



IN THE COURT OF APPEAL

AT NYERI

CORAM: VISRAM, KOOME & OTIENO ODEK, JJ.A.

CIVIL APPEAL NO. 175 OF 2010

JOHN NJUE NYAGA APPELLANT

VERSUS

NICHOLAS NJIRU NYAGA 1ST RESPONDENT

HARRISON IRERI NYAGA 2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Embu

(Khaminwa J.) dated 30th October, 2007

in

H.C.C.A No. 30 of 2006)

JUDGMENT OF THE COURT

1. This appeal relates to the Land Disputes Act and two legal issues have arisen. The first is whether the Land Disputes Tribunal and the Appeals Committee as established under the Act have jurisdiction to deal with issues of trusteeship over land. The second question is whether there is a right of appeal to this Court from a decision or judgment delivered on appeal by the High Court in a matter under the Land Disputes Act.
2. The appellant and the respondents are brothers. The 1st respondent, Nicholas Njiru Nyaga lodged a complaint before the Embu Divisional Land Disputes Tribunal against Harrison Ireri Nyaga and John Njue Nyaga in relation to the land parcel **Kaagari/Kigaa/1621** measuring 4.59 acres. The claim by Nicholas Njiru Nyaga was that the suit property was ancestral land and he should be given a portion thereof.
3. The dispute was heard by the Embu Divisional Land Appeals Tribunal as **Embu Land Tribunal Case No. 35 of 2004**. In his testimony before the Tribunal, the 1st respondent stated that the suit property was registered in the name of the 2nd respondent as a trustee and later the 2nd respondent secretly exchanged the family land with the appellant. That the family land parcel

Kaagari/Kigaa/1621 was exchanged with land parcel **Kagaari/Weru/253**.

4. The 2nd respondent testified before the Tribunal that after land demarcation, he was given **Kaagari/Kigaa/1621** as a trustee of his father's children. That in 1978, he was desirous of using the land to obtain and secure a loan. That the land was divided verbally whereby John Njue Nyaga (appellant) was to get one (1) acre; Harrison Ileri Nyaga 1.59 acres, Nicholas Njiru one (1) acre and Johnson Muthee one (1) acre. That the appellant John Njue asked him to exchange his portion and he would be the trustee for the rest of the family. That they exchanged without the knowledge of other family members and they did exchange with **Kaagari/Weru/253**; that after the exchange, he secured a loan using the title **Kaagari/Weru/253**. That John Njue bought a plot for their late brother (Johnson Muthee) and built a house in exchange of his one acre. That Nicholas has no land and he should be given his one acre.
5. The Embu Divisional Land Disputes Tribunal upon hearing the matter issued a verdict that the District Land Registrar and the District Surveyor should sub-divide land parcel **Kaagari/Kigaa/1621** into three portions two portions of which should be one acre each and Nicholas Njiru Nyaga to get one (1) acre, Nancy Wanjiru Mutee who is the wife of Johnson Muthee (deceased) to get one (1) acre and John Njue Nyaga to get 2.59 acres of which this comprises of his portion of one (1) acre and 1.59 acres which they exchanged with Harrison Ileri Nyaga. It was also decided that Harrison Ileri Nyaga to remain with his 10 acres land parcel **Kaagari/Weru/253**.
6. Aggrieved by the decision of the Embu Divisional Lands Tribunal, the appellant herein John Njue Nyaga moved to the Eastern Province Appeals Committee. The Appeals Committee deliberated on the matter and upheld the decision of the Tribunal. The Appeals Committee's verdict was to the effect that the land should be shared as per the award of the Tribunal.
7. Further aggrieved by the decision of the Eastern Province Appeals Committee, the appellant moved to the High Court and by judgment dated 30th October 2007, the learned Judge (Khaminwa J.) dismissed the appeal with costs. The learned judge in dismissing the appeal expressed herself:

“There is evidence that the dispute relates to family land and all the Tribunals did was to decide and order that the parties be registered according to the manner the land had been allocated among them to secure their rights in accordance with the trust admitted by the trustee and as accepted by the beneficiaries of the trust. The land had already been divided informally and it is within the land that the beneficiaries do secure their rights by registration to avoid disputes in future. I do not find that the Appeals Committee acted without jurisdiction...The grounds of appeal has no merit and the appeal is dismissed with costs of the appeal to the respondent.”

8. The appellant still aggrieved by the decision of the learned Judge has moved to this court and in the memorandum of appeal has raised three grounds to wit:
 - i. *That the learned Judge erred in law in not finding that the Tribunals both in the District and the Provincial Appeals Committee did not have jurisdiction to entertain the matter herein and/or the dispute.*
 - ii. *That the learned Judge erred in law in not finding that the Tribunal's act of distributing the property of the appellant which was not subject of the appeal and also to non-parties was illegal and unconstitutional.*
 - iii. *The entire proceedings and the verdicts were unlawful, illegal, unconstitutional and null and void.*
9. The first issue for us to consider is whether this Court has jurisdiction to hear appeals from the High Court in an appeal emanating from the Land Disputes Act. As was stated in the ***Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd 1989 KLR 1***, jurisdiction is everything; without it, a court has no power to take one more step. ***In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011***; the Supreme Court noted that ***The Lillian ‘S’ case [1989] KLR 1*** establishes that

jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity..." A court of law or any Tribunal must down tools in respect of any matter before it the moment it is without jurisdiction.

