



**REPUBLIC OF KENYA**

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

**AT NYERI**

**ELC APPEAL NO. 117 OF 2014**

**JAMES KARUKU KIRERU.....APPELLANT**

**VERSUS**

**LUCY GATHONI KIRERU.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This appeal relates to an award of the Central Provincial Land Disputes Appeals Committee (hereinafter “the Appeals Committee”) made on **5<sup>th</sup> August, 2011** in claim No. Muranga North 4/2008.

2. The award appealed stated as follows:-

**“AWARD”**

**This Provincial Tribunal has decided to uphold the Mathioya Tribunal Award as follows:-**

**Lucy Gathoni Kireru to get her share of 1 ½ acres from Loc 14/Kairo/2218.**

**We are appealing to court to issue the necessary orders....”**

2. Aggrieved by the aforementioned award/decision of Appeals Committee, the appellant (James Karuku Kireru) brought the current appeal on the grounds that the Appeals Committee failed to appreciate the powers given to it under **Section 3(1)** of the repealed Land Disputes Tribunal Act, No.18 of 1990 (hereinafter “the Act”) and that the Appeals Committee contravened the provisions of **Section 8(7)** of the Act by failing to give reasons for its decision.

3. Terming the decision of the Appeals Committee bad in law, the appellant urges this court to set it aside and allow the appeal.

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

5. In the submissions filed on behalf of the Appellant, it is pointed out that the dispute preferred at District Tribunal and at the Appeals Committee touched on a registered parcel of land to wit,

Loc.14/Kairo/2218 and submitted that the dispute was outside the jurisdiction of the Tribunal established under the Act.

6. The Appeals Committee is faulted for having failed to give its views concerning the dispute and instead adopting the decision of the District Tribunal and for having failed to give the dispute preferred to it a number.

7. Maintaining that the Tribunal did not have jurisdiction to hear and determine the dispute, the appellant urges the court to allow the appeal as prayed.

8. On behalf of the respondent, reference is made to **Section 3(1)(b)** of the Act and the case of **Susan Nyambura Wahome & 4 others v. Central Province Land Disputes Appeals' Committee Nyeri Civil Appeal No. 195** of 2009 (unreported) and submitted that the Appeals Committee had jurisdiction to arbitrate the dispute because it was on a claim to occupy and or work land.

9. In the case of Susan Nyambura Wahome (*supra*), the Court of Appeal stated:-

**“...the Land Disputes Tribunal was a creature of statute. The Land disputes Tribunal Act No. 18 of 1990 (now repealed) Section 3(1) provides the matters that form the jurisdiction of the elders' tribunal are issues of:-**

- 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,”**

Our own understanding of the dispute that was taken to the tribunal for determination was the issue of whether the suit property was land held in common, or a claim to occupy land. We say this because, it is uncontested that when Susan, the mother of the appellants and 4<sup>th</sup> respondent returned to live with her father in the early 1960's, she lived on the suit property with all her children. When her father died, he left her and her children living on this land, thus, they were occupying the land and working on it by the time the respondent was registered as proprietor.

The problem the learned judge identified was the tribunal overstepped their jurisdiction when they ordered a sub-division of the suit premises and transfer thereto to the appellants...The learned judge's intention is clear, it was to nullify an order that was made in excess of jurisdiction as she posited in part of her ruling as follows:-

***“The fact that judgment has been entered in terms of the award cannot preclude this court from granting an order of prohibition to stop execution of the judgment whose very source was a nullity.”***

In our considered view, this observation is not entirely correct in law because the order of prohibition that was issued did not solve the problem that was facing the court and the parties. Firstly, the tribunal was a creature of the law and both parties submitted themselves to its jurisdiction and it is the 4<sup>th</sup> respondent who appealed before the Provincial Land Disputes Tribunal. In other words he could have applied to quash the decision of the Land Disputes Tribunal instead of appealing. The issue we have to address is the fact that the tribunal is said to have exceeded its jurisdiction and went further to order sub-division of land. After considering the evidence and establishing that all parties were occupying the suit land the tribunal ordered the sub-division of the land among the appellants and the 4<sup>th</sup> respondent. Perhaps if the tribunal merely declared that the appellants were in occupation of the suit land and stated the portions they occupied without making a definitive order of subdivision and transfer and leaving the parties to seek the orders of transfer in the High Court that would have been within the acceptable limits of the Act (*in essence the Court of Appeal agreed with the submissions that the Court had no power to order transfer of the land to the parties to the dispute*). Emphasis supplied.

**The court further stated:-**

**“Even if we were to consider this dispute within the principles of the overriding objectives in the administration of justice which can be done because courts have shifted and they no longer worship at the altar of technicalities, we are afraid this is not one of them. This is a matter that touches on a principle of law regarding the effects of the remedies in judicial review and also touches on the fundamental rights over rights to property by members of the same family who have occupied land through their mother in all lifetime and now suit land is registered in the name of one of them, the 4<sup>th</sup> respondent. It is the 4<sup>th</sup> respondent who pursued the wrong remedy after he lost a case for what would have been an appropriate remedy. Was he entitled to litigate in installments and after he lost the case for orders of certiorari, file another suit seeking the orders of prohibition?”**

**We think not....as matters stand, the decree of the Chief Magistrate, still stands...”**

10. It is further submitted that the Appeals Tribunal had no power to determine whether or not the District Tribunal had power to hear and determine the dispute preferred before it and opined that if aggrieved by the award of the Tribunal, the appellant ought to have filed a judicial review application to quash the earlier decision of the tribunal.

11. Concerning the contention that the Appeals Committee failed to give the appeal a number as by law required, it is submitted that the appeals Committee did give the Appeal a number to wit, No. Muranga North 4/2008. Besides, it is submitted that the Appeals Committee knew the matter it was seized off.

12. After considering the pleadings and the submissions files, I find the issues for determination to be;

- 1) Whether the Appeals Committee had power to hear and determine the dispute preferred before it?
- 2) Whether the appeal Committee abdicated its duties under the statute?
- 3) If the answer to (2) above is in the affirmative, whether the abdication of the duties rendered the appeal fatally defective?
- 4) Whether the appellant has made up a case for being granted the orders sought?
- 5) What orders should the court make?

13. Concerning the 1<sup>st</sup> issue, I begin by pointing out that the dispute preferred to the District Tribunal and which led to the appeal to the Appeals Committee and subsequently to this Court was a demand by the respondent, (appellant's sister) of a share of her father's land to wit, Loc.14/Kairo/2218 which was at the material time registered in the name of the appellant.

14. The respondent contended that she had a right to share the land because she was unmarried and had been left in occupation of the suit land by her parents. The tribunal heard that following the passing on of the respondent's parents, the suit property had been subdivided and shared between the appellant and herself as per the wishes of her parents. The respondent blames the children of the appellant for removing the boundaries to the sub-divisions to the suit land.

15. In his statement of defence before the District Tribunal, the appellant admitted that the respondent and himself lived in the suit property but denied her contention that she was entitled to a share thereof. He however, acknowledged that the respondent was entitled to a share of the land they had, but contended that she should claim her share from her 4 siblings and not him alone.

16. Upon evaluating the evidence adduced before it the District Tribunal, *inter alia*, held:-

**“James Kauruku Kireru (the appellant herein) ID3466756 was a trustee to the land parcel**

no.Loc14/Kairo/2218 of about 4.6 acres.

