



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELCA CASE NO. 32 OF 2014

JANE WAINOI GATHUTWA 1ST APPELLANT

ESTHER WANGITHI I KAMANDU 2ND APPELLANT

VERSUS

GRACE KAGUU MARUA 1ST RESPONDENT

JANE WAMBUI MARUA 2ND RESPONDENT

(AN APPEAL FROM THE RULING DELIVERED ON 23RD MARCH, 2007 BY HON. A.K. ITHUKU – R.M. AT KERUGOYA SENIOR RESIDENT MAGISTRATE’S COURT LDT NO. 1 OF 2007)

JUDGMENT

This is an appeal against the award of the Senior Resident Magistrate’s Court Kerugoya in award No. 1 of 2007 made on 5th February 2007.

In the memorandum of appeal filed on 5th March 2007, the following ten grounds of appeal are raised:-

1. *That the Tribunal and the Court misconducted itself by failing to allow the appellants avail their witnesses*
2. *That the Tribunal and the Court was wrong in basing its ruling on documents not produced as evidence*
3. *That the Tribunal and the Court was wrong in failing to recognize that the appellants have no other place to live and the suit land was their livelihood*
4. *That the Tribunal and the Court was wrong because it did not take into account the parties Customary Law which it was enjoined to do*
5. *That the Tribunal and the Court was clearly biased against the appellants thus resulting in an injustice to them*
6. *That the Tribunal and the Court did not take into account all relevant factors*
7. *That the Tribunal and the Court should have taken into account that the respondents had taken the law into their own hands by chasing the appellants from that land before the Tribunal had made its award and the same entered as a judgment of the Court*
8. *That the Tribunal and the Court misconducted itself by taking into account irrelevant matters in reading (sic) its decision*
9. *That the Tribunal and the Court was wrong to act on hearsay evidence*
10. *That the lower Court erred in issuing the decree herein before the Statutory period within*

which to appeal had lapsed.

The appellants therefore urged this Court to:-

- a. ***Set aside the award by the Central Division Land Dispute Tribunal, reverse and/or set aside the award by the Tribunal and grant their prayers as sought in their claim before the Tribunal***
- b. ***Set aside reverse and/or vary the decree issued herein by the subordinate Court on 23rd February, 2007***
- c. ***Order that the suit land be sub-divided into the respective shares and that the Executive officer at the Law Courts Kerugoya be ordered to sign all necessary papers to effect the sub-division and transfer of the suit land***
- d. ***Order that the respondents pay the costs in this Court, in the Tribunal and in the Court below***
- e. ***Any other orders that this Court may deem fit to grant***

This appeal was originally filed at the High Court in Nyeri as Civil Appeal No. 9 of 2007 and according to the record, it was admitted for hearing on 8th April 2009 before an order was made by Wakiaga J. on 21st February, 2013 transferring it to this Court. It came before me first on 1st July 2013 when there was no appearance by either party. It was eventually canvassed before me on 1st December 2014 when the parties who are acting in person made oral submissions.

I have considered the memorandum of appeal and the oral submissions by both the appellant and the respondents. In the course of hearing the appeal, it became apparent that infact this matter had been heard by the High Court in Nairobi. I therefore called for the proceedings in that case and on 10th December 2014, the 2nd Respondent availed to me a copy of the judgment in Nairobi High Court Civil Appeal No. 405 of 1993 wherein the appellant was one RICHARD MWANGI and the respondents were GRACE KAGUU MARUA and JANE WAMBUI MARUA who are the same respondents herein. I shall revert to that judgment later on.

From the record herein, it is clear that the dispute between the parties herein was over a parcel of land known as MUTIRA/KAGUYU/433. The same was referred to the Central Division Land Disputes Tribunal. The appellant herein was one of the two claimants the other being ESTHER WANGITHI KANANDU. The two respondents herein were the defendants in that case.

After hearing the dispute, the Tribunal dismissed the claimants claim and in doing so, gave two reasons:-

1. ***That this dispute had been the subject of Nyeri High Court Civil Appeal No. 52 of 2004 and***
2. ***That the Tribunal had no jurisdiction to determine a dispute concerning ownership of the parcel of land MUTIRA/KAGUYU/433 .***

The Tribunal's award was forwarded to the Senior Resident Magistrate's Court at Kerugoya which confirmed the same and issued a decree dated 5th February 2007 in terms of that award. It is clear from the memorandum of appeal that, that decree and the order of the Tribunal are the subject of this appeal.

