IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KIAGE & ODEK, JJA.)

CIVIL APPEAL NO. 161 OF 2011

BETWEEN

JOSEPH KAROBIA GICHERU……..……..……..
APPELLANT

AND

MICHAEL GACHOKI GICHERU ……..
……. RESPONDENT

(Appeal from the judgment of the High Court at Nyeri (Kasango, J.) dated 29th April, 2008

in

HCCA NO. 96 OF 1999 (A))

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JUDGMENT OF THE COURT

The dispute between **JOSEPH KAROBIA GICHERU** (the Appellant) and **MICHAEL GACHOKI GICHERU** (the Respondent) who are blood brothers relates to a piece of land known as Parcel No. INOI/THAITA/160 situated in Kirinyaga District and measuring about 5 acres. The land is registered in the name of the appellant but the respondent lays claim to a portion of it on the basis that the same belonged to the parties' deceased father prior to its demarcation and that the appellant holds it in trust for both of them. This claim the appellant has resolutely refuted and resisted.

Unable to procure the appellant's voluntary sub-division of the land so as to have it shared between them, the respondent approached the Kirinyaga Central Division Land Disputes Tribunal. That Tribunal after hearing the parties and their

witnesses found in the respondent's favour and ruled as follows on 21st March 1998;

"From the proceedings and the above factors we noted that Michael Gicheru [the

respondent] has right to be given a part of INOI/THAITA/160 as Joseph Karubia [the appellant] was only a trustee. The claimant … has been awarded 2 acres from Inoi/Thaita/160. Mr. Joseph Karobia to remain with the rest of the remaining farm almost three acres."

The appellant felt aggrieved by the tribunal's aforesaid award and lodged an appeal before the Appeals Tribunal for Central Province, which, after hearing the parties, upheld the lower tribunal's determination and dismissed the appellant's appeal. That was on 27th July 1999.

Undeterred by that second set back, the appellant moved to the High Court at Nyeri by appeal raising in his Memorandum some three grounds, namely;

"1. That the Appeals Tribunal erred in law in upholding the decision of Kirinyaga Central Division Tribunal without giving reasons for such upholding and thereby prejudiced their decision.

2. ***The appeals tribunal erred in law in finding that the appellant was a trustee without any evidence having been led in support of a trust and thereby occasioned a miscarriage of justice.***

3. ***The appeals tribunal erred in law in not making a determination of whether land parcel No. Inoi/Kariko/35 was purchased by the appellant together with the respondent and whether such purchase would determine the alleged trust on land parcel No. Inoi/Thaita/160."***

The appeal to the High Court was heard by Kasango J. At that hearing, counsel for the appellant did raise for the first time the question of whether the two tribunals that had dealt with the dispute between the parties had jurisdiction to determine the question of ownership and trust on which their decisions turned. This issue of jurisdiction was not in the Memorandum of Appeal before the High Court that we have set out above and there is no indication that any attempt was made to amend the said Memorandum. Nor was leave sought of that court to urge a ground that was outside the filed Memorandum. The learned Judge took a dim view of this introduction of a new, unpleaded matter and said so in her judgment;

"It is important to bear in mind those grounds because during submissions at the hearing of this appeal counsel for the appellant sought to introduce new grounds that were not in the Memorandum of Appeal. Before I even begin to consider the substantive appeal I need to state that parties are bound by their pleadings. A party cannot divert from the pleadings they have brought before court and a court cannot grant that which is not prayed for …

The argument therefore that the appeals committee exceeded its jurisdiction first amongst other arguments will not be considered in this judgment because they did not form part of the grounds of appeal."

So stating the learned Judge dealt with the issues in the Memorandum of Appeal before her and then dismissed the appeal with costs to the respondent on 29th April 2008.

That determination by the learned Judge did not go down well with the appellant who filed a Memorandum of Appeal before this Court in which he hinged his complaints, in ironic twist, on a two-ground attack on the very the question of jurisdiction that had been given a wide berth by the learned Judge;

"1.That the honourable learned Judge erred in law in upholding the decision of both the Kirinyaga Central Division Tribunal and the Central Provincial Appeals (sic!) which tribunals had no jurisdiction on issues touching on tile to land.

2. That the honourable learned Judge erred in law in upholding the decision of both the Kirinyaga Central Division Tribunal and the Central Provincial Appeals Tribunal and proceeding to uphold that the appellant held the suit property in trust for the respondent

without considering that both tribunals had no jurisdiction on issues touching on trust."

Given the centrality of the question of jurisdiction as a matter of law, and considering the learned Judge's reasons as to why she would not consider it unpleaded, we did express our surprise that Mr. Nganga, counsel for the appellant, did not deem it fit to cite any authorities before us. This Court is at the vanguard of a jurisprudential renaissance and at the basic minimum we expect counsel who practice before us to evince the kind of thorough research and robust submissions that befit a Court that is invested with finality in the vast majority of legal questions and plays a corrective and didactic role. Counsel must come properly prepared to argue the law.

