



REPUBLIC OF KENYA



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**Njau & another v Mburu (Environment and Land Appeal 47B of 2023)
[2024] KEELC 1477 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1477 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 47B OF 2023**

BM EBOSO, J

FEBRUARY 28, 2024

BETWEEN

SOLOMON MBURU NJAU 1ST APPELLANT

ELIZABETH WAMBUI 2ND APPELLANT

AND

EUNICE WANJIRU MBURU RESPONDENT

*(Being an Appeal against the Decision/Award of the Githunguri Land
Dispute Tribunal in Case No. 16/20/9/2010 delivered on 22/6/2010)*

JUDGMENT

1. This appeal was transferred from the defunct Nyeri Provincial Land Disputes Appeals Committee pursuant to the ruling rendered by this court [Gacheru JJ] on 15/6/2020 in Thika ELC Misc Application No 58 of 2019. The Provincial Land Disputes Appeals Committees were constituted under Section 8 of the repealed Land Disputes Tribunals Act, 1990 to hear land dispute appeals from the Land Disputes Tribunals established for every land registration district under Section 4(1) of the repealed Act. The *Environment and Land Court Act*, 2011 repealed the said Act, thereby abolishing both the Land Disputes Tribunals and the Provincial Land Disputes Appeals Committees that existed under the repealed Act.
2. At the time of repeal of the Act, there existed a pending appeal by Solomon Mburu Njau and Elizabeth Wambui Mburu at the Nyeri Provincial Land Disputes Appeals Committee, challenging the award of the Githunguri Land Disputes Tribunal rendered on 22/6/2010 in Githunguri Land Disputes Tribunal Case No 16/20/9/2019. The appeal exposes the challenges and intrigues that polygamists are expected to surmount in managing their families. Among the issues to be determined in this appeal is the question as to whether the Tribunal exceeded its jurisdiction in the impugned award. I will outline a brief background to the appeal before I dispose the issues that fall for determination in the appeal.



Background

3. From the record of the Tribunal, it does emerge that Elizabeth Wambui Mburu [the 2nd appellant] is the first wife of Solomon Mburu Njau [the 1st appellant]. Eunice Wanjiru Mburu [the respondent] is the second wife of Solomon Mburu Njau. He married the two women in 1966 and 1971 respectively. For convenience, I will identify parties to this appeal by their respective first names.
4. The first marriage of Solomon was blessed with seven [7] children. In 2010, the first born in the first marriage was said to be 43 years old while the last born was said to be 13 years old. The second marriage of Solomon was blessed with eight [8] children. In 2010, the first born in the second marriage was said to be 39 years old while the last born was said to be 25 years old.
5. Land parcel number Githunguri/Githunguri/2214, measuring 1.86 hectares and land parcel number Sipili/Ndonyoloip Block 2/4408 [Mutukanio] measuring 1.220 hectares, were registered in the name of Solomon. Land parcel number Githunguri/Githunguri/2214 is ancestral land that Solomon inherited from his father. The two families harmoniously lived on land parcel number Githunguri/Githunguri/2214 until 1995 when the marriage between Solomon and Eunice started experiencing problems. Eunice alleges that Solomon chased her out of the matrimonial home in February 1997. Solomon subsequently transferred land parcel number Githunguri/Githunguri/2214 to his first wife, Elizabeth.
6. In 2010, Eunice lodged a claim at the Githunguri Land Disputes Tribunal against Solomon [her husband] and Elizabeth [her co-wife]. It does emerge from the Tribunal's summary of her case that she contended that Githunguri/Githunguri/2214 was family land where she had lived with her 8 children for 27 years. She added that they had been cultivating the land and had planted tea on it. It was her case that her matrimonial home was on the land. She sought her "share" of the land, contending that the developments on the land had been jointly undertaken by her, their common husband and her co-wife. She sought to be given 1½ acres out of the land. She did not, however, make any claim over Sipili/Ndonyoloip Block/4408 [Mutukanio].
7. From the award of the Tribunal, it does emerge that in his evidence, Solomon acknowledged that Elizabeth and Eunice were his two wives whom he married in 1966 and 1971 respectively. He also acknowledged that the seven [7] children of Elizabeth and the eight [8] children of Eunice were sired by him. He stated that he had transferred land parcel number Githunguri/Githunguri/2214 to his first wife, adding that he intended to settle his second wife by giving her 2 acres out of Sipili/Ndonyoloip/Block 2/4408 (Mutukanio). It was his case that he wanted his first wife to give him back land parcel number Githunguri/Githunguri/2214.
8. The Tribunal considered the claim and made an award in the following verbatim terms:

“ After considering the above we rule as follows:

 1. That the Land Registrar to cancel title deed Githunguri/Githunguri/2214 and Sipili/Ndonyoloip Block 2/4408 [Mutukanio] Ng'arua.
 2. That Githunguri/Githunguri/2214 be registered in the names of:
 - a) Solomon Mburu Njau
 - b) Elizabeth Wambui Mburu
 - c) Eunice Wanjiru Mburu



As trustees of the children

3. That Sipili/Ndonyoloip Block 2/4408 [Mutukanio] be registered in the names of:
 - a) Solomon Mburu Njau
 - b) Elizabeth Wambui Mburu
 - c) Eunice Wanjiru Mburu

As trustees of the children

4. Both Elizabeth Wambui and Eunice Wanjiru to use both lands in equally [sic].

Appeal

9. Aggrieved by the award of the Tribunal, the two appellants lodged an appeal in the Provincial Land Disputes Appeals Committee at Nyeri, advancing the following verbatim grounds of appeal:
 1. That the Githunguri Land Disputes Tribunal acted in excess of their jurisdiction disregarding the limits of their powers. [sic]
 2. That the elder's award purports to authorize canceling of title currently under the names of the 2nd appellant whilst knowing that they do not have such powers
 3. That during the proceedings and hearing at the said Tribunal the elders were completely and totally biased against the objectors and even what is recorded in the proceedings is not the same as what transpired during hearing
 4. That due to foregoing we strongly object to elders award as same is an abuse of their powers
10. The appellants urged the Provincial Land Disputes Appeals Committee to allow the appeal and set aside the award of the Tribunal. As observed in the introductory part of this Judgment, the appeal was transferred to this Court upon repeal of the Land Disputes Tribunals Act. The appeal was subsequently canvassed before this court through written submissions.

Appellants' Submissions

11. The appellants filed joint written submissions dated 18/10/2023 through M/s Wanjohi & Wawuda Advocates. Counsel for the appellants submitted that the Githunguri Land Disputes Tribunal acted in excess of its jurisdiction and powers under Section 3 (1) of the Land Disputes Tribunals Act [now repealed] in ordering cancellation of the titles held by the appellants and ordering registration of the same in the names of both the appellants and the respondent. Counsel relied on the decisions in the cases of Michael Thiongo Gatete v Attorney General & 4 Others [2017] eKLR and Joseph Kirugu Njuguna v Land District Tribunal Maragua & 2 Others [2016] eKLR. Counsel added that the Tribunal's award was illegal and a nullity. Counsel for the appellants urged the Court to set aside the award of the Tribunal. Counsel further urged the Court to award the appellants costs of the appeal.



Respondent's Submissions

12. The respondent opposed the appeal through written submissions dated 11/9/2023, filed by M/s Muthoni G.M & Company Advocates, and further submissions dated 9/11/2023 filed by M/s Ngari & Kaburu Advocates. Counsel for the respondent identified the following as the two issues that fell for determination in the appeal: (i) Whether the Githunguri Land Disputes Tribunal acted beyond its jurisdiction, disregarding its powers; and (ii) Whether the respondent is entitled to a share in land parcel number Githunguri/Githunguri/2214.
13. On whether the Tribunal acted beyond its jurisdiction, counsel for the respondent submitted that the Tribunal acted within its jurisdiction. Counsel submitted that the respondent filed a claim at the Tribunal in 2010 after being denied access to farm on the land despite being a wife to the 1st appellant and despite having built her matrimonial home on the land. Counsel added that the claim filed by the respondent was a dispute of a civil nature relating to occupation and cultivation of the suit property which could be adjudicated upon by the Tribunal under Section 3 (1) (b) and (c) of the Land Disputes Tribunals Act, [now repealed]
14. On whether the respondent is entitled to a share of land parcel number Githunguri/Githunguri/2214, counsel for the respondent submitted that the appeal by the appellants is intended to dispossess the respondent of her rightful share in the land. Counsel added that the 1st appellant's action of transferring the land to the 2nd appellant to the exclusion of the respondent despite both of them being his wives was uncalled for. Counsel added that the respondent had lived on the land together with her children for 27 years.
15. Counsel for the respondent contended that the Tribunal ordered that the land be shared equally in recognition of the polygamous marriage among all the parties, a fact admitted by the 1st appellant during the hearing of the dispute. Counsel argued that the land was matrimonial property where all the parties to this appeal lived and raised their children. Counsel further argued that all the parties were entitled to equal rights over the land. Counsel relied on Article 43 (3) of *the Constitution* of Kenya and Section 6 of the Matrimonial Properties Act in support of his submission.
16. Counsel added that the 1st appellant fraudulently transferred the suit property to the 2nd appellant without consent of the respondent. Counsel added that the respondent and the 1st appellant remained married despite the respondent being chased away from her matrimonial home by the 1st appellant. Counsel argued that the 1st appellant confirmed in his evidence before the Tribunal that he married the respondent in 1972 and that he had not divorced her. Counsel argued that in the circumstances, the court has the jurisdiction to pronounce itself on the beneficial interest of persons who are in a marriage during its subsistence and not necessarily at the time of divorce.
17. Counsel for the respondent submitted that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage, and at the dissolution of the marriage pursuant to Article 45 (3) of *the Constitution* of Kenya, 2010. Counsel relied on the decision in the case of PNN v ZWN [2017] eKLR to support his submissions. Counsel urged the court to dismiss the appeal.

Analysis and Determination

18. I have considered the record of appeal, the grounds of appeal and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in the appeal. The three key issues that fall for determination in the appeal are: (i) Whether the Tribunal acted in excess of its jurisdiction and powers under the repealed Land Disputes Tribunals Act 1990; (ii) Whether the respondent established a claim of the right to occupy or work



on the two parcels of land under Section 3(1) (b) of the Land Disputes Tribunals Act; and (iii) What order should be made in relation to costs of this appeal. I will dispose the three issues sequentially in the above order.

19. Did the Tribunal act in excess of its jurisdiction and powers under the Land Disputes Tribunals Act? The appellants contend that Section 3(1) of the Act did not confer upon the Tribunal the jurisdiction to deal with “title in respect of registered land.” They add that issues “relating to titles of registered land were a preserve of the High Court as provided for under Section 159 of the Registered [Land Act](#) [repealed].” The appellants further contend that the Tribunal erred when it ordered cancellation of the appellants titles and ordered registration of the titles in the names of the appellants and the respondent.

20. The jurisdiction and powers of the Land Disputes Tribunals were set out in Section 3(1) 3(7) and 3(8) of the repealed Act which provided as follows:

Section 3(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) The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party’s witness or witnesses.
- (8) The Tribunal shall give reasons for its decision, which shall contain a summary of the issues and the determination thereof, and which shall be dated and signed by each member of the Tribunal.

21. It is clear from a reading of the above framework that the repealed Act gave the Tribunal jurisdiction to adjudicate and determine disputes relating to: (i) division of, or determination of boundaries to land, including land held in common; (ii) a claim to occupy or work on land; and (iii) a claim relating to trespass to land. The Act did not vest in the Tribunal jurisdiction to cancel registered titles relating to land. Jurisdiction relating to cancellation of titles relating to land was vested in the Courts under the relevant land registration statutes. Indeed, the superior courts have emphasized this point in a line of decisions, among them *Republic V Chairman, Lurambi Land Disputes Tribunal & 2 others* [2006] eKLR.

