



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC APPEAL NO. 42 OF 2014**

**PETERSON MACHARIA MUTHAMI.....APPELLANT**

**-VERSUS-**

**HANNAH NYAMBURA GITHENYA.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The respondent herein, **Hanna Nyambura Githenya**, instituted a claim before Kieni East Land Dispute Tribunal against the appellant, Peterson Macharia Muthami seeking an order for removal of the appellant from the parcel of land known as **Gakawa/Kahurura Block IV/239** (hereinafter referred to as “the suit property”).
2. The respondent claimed that she is the owner of the suit property having bought it from Mbari ya Mute Co. Ltd.
3. The appellant, on the other hand, contended that he is the owner of the suit property having bought it from one, Gachube.
4. Upon considering the respective cases of the parties the Tribunal made the following findings: -

**“a.) The objector (the objector is the appellant in this appeal) claims that he lost all the documents which included the sale agreement, receipts for share contributions and the ballot papers were not convincing. ... the ballot paper which had the number of the plot which was reflected in the title deed he did not tell us whether he lost after receiving the title or before.**

**b). The statement by the objector that he does not remember the year he bought the land from Mr. Waweru Kamau is not true as this is one of the most important dates one ought not to forget.**

**c). The objector started to develop the land in 2003 while he got the title deed on 9<sup>th</sup> November 2005, this leaves a lot to be desired as the buyer of the land first obtains title deed then proceeds to develop the land.**

**d). The witness who came to testify for the objector Mr. Muhuthia and who was the company’s assistant secretary did agree that the ballot paper held by the claimant (the respondent in this appeal) was the same as those which were being given by his company to**

those who qualified for the land.

e). The objector gave contradicting statements that he bought the land from Mr. Waweru Kamau and he bought the land later from Mr. Gachube Gachara. This was his statement as he told the tribunal that he told the chief of Gakawa. He was not willing to call Mr. Gachube as his witness.

### **Decision/ determination**

a) The claimant, Annah Nyambura Githenya, has presented herself with all documents from the company and has convinced the panel that **she is the legitimate owner of the land parcel Number Gakawa/ Kahurura/ Block IV/239.**

b) The objector, Peterson Macharia Muthama, did not convince the panel how the land belongs to him and even how he obtained it especially from the time he bought it from Mr. Waweru Kamau on a date not known to him, or was it from Gachube Gachara to the time he started to develop the land in the year 2003 and the time **he obtained the title deed in the year 2005.** A buyer of the land from a member first obtains the title deed then proceeds to develop the land. This was not the case.

c) The land office Nyeri is to be held responsible for issuing Title deeds of the same plot to two people.

d) **The Honourable court should order the cancellation of the title deed held by Mr. Peterson Macharia Muthanu and order the lands office Nyeri to open a land register for the claimant, Annah Nyambura Githenya. As she could not have obtained her title from nowhere there must have been some records that were somehow removed from the file/register to illegitimate her ownership as she has proved beyond reasonable doubt that she is the legal owner of the land.**” (Emphasis supplied).

5. The award was read to the parties and adopted as a judgment of the court on **16th July, 2008.**

6. Aggrieved by the above decision of the Tribunal, the appellant appealed to the defunct Land Dispute Appeals Tribunal on the grounds that:

1. The elders (read the Tribunal) erred in law and fact by entertaining a matter based on title to land.

2. That the elders erred in law and fact by failing to consider his evidence

3. The award was bad in law.

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

### **Submissions**

#### **Appellant’s submissions**

8. On behalf of the appellant, it is submitted that the Tribunal lacked jurisdiction to order cancellation of a title deed. In this regard reference is made to **Section 159** of the Registered Land Act, Cap 300 Laws of Kenya (repealed) and submitted that under that section of the law, the power to order rectification of title is vested in the High Court of Kenya.