### **Award**

According to evidence adduced from both parties, witnesses and document produced, the tribunal established that the plaintiff, Lucy Gathoni Kireru ID/3392808 was entitled to inherit 1.5 acres from her father's land parcel No.Loc.14/Kairo/2218 held by her brother, James Karuku Kireru ID/3466756 as a trustee of family land. The defendant, James Karuku Kireru ID/3466756 should therefore unconditionally subdivide and transfer 1.5 acres to the plaintiff, Lucy Gathoni Kireru ID/3392808 and District Land Officer and District Surveyor to facilitate the process. Should any party prove difficult, the Court executive Officer should sign documents and facilitate the subdivision and transfer accordingly."

17. Aggrieved by that determination, the appellant preferred an Appeal to the Appeals Committee where he admitted that the suit property was family land (he had inherited the same from his father). He denied the respondent's contention that he had been given a portion of the suit property by his father and contended that his father's land was shared among his father's sons.

18. He reiterated his contention before the lower Tribunal that the respondent should get land from all the beneficiaries of his father's land. In this regard, he stated that he had offered the respondent ½ an acre.

19. The respondent maintained that she was given 1 ½ acre from the suit property by her late mother. Explaining that she was in occupation of ½ acre she urged the Appeals Committee to officially give her 1 ½ acres.

20. Upon considering the appeal preferred before it, the Appeals Committee rendered itself as follows:-

### **"Award**

**This provincial tribunal has decided to uphold the Mathioya tribunal award as follows:-**

**Lucy Gathoni Kireru to get her share of 1 ½ acres from Loc.Kairo/2218. We are appealing to the court to issue the necessary orders. The claim was heard and determined this 21<sup>st</sup> day of July, 2011. Each party to meet its costs.**

**Any aggrieved party may appeal after 60 days."**

21. It is that determination that prompted the filing of the current appeal.

22. In the case of **Republic v. Chairman, Lurambi Land Dispute Tribunal & 2 others (2006) eKLR** 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 its powers under section 3(1) of the Land Disputes Tribunal Act No.18 of 1990.**

**The ex parte Applicant was also not heard or given the right to be heard...I am satisfied that the decision of the Tribunal was a nullity not least because it was ultra vires its powers under section 3 (1) of Act 18 of 1990..."**

### **Analysis and determination**

23. It is not in dispute that the subject matter before the District Tribunal and the Appeals Tribunal was registered land. It is also not in dispute that both the District and the Appeals Tribunal lacked

jurisdiction to hear and determine the dispute preferred before them.

24. On the authority of **Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 others (2012) eKLR** a court's Jurisdiction flows from either the Constitution or Legislation or both. A court of law (Tribunal) can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. By arbitrating over a matter they had no power to arbitrate, the Tribunals acted ultra vires. That being the case their decision was a nullity in law. In this regard see the case of **Republic v. Chairman, Lurambi Land Dispute Tribunal & 2 others (2006) eKLR (supra)**. Also see the case of **Mateo Githua Ngurukie vs. Hon. Attorney General and 5 Others; Nyeri High Court Civil Suit No. 206 of 1999** where Ombayo J., 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. (See Wachira wambugu Case (supra) and Julius Mburu Mbuthia case, supra). It follows therefore that the instant issues are not *Res judicata* due to the fact that they were deliberated upon and determined by an incompetent tribunal that lacked jurisdiction over the same..**

**In the case of Vincent Kipsongok Rotich v. Orphah Jelangat Ngelechei (2014)e KLR supra, the learned judge Munyao J., declined to declare the suit therein *res judicata* despite the existing decision/order that had been made by the LDT and adopted by the Hon. Magistrates Court.”**

25. Having found the proceedings preferred at the defunct land disputes tribunal in respect of this matter to have been a nullity in law, I declare them as such and direct that the parties revert to the status which obtained before the impugned proceedings were taken.

26. Since this is a family dispute I order that each party bears its costs.

**Dated, signed and delivered at Nyeri this 17<sup>th</sup> day of May, 2016.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

Mr. Mindo for the appellant

C.N. King'ori h/b for Theuri Mwangi for respondent

Court assistant - Lydia