



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
CHUKA ELC CIVIL APPEAL CASE NO 21 OF 2017
FORMERLY MERU ELC CASE NO. 117 OF 2010
GILBERT NDIGWA MWANGIE.....APPELLANT
VERSUS
SAMUEL NJAGI M'NYAMBA.....RESPONDENT
JUDGMENT

(Being an Appeal from the Decision of the Provincial Appeals Committee in Appeal No. 102 of 2009).

1. The Memorandum of Appeal in this appeal is dated 5th October, 2010 and has the following grounds:

1. The Provincial Appeals Committee erred in law by holding that the Land Dispute Tribunal Case No. 49 of 2009 was a claim based on ownership of land when in fact the claim was on boundary dispute.
2. The Provincial Appeals Committee erred in law by failing to hold that the Land Dispute in Chuka Case No. 49 of 2009 had jurisdiction to hear and determine the case since it was a boundary dispute.
3. The Provincial Appeals Committee erred in law by failing to uphold the District Land Dispute Tribunal judgment which was lawful and legal.
4. That the Provincial Appeals Committee erred in law by conducting a hearing during the appeal instead of analyzing the evidence on record and in the particular the proceedings and award of the District Land Dispute Tribunal together with the grounds raised in the memorandum of appeal.
5. That the Provincial Appeals Committee erred in law by delivering a judgment/ruling in favour of the respondent when there was no evidence to support the respondent's claim.
6. The Provincial Appeals Committee erred in law by failing to make a finding and holding in favour of the appellant when evidence on record was overwhelmingly against the respondent.

Reasons wherefore the appellant proposes to the honourable court that,

- a) The Provincial Appeals Committee award/judgment/ruling be set aside and the same be substituted with the award of the District Land Dispute Tribunal.

b) Costs of this appeal be borne by the respondent.

2. Predicated upon the foregoing grounds, the Appellant seeks orders that:

a) The Provincial Appeals Committee award/judgment/ruling be set aside and the same be substituted with the award of the District Land Dispute Tribunal.

b) Costs of this appeal be borne by the respondent.

3. This appeal was canvassed by way of written submissions.

4. The appellant's submissions, by and large, mirror the grounds contained in the memorandum of appeal. On ground 1 in the appeal he asserts that the claim concerned a boundary dispute and not ownership of land. He also says that the appeals committee in appeal No. 102 of 2009 conducted itself as a trial court rather than as an appellate court by hearing oral evidence. He laconically asserts that as this matter was a boundary dispute the Appeals Committee erred in finding that the Land Disputes Tribunal had no jurisdiction.

5. On ground 2, he asserts that by finding that the Land Disputes Tribunal had no jurisdiction, the Appeals Committee erred as the matter was a boundaries dispute within the purview of section 3 of the defunct Land Disputes Tribunals Act. He goes on to say that ground 3 has merit as the District Tribunal had jurisdiction to handle boundary disputes.

6. Regarding ground 4, he asserts that it was unlawful for the Appeals Committee to conduct a hearing instead of analyzing the available evidence. On ground 5 the appellant says that the available evidence did not support the judgment delivered by the Appeals Committee. Ground 6 is, by and large, an echo of ground 5 and says that the Appeals Committee decision should have been in favour of the Appellant as there was overwhelming evidence against the defendant.

7. The appellant asserts that not to find in his favour would subject him to substantial injustice. He says that he bought the suit land from the brother of the respondent and that he had developed the land. After requesting the respondent to leave part of his land, the respondent refused to vacate his land. He filed LDT Case No. 6 of 2006 where he raised the issue of trespass and a boundary dispute. He says that the LDT rightly found in his favour. He says that the Appeals Committee acted illegally by employing an unorthodox procedure which entailed re-hearing of the case. He says that the decision of the Appeals Committee had awkward ramifications as he cannot access his land even though he is the registered owner of land parcel no. KARINGANI/NDAGANI/7509.

8. The appellant says that section 40 of the Constitution entitles him to protection of his right to property. He restates that he bought the suit property and had acquired title.

9. The respondent in response to grounds 1, 2, 3, 5 and 6 of the appeal says that Land Disputes Tribunal Case No. 6 of 2009 concerned ownership of land and not a boundary dispute. He says that the notice to vacate the land dated 19.2.2009 directed at the respondent by the appellant shows that the issue in dispute was land ownership. He avers that the respondent relied on this letter on 6.4.2009 during the hearing of LDT. Case No. 6.

10. He says that the appellant bought the suit land when there was a pending suit involving the respondent and his brother. He says that parcel No. Karingani/7509 was hived from land parcel No. Karingani/ndagani/6304 which was one of the parcels of land being contested in Chuka PM's Court, Suit No. 37 of 2005. He submits that the appellant had abused the court process as he should have waited for the outcome of Chuka PM's Court No. 37 of 2005.

11. The claim by the respondent that during the hearing of this matter by the appeals committee, both parties had conceded that the tribunal in LDT Case No. 6 lacked jurisdiction, is not substantiated. I will say no more about this claim.

12. Concerning ground 4 of the Appeal, the respondent says that in conducting a hearing, rather than merely analyzing the evidence on record, the Appeals Committee was complying with mandatory provisions of, to wit, sections 8(6), 8(7) and the proviso to section 8(7) of the Lands Disputes Tribunals Act.

13. The respondent says that this appeal was filed 7 months from 23.2.2010 when the impugned decision was made instead of within the 60 days stipulated by the law. He also states that it is Chuka LDT Case No. 6 of 2009 that spawned this appeal and not Chuka LDT Case No. 49 of 2009 which is unknown to him. He urges the court to dismiss the appeal for reliance on a non-existent land disputes tribunal case.

14. I find that the primary issue to be determined is whether the original dispute in the Chuka Land Disputes Tribunal was a boundary dispute or a claim for ownership of land. Whichever finding this court will make will have ramifications as to whether the appeal will be allowed or be dismissed.

15. The Memorandum of Appeal in this Appeal is dated 5th October, 2010 and was indeed originally referred to as Meru High Court Civil Appeal No. 117 of 2010. I opine that the submission by the respondent that the appeal was filed outside the prescribed statutory period comes rather late, 7 years after the appeal was filed. It should have been raised as a preliminary objection soon after the appeal was filed.

16. The prayer that the appeal be dismissed as it refers to LDT Case No. 49 of 2009 instead of LDT Case No. 6 of 2009, is not tenable as it is cured by the fact that in their pleadings and submissions, the parties refer to the correct subject matter and the correct tribunal case.

17. It is not controverted that the appellant is the registered owner of land parcel NO. Karingani/Ndagani/7509. It is not also controverted that he bought the suit land from the respondent's brother. His claim that he has developed his land is not challenged. Proceedings in Chuka PM's Court, Civil Suit No. 37 of 2005, which the respondent says was ongoing when the appellant bought his land from the respondent's brother have not been annexed. The court is not aware of the decision made in that suit. However, these issues though important, will not determine how this appeal will be decided. The primary determinant will be if or if not this suit originally emanated from a boundary dispute or a land ownership dispute.

18. I find the authority proffered by the Appellant, that is, Meru HCC Appeal No. 106 of 2008 (Meru Catholic Diocese AND Lawrence Gitonga) relevant to this matter. The re-hearing of the suit by the Appeals Committee was rather unorthodox.

19. The decision of the Land Disputes Tribunal in Chuka Case No. 6 of 2009 was in the following terms:

A: DECISION OF THE TRIBUNAL

Having heard and considered the representation of all the parties and having considered all the documents submitted to us we hereby decide as follows;

B. BACKGROUND FACTS/ FINDINGS

1. **The** boundary in dispute is an Agricultural Land Reg. No. Karingani/Ndagani/7509
2. **The** boundary was established by the survey of Kenya through the court order.
3. **The** tribunal elders visited the boundary in dispute and found that boundary marks and the fence had been removed.

C. JUDGMENT/ORDER

In view of the foregoing this tribunal (sic) elders order the survey of Kenya to move in and rectify and bring the boundary to where it was fixed. Costs be in the cause.

20. It is veritably pellucid that the Land Disputes Tribunal in Chuka was purely dealing with a boundary dispute. I need not say any more. In terms of the provisions of section 3(1) (a) of the Land Disputes Tribunals Act, it had jurisdiction to handle and determine the dispute that spawned this Appeal.

21. In the circumstances this appeal is allowed. I grant judgment in favour of the Appellant in the following terms:

a) The provincial appeals committee award/judgment/ruling is hereby set aside and the same is substituted with the award of the District Land Disputes Tribunal in Chuka Land Disputes Tribunal Case NO. 6 of 2009.

b) Cost will follow the event and are awarded to the appellant,

Delivered in open court at Chuka this **14th day of November, 2017** in the presence of:

CA: Ndegwa

I.C. Mugo for the Appellant

Samuel Njagi M’Nyamba - Respondent

P. M. NJOROGE,

JUDGE.