9. Further reference is made to the case of **Joseph Malakwen Lelei & Another V. Rift Valley Land Dispute Appeals Committee & 2 others** (2014) eKLR and submitted that the award and all proceedings flowing there from are null and void. In that case, it was held:

**“Section 3 of the Land Dispute Tribunal Act (repealed) gives jurisdiction to Land Dispute Tribunal to handle claims in the following matters only:-... all cases of civil nature involving a dispute 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.....evidently the above provisions does not include jurisdiction to deal with issues of determination of title or ownership of registered land.....”**

10. Further reference is made to the decision of **Okwengu J.**, (as she then was) in the case of **Benson Maina Thiongo V. Joseph Waweru Mwangi (2006)eKLR** where it was, *inter alia*, held:-

**“Orders made by a tribunal without jurisdiction are null and void.....”**

### **Respondent’s submissions**

11. On behalf of the respondent, it is reiterated that the suit property belongs to the respondent and contended that the respondent was justified in filing the claim before the Tribunal to evict the appellant who had trespassed thereon.

12. It is further submitted that both parties submitted to the jurisdiction of the court.

13. The Appeal is said to be incompetent for having been filed out of the time provided under the Land Disputes Tribunals Act without leave of the court.

14. According to the respondent, the appellant ought to have appealed within 30 days from the date of the award and not from the date of adoption of the award.

### **Analysis and determination**

15. From the evidence adduced before the Tribunal, it is clear that the dispute preferred before the Tribunal related to ownership of registered land. The Respondent claimed that she had the right to eject the appellant from the suit property. The respondent’s claim was premised on her contention that she was the rightful owner of the suit property.

16. The appellant, on the other hand, contended that being the registered proprietor of the suit property, he was entitled to remain thereon.

17. Although the Tribunal on the basis of the evidence produced before it found in favour of the respondent, the appeal herein turns on the following issues:

**1. Whether the appeal was filed out of time hence incompetent?**

**2. Whether the Tribunal had power to hear and determine the dispute before it given the fact that it touched on title to land?**

18. With regard to the 1<sup>st</sup> issue, although **Section 8(1)** required that the appeal be lodged within 30 days of the decision of the Tribunal, I take judicial notice of a practice that existed concerning appeals, where normally, like in, the instant case, the elders notified the parties of their right of appeal after judgment was read. The court also notified the parties of their right of appeal which was within thirty (30) days from the date the judgment was read.

19. According to the decision of the Court of Appeal in the case of **Chege Macharia v. Francis Kimani Kirimira (2015) e KLR**, it appears that the right of appeal accrues after the judgment is read and not

after the date of the award. See the said judgment where it was held:

**“...We are of the considered view that where, as in this case an award had been properly forwarded by the Chairman of the Tribunal but was not yet read when the Act was repealed, the proper course would have been for the magistrate to adopt the award and read it as a judgment of the court to be followed by the usual process of decree and execution and appeal where parties so desire. Such appeals would be to the High Court by dint of clause 13 of the practice direction, the Provincial Appeals Committee also having met their quietus with the repeal of the Act.”**

20. Also see the case of **Benson Maina Thiongo V. Joseph Waweru Mwangi** (*supra*) where it was held that the timelines for lodging an appeal provided under **Sections 7(1) and (2)** of the Land Disputes Act do not take away the rights of any party who is dissatisfied with the award of the Tribunal to appeal to the appeals committee as provided under **Section 8 (1)** of the Land Dispute Tribunals Act nor does it take away the further right of appeal to the High Court provided under **Section 8(9)** of the Land Disputes Tribunals Act.

21. In view of the foregoing, I overrule the objection of the appeal on the alleged time bar.

22. On whether the Tribunal had jurisdiction to hear and determine the dispute preferred before it, having found that the decision turned on ownership of the suit property, which is registered land, I adopt the decision in the case of **Joseph Malakwen Lelei & Another V. Rift Valley Land Dispute Appeals Committee & 2 others** (*supra*) to the effect that **Section 3** of the Land Dispute Tribunals Act repealed does not confer on the Tribunal jurisdiction to deal with issues of determination of title to or ownership of registered land.

23. Since the dispute preferred before the Tribunal could not be determined without considering and determining the rights of the parties to the suit property, which was registered land, I find and hold that the Tribunal lacked jurisdiction to hear and determine the dispute preferred before it.

24. The upshot of the foregoing is that the appeal herein has merit and is allowed as prayed.

**Dated, signed and delivered in Nyeri on this 23rd day of January, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Waweru Macharia for the appellant

Mr. Wachira for the respondent

Court clerk - Esther