of by way of written submissions.

Appellant’s submissions

4. On behalf of the appellant, a brief background of the case is given and because the Tribunal *inter alia* ordered the sub-division of the suit property and transfer of a portion therefrom to the respondent, it is submitted that the Tribunal acted outside its jurisdiction.

Respondent’s submissions

5. On behalf of the respondent, it is submitted that the Tribunal had power to hear and determine a claim to work and occupy land. It is pointed out that the respondent was in occupation of the suit property and explained that she filed her claim before the Tribunal because the appellant was threatening to evict her from the suit property where she had established her home.

6. Based on the contention that the respondent and her children had a right to remain in occupation of the suit property, it is submitted that the Tribunal did not err by ordering sub-division of the suit property into two equal portions and transfer of a portion thereof to the respondent and her sons.

Analysis and determination

7. It is not in dispute that the subject matter before the District Tribunal and the Appeals Tribunal was registered land.

8. From the proceedings of the District Tribunal, it is clear that the dispute preferred to the Tribunal touched on the respondent’s right to occupy and work the suit property which occupation and right to work the land was threatened by the appellant-(The appellant had issued the respondent with a notice to vacate the suit property).

9. Apart from urging her claim based on the right to occupy and work the suit land, the respondent urged the Tribunal to order that the land be subdivided equally between the objector and herself.

10. The objector acknowledged that the respondent and her family were living in a portion of the suit property which she had given them to construct their house and farm but explained that she was not willing to give the respondent and her family land because they had been abusing her.

11. Based on the evidence presented before it, the District Tribunal *inter alia* observed:-

(i) ...the parcel Mutira/Kaguyu/136 measuring 4.6 acres is a clan land which should be shared by entire family of Difatha Kiama Ciugi;

(ii) The objector and his daughters are all in agreement that the claimant (read the respondent) is a real wife of late son John Ngigi and her 3 sons...;

(iii) The family has constructed a permanent house in the said parcel where they have been residing over years with the late Ngigi and no idea of dispute was lodged anywhere;

(iv) The objector had shown the family a portion of land with 2100 stems of tea and the sons a place to construct their houses.

(v) After end of late Ngigi’s burial the claimant’s family, the objector and clan elders met and made agreement which resolved to iron out all the old differences and that a portion of land of tea bushes be given to claimant family.

(vi) This is a claim to occupy/work land as spelt in Kenya Gazette Supplement Acts 1991 dated 18th January, 1991 No. 3(b).

12. On the basis on the above findings, the lower Tribunal made the following award: -

“

1. The parcel of land Mutira/Kaguyu/136 registered under Difatha Kiama Ciugi ID. 2905862 measuring 4.6 acres be subdivided into two equal portions as follows:-....

2. The claimant Teresia Wangari Ngigi ID No.1521301 to retain the parcel of land with her permanent house;

3. The court executive officer to sign the relevant documents if the objector refuses;

4. The land registrar dispenses with old title deed if the objector refuses to provide;

5. The OCPD provide security if needed;

6. Any restriction/caution be revoked to facilitate for the sub-division...”

13. It is the above determination of the District Tribunal which the Appeals Committee upheld through its award cited herein above.

14. The sole question for determination is whether the appeals committee erred by upholding the decision of the Tribunal to the effect that the suit property be subdivided into two equal portions and once sub-division is done, the subdivided portions be transferred to the respondent and the appellant.

15. In answering the above question, I adopt the decision in the cases of **Republic v. Chairman, Lurambi Land Dispute Tribunal & 2 others (2006) eKLR** and **Mateo Githua Ngurukie vs. Hon. Attorney General and 5 Others; Nyeri High Court Civil Suit No. 206 of 1999.**

16. In the case of **Republic v. Chairman, Lurambi Land Dispute Tribunal & 2 others** supra, it was held: -

“The powers vested in the tribunal under section 3(1) of Act 18 of 1990 do not include power to determine issues of or affecting title to land. The tribunal clearly acted beyond the purview of its jurisdiction and its decision was clearly ultra vires powers under section 3(1) of the Land Disputes Tribunal Act No.18 of 1990.

17. In the case of **Mateo Githua Ngurukie vs. Hon. Attorney General and 5 Others** supra it was stated:

“Over and again the Court of Appeal and High Court have held that the Land Dispute Tribunal lacks jurisdiction over registered land especially where the matter at hand touches on title of land...”.

18. Whilst under **Section 2** as read with **Section 3** of the Land Disputes Tribunals Act No. 18 of 1990 (repealed) (hereinafter referred to as the Act), the Tribunal had jurisdiction to entertain the respondent’s claim based on her right to occupy and work the suit property), the Tribunal exceeded its said mandate by ordering that the suit property be sub-divided into two equal portions and ordering that the subdivisions be transferred to the respondent and the appellant respectively. This would not have been the case if the Tribunal had merely determined that the respondent had a right to occupy and work the portion of land she was occupying and working on. I say so because by dint of the provisions of **Section 2** as read with **Section 3** of the Act, the Tribunal had jurisdiction to entertain claims of civil nature relating to a claim to occupy/work land notwithstanding the fact that the land was registered under the Registered Land Act, Cap 300 Laws of Kenya (now repealed).

19. Having determined that the Tribunal erred in ordering the sub-division and transfer of a portion of the suit property to the respondent when it had no jurisdiction to do so, I need not say anything more to demonstrate that the appellant has made up a case for setting aside the award of the Tribunal.

20. The upshot of the foregoing is that the appeal herein succeeds to the extent that the order for sub-division of the suit property into two equal parts and for transfer of the sub-divisions to the respondent and the appellant or their beneficiaries as listed in the award is set aside.

The consequential orders flowing from that determination namely, the order requiring the executive officer to sign relevant documents if the objector refuses; the order dispensing the production of original title in effecting transfer; order for provision of security in effecting the transfer and the order for removal of any caution/restriction to facilitate sub-division are also set aside.

21. This being a family dispute, each party shall bear their costs of the appeal and the proceedings before the District Tribunal.

22. Because this decision is not determinative of the parties’ rights to the suit property, the parties are advised to take their dispute to a court with jurisdiction to determine their substantive rights to the suit property or have their rights to the suit property determined in any other way acceptable to them.

23. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 24th day of September, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the appellant

Wilfred Kaara Ngige – 1st respondent

N/A for 2nd respondent

Court assistant - Esther