10. The issue for our consideration is whether this Court has jurisdiction to entertain this appeal and whether the present appeal is competent. We have considered the written submissions by counsel on this matter. The jurisdiction of this Court is conferred by the Constitution and Statute; appellate courts are creatures of Statutes. **Section 3 (1) of the Appellate Jurisdiction Act** states that:

"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."

11. The jurisdiction of the Court of Appeal to hear appeals from any other courts and tribunals save for the appeals from the High Court have to be expressly stated in any written law. As to whether this Court has jurisdiction to hear appeals from the High Court on matters related to the Land Disputes Act, we are guided by the decision of this Court in ***Humphrey Olwisi Muranda – v- Yakobet Nechesa Wabuko Civil Appeal No. 44 of 2006*** where on facts in *pari materia* to the present appeal it was stated:

"The appeal to the High Court was brought pursuant to the provisions of the Land Disputes Act. The High Court, as we have said, has dismissed that appeal. There is no provision in the Act allowing an appeal from the decision of the High Court to this Court. No right of appeal is provided by the Act. We think we have no jurisdiction to hear the appeal under the Act and that being so, we must down our tools. Accordingly, the appeal before us is and has always been incompetent and we order that it be and is hereby struck out..."

12. On this issue we are also guided by the decisions of this court in ***Nekesa – v- Wanjala, Civil Appeal No. 23 of 1985*** where it was stated that cases of a civil nature involving a dispute as to title fall outside the jurisdiction of the Land Disputes Tribunals. We also refer to the decision of this Court in ***Domica Wamuyu Kihu – v- Johana Ndura Wakaritu, Civil appeal No. 269 of 2007*** wherein this Court stated that **Section 8 of the Land Disputes Tribunal Act** which provides for appeals from the decisions of the Tribunal and the Appeals Committee does not provide for appeals to the Court of Appeal from the decisions of the High Court in such matters.

13. The above cited authorities incline us to state that we do not have jurisdiction to hear and determine the present appeal. However, one pertinent issue has been raised that needs consideration by this Court and that is whether the two tribunals erred in law and vested themselves with jurisdiction which they did not possess? What is the jurisdiction of the Land Disputes Tribunals under the Act? **Section 3(1) of the Land Disputes Tribunal Act** provides for the jurisdiction of land disputes tribunal which is confined to determination of three issues namely: (a) the division of or the determination of boundaries to land including land held in common; (b) claims to occupy and work land and (c) trespass to land. In the instant appeal, the issue before the Embu Divisional Tribunal related to division of land which was land parcel **Kagaari/Kigaa/1621**. We agree that there was no claim or question of trespass and no boundary dispute before the Tribunal. The record shows that the issues before the Tribunal was division of land and claim to occupy and work land; the record shows that the Tribunal was guided in its decision by the trusteeship which was admitted to exist over the land by all parties. The Tribunal was also guided by the division of land as agreed between the appellant and the 2nd respondent. It is our considered view that the case of ***Nekesa - v- Wanjala, Civil Appeal No 23 of 1985***, is distinguishable from the present case. The issue before the Divisional Tribunal was not to determine whether or not a trust existed over land parcel **Kagaari/Kigaa/1621**; the Tribunal was not determining title to the land parcel **Kagaari/Kigaa/1621**; the existence of a trust over the parcel of land was admitted and was not in issue. The issue of title and trusteeship were not in dispute as the appellant and all respondents admit that the appellant was not the absolute proprietor of parcel Kagaari/Kigaa/1621 but a trustee thereof. The case of ***Jotham Amunavi -v -***

Chairman Sabatia Division Land Disputes Tribunal Civil Appeal No. 256 of 2002 is also distinguishable since the issue in that case related to title to land. There is no dispute as to title in the present case. The appellant also raised the issue that the Tribunals erred in dealing with land parcel **Kaagari/Weru/253**. On this issue, the appellant in his testimony before the Tribunal stated that he secretly exchanged the family land with **Kaagari/Weru/253**. It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings.

14. We find that both tribunals and the High Court had jurisdiction to hear and determine the present case noting that the primary issue was one of division of the land and the right to occupy land between the claimants as beneficiaries of an existing trust. The totality of our consideration of the grounds of appeal, the submissions made and the applicable law is that this appeal is incompetent as there is no right of appeal to this Court; the appeal has no merit and is dismissed with costs to the respondents.

Dated at Nyeri this 3rd day of October, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

**I certify that this is a
true copy to the original.**

DEPUTY REGISTRAR