It is therefore clear that the dispute between the parties herein was heard in accordance with the provisions of the ***Land Disputes Tribunal Act*** (now repealed). Under ***Section 7 of the said Act***, once the Tribunal had determined a case, it would file its award in the magistrate's Court. The Court would then enter judgment in accordance with the Tribunal's award from which a decree would then issue.

Section 8(1) of the said Act goes further to provide for what an aggrieved party shall do. It says:-

“Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated”

Section 8(8) and (9) of the same Act goes on to state that the decision of the Appeals Committee shall be

final but a party may appeal from that decision to the High Court on points of law within sixty days. It is clear from the law therefore that there could be no appeal to this Court from a decision of the **Land Disputes Tribunal** established under the now repealed **Land Disputes Act**. An appeal could only lie to this Court and on a point of law from a decision of the Appeals Committee of the Province in which the land is situated. No evidence was placed before me to show that any appeal was preferred to the Appeals Committee and if so, with what results. From the Memorandum of appeal, however, it is clear that this appeal is from the decision of the Senior Resident Magistrate's Court and that of the Tribunal. There could be no right of appeal against any of those decisions to this Court as pointed out above and therefore the decision to admit this appeal made on 8th April 2009 could only have been made in error.

In the circumstances, this appeal is clearly for dismissal.

But that is not all. From the judgment of Aganyanya J. (as he then was) in Nairobi High Court Civil Appeal No. 405 of 1993 which was availed to me by the 2nd respondent in the course of the appeal, it is clear that this dispute did end up on appeal to the High Court where the appellant (RICHARD MWANGI GATHUTWA) was appealing against the decision of the Resident Magistrate E.N. Maina (now a Judge of the High Court) who had dismissed a claim by the said RICHARD MWANGI GATHUTWA over the same land subject matter of this appeal. It is clear from the proceedings in the Central Division Land Disputes Tribunal that the said RICHARD MWANGI GATHUTWA or KATUTHWA who is deceased was in fact the husband to the appellant herein. From those proceedings, the appellant was claiming her husband's share in the land. Justice Aganyanya (as he then was) dismissed the appeal on 23rd September 2002. It follows therefore that this appeal is res-judicata having been determined some twelve years ago. It cannot be entertained afresh in this Court having been concluded in a Court of competent jurisdiction.

Finally, even assuming that this appeal is properly before me, the decision of the Central Division Land Disputes Tribunal which dismissed the appellant's claim for want of jurisdiction cannot be faulted. As indicated above, this dispute involved land registered as MUTIRA/KAGUYU/433 and it is clear from the proceedings that the appellant wanted to be given one acre out of that land which she claimed belonged to her husband. The subject matter of the dispute being registered land, the Land Disputes Tribunal would not have had the jurisdiction to sub-divide it and give the appellant one acre as she claimed. The Land Disputes Tribunal was therefore entitled to do what it did by refusing to award the appellant the one acre as that would have been an illegal judgment - see **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISIONAL LAND DISPUTES TRIBUNAL & ANOTHER C.A. CIVIL APPEAL NO. 256 of 2002** where the Court of Appeal held that a Land Disputes Tribunal had no jurisdiction to hear a disputes relating to title to registered land. That is what the appellant herein was seeking and the Tribunal was correct in law in downing its tools. Similarly, the Senior Resident Magistrate's Court Kerugoya cannot be faulted for confirming that award by the Tribunal because under **Section 7 (2) of the repealed Land Disputes Tribunal**, the magistrate was obliged to enter judgment in terms of the award and draw a decree accordingly.

In view of all the above, this appeal lacks merit and is hereby dismissed with costs.

B.N. OLAO

JUDGE

8TH APRIL, 2015

8/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Appellants – present

Respondents – present

COURT: Judgment delivered in open Court this 8th day of April 2015

Appellants present

Respondents present

Right of appeal explained.

B.N. OLAO

JUDGE

8TH APRIL, 2015