22. I have examined the impugned award. The first limb of the award was an order cancelling the two titles that were at that point registered in the names of the appellants. The second limb of the award was an order directing registration of land parcel number Githunguri/Githunguri/2214 in the names of the three parties to this appeal as trustees of unnamed children. The third limb was an order directing registration of land parcel number Sipili/Ndonyoloip Block 2/4408 [Mutukanio] in the names of the three parties to this appeal as trustees of unnamed children. The fourth limb was an order directing that both Elizabeth and Eunice were to use the land equally.

23. It does therefore emerge from the award of the Tribunal that the first, second and third limbs of the award were made in excess of the jurisdiction vested in the Tribunal under Section 3(1) of the Act. The only limb of the award which fell within the jurisdiction of the Tribunal was the award relating to the



right to occupy and work on the land [use the land] in tandem with the recognized customary law of the community.

24. Even then, the respondent did not present a claim relating to land parcel number Sipili/Ndonyoloip Block 2/4408 [Mutukanio]. She did not present evidence relating to her right to occupy or work on this particular parcel. Her claim only related to parcel number Githunguri/Githunguri/2214. For this reason, the Tribunal acted in excess of its jurisdiction when it made an award relating to the said parcel yet the respondent had not made a claim relating to Sipili/Ndonyoloip Block 2/440 [Mutukanio]. The Tribunal ought to have restricted itself to the parcel in respect of which the respondent had made a claim. To the above extent, the court is satisfied that the Tribunal acted in excess of its jurisdiction.
25. Did the respondent establish a claim to occupy or work on the two parcels of land? I have made a finding that the respondent neither made a claim for nor presented evidence relating to her right to occupy or work on land parcel number Sipili/Ndonyoloip/4408 [Mutukanio].
26. With regard to Githunguri/Githunguri/2214, it does emerge from the evidence that was presented before the Tribunal by Pius Karegwa Migichi – a witness called by the appellants, that this parcel is ancestral land that was given to Solomon by his father. It also emerges from the evidence of the two appellants that the two families that Solomon brought forth [Elizabeth together with her 7 children and Eunice together with her 8 children] lived on the land and had their respective homes on the land. The two wives of Solomon had their matrimonial homes on this particular parcel. By dint of the above evidence relating to common occupation and common use of the parcel, it is clear that Eunice and her eight children have a customary right and are entitled to occupy and work on what they occupied and worked on prior to the disagreement between Solomon and Eunice. The fourth limb of the award of the Tribunal will be upheld only to this extent. I would add that issues relating to the registration of Elizabeth as the sole proprietor of the ancestral land are to be ventilated on the platform of a proper suit in a proper court. I will confine myself to the issue that fell for determination by the Tribunal under Section 3(1) of the repealed Act which relates to common occupation and working on land parcel number Githunguri/Githunguri/2214.
27. On costs, the errors leading to this appeal were made by the Tribunal. In the circumstances, parties will bear their respective costs of the Appeal.

Disposal Orders

28. In the end, this appeal partially succeeds and is disposed in the following terms:
 - a. The first, second and third limbs of the award dated 22/6/2010 rendered in Githunguri Land Disputes Tribunal Case No 16/20/9/2010, numbered 1; (2) (a) (b) (c); and 3(a) (b), (c) are set aside on the ground that they were made in excess of the jurisdiction of the Tribunal.
 - b. The fourth limb numbered “4” is varied to read as follows:

“Eunice Wanjiru Mburu and her eight children have a customary right to occupy and work on the portion of Githunguri/Githunguri/2214 which she occupied and worked on prior to her eviction from the land.”
 - c. Parties shall bear their respective costs of this appeal

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF FEBRUARY 2024

B M EBOSO

JUDGE



In the presence of: -

Mr. Muriithi for the Plaintiff

Ms Nini for the Defendant

Court Assistant: Hinga