In order for courts or other bodies or tribunals to have the legal capacity to hear and determine disputes before the parties that come before them, the courts or tribunals must first be clothed or invested with the requisite authority and legitimacy that flows from their constitutive instruments. That authority is what is referred to as jurisdiction and it is fundamental to the efficacy and legality of whatever decisions, orders, directives, or determinations that may issue from such court or tribunal. Lord Mackay of Clashfern, the former Lord High Chancellor of Great Britain put it thus in ***Halsbury's Laws of England***, 4th Edn. Re-issue Vol. 10;

> ***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means."***
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> (Para 314, P 132)

As the jurisdiction that the High Court is assailed for not examining is that of the two land disputes tribunals that had previously dealt with the disputes between the parties, it is apposite to set out the provision of the relevant law which was the Land Disputes Tribunal Act No. 18 of 1990. **Section 3** of the said Act dealt with jurisdiction of the said tribunals as follows;

"S3(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."***

As this statutory provision was specifically enacted to remove certain matters from the ordinary courts, particularly magistrate's courts, thereby limiting their civil jurisdiction to the extent of the donation of the same to the tribunals, it follows that the interpretation of the jurisdiction donated to the tribunals, has to proceed from a position of strictness. The tribunals have jurisdiction as granted by the statute and no more.

Where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ***ab initio***. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate, could confer upon such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end.

We accept as sound the observation by Kuloba R in **Judicial Hints on Civil Procedure** (Law Africa) at P 65 on the effect of lack of jurisdiction;

"If a court has no jurisdiction, its judgments and orders, however precisely certain and

technically correct, are mere nullities, and not only voidable.

[T]hey are void and have no effect either as estoppels or otherwise, and may not only be set aside at any time by the court in which they rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack of jurisdiction. That being so, the point of jurisdiction may properly be taken in an appellate court. Lucie-Smith J. in Seid bin Seif Vs. Shariff Mohammed Shatry [1940] 19 (1) KLR 9 at 10, 27 March 1940."

We very much doubt that the learned judge properly appreciated the true nature of a jurisdictional objection. Had she done so, she would not have engaged in the rather formalistic repudiation of the point raised on the merely technical and procedural basis that the matter had not been raised on the appellant's grounds of appeal before her and parties are bound by their pleadings. We are quite clear in own mind that a nullity cannot be converted into a validity on the basis of a default of pleadings.

That the tribunals did not have jurisdiction to deal with the twin issues of title and trust is clear not only from a plain reading of the statute, but also from a long line of authorities both of the High Court and of this Court. In **ISSAC MAINA MURATHE Vs. JESIDAH WANJIRU MURATHE [2010]e KLR**, for instance, W. Karanja, J. (as she then was) addressed the issue of the tribunal's jurisdiction as follows;

"This jurisdiction does not therefore extend to determining ownership of land and cancellation of title deeds. The tribunal had no jurisdiction to interfere with these rights. Issues of ownership of registered land and alteration or cancellation of title deeds is strictly within the domain of the High Court and the subordinate court in a few instances depending on the value of the land.

The orders made by the Tribunal/Provincial Committee though well intentioned were therefore *ultra vires* ***the law and the same are null and void for all intents and purposes."***

This Court in **BEATRICE M'MARETE Vs. REPUBLIC & 2 OTHERS EX-PARTE JOHN GITONGA MBUI [2004] eKLR** had this to say;

"In our view, the dispute before the Tribunal did not relate to boundary, claim to occupy or work land, but a claim to ownership. Taking into account the provision of Section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the applicant. In our view, the Tribunal acted in excess of its jurisdiction."

The same holding was reflected in the earlier decision of this Court in **JOTHAM AMUNAVI Vs. THE CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL & ANOR Kisumu Civil Appeal No. 250 of 2002** (unreported).

"It is clear that the proceedings before the tribunal related both to title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of Section 3(1) of this Land Disputes Tribunal Act.

By Section 15 of the RLA such a dispute can only be tried by the High Court or by the Resident Magistrate's Court in cases where such latter court has jurisdiction."

Once the issue of the jurisdiction of the tribunals was brought to the attention of the learned judge, albeit belatedly, it was a matter so fundamental to the validity of the orders that had been made, the Judge ought to have made a decision on it. By failing to do so, the learned judge fell into error and we

have no hesitation in granting the appeal against her judgment. We now order that the said judgment be set aside in entirety.

Consequently, the decision of the Central Provincial Appeals Tribunal in Appeal Case No. 99 of 1999 delivered on 27th July, 1999 is set aside. The decision of the Kirinyaga Central Divisional Tribunal leading to that appeal is also set aside.

As the appellant could and should have raised the issue of jurisdiction at an earlier date but failed to do so, he is not deserving of costs. Each party shall bear his own costs.

Orders accordingly.

Dated and delivered at Nyeri this 18th day of September 2013.

ALNASHIR VISRAM

……..……

JUDGE OF APPEAL

P.O. KIAGE

……...…

JUDGE OF APPEAL

J. OTIENO ODEK

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR