



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, MUSINGA, MURGOR, JJ.A.)

CIVIL APPEAL NO. 257 OF 2006

BETWEEN

WACHIRA WAMBUGU }

CHRISTOPHER NGAHU WACHIRA }

MOSES WAMBUGU WACHIRA } APPELLANTS

VERSUS

DISTRICT LAND DISPUTE TRIBUNAL OTHAYA }

CENTRAL PROVINCE LAND DISPUTES APPEALS COMMITTEE }

NYERI CHIEF MAGISTRATE’S COURT }

BENJAMIN KNOXWELL NGATIA WAMBUGU.....RESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at Nyeri (Khamoni, J.) dated 8th December, 2005

in

H.C. Misc. Appl. No. 117 of 2002)

JUDGMENT OF THE COURT

1. This appeal arises from a Judicial Review Application No. 117 of 2002 in the High Court of Kenya at Nyeri. In that matter the appellants sought:

“(i) That an order of certiorari do issue to quash the decision of the Central Province Land Disputes Appeals Committee award delivered on 6th March, 2002.

(iii) That an order of prohibition do issue against the Nyeri Chief Magistrate's court to stop it from entering/executing judgment based on the award of the Central Province Land Disputes Appeals Committee as prayed for in the Award No. 31 of 2001, Nyeri."

2. The applicants (now the appellants herein), contended that the Provincial Land Disputes Appeals Committee acted in excess of its jurisdiction by entertaining a matter based on trust and alleged fraud. They further claimed that the Provincial Land Disputes Appeals Committee acted against the principle of natural justice by denying the 2nd and 3rd appellants right to be heard.

3. In a brief ruling, the trial judge, Khamoni, J. dismissed the application for the following reasons:

(i) The applicants had failed to produce all the relevant information, such as recent certified copies of land registers, relating to the parcels of land in dispute that is, Chinga/Gikigie/939, 940, 941 and 942 which would have enabled the court to see the legal position regarding those titles. They had instead produced certified copies of land registers of the mother titles numbers 68 and 69 which had been closed after subdivision.

(ii) While the applicants sought a prohibition to issue against the Chief Magistrate's Court to stop it from entering or executing a judgment based on the award of the Central Province Land Disputes Appeals Committee, the applicant had wrongly stated that the judgment was the one prayed for in Award Case No. 31 of 2001 which was a decision of the Othaya District Land Disputes Tribunal.

(iii) The applicants had failed to disclose to the court that there was an existing court judgment based on an earlier award from Othaya District Land Tribunal filed in the Nyeri Chief Magistrate's Court on 24th April, 2001, Award Case No. 31 of 2001.

(iv) The applicants had not cited any provision of the Land Disputes Tribunal Act that prevented Tribunals or Appeals Committees from considering issues involving trusts or fraud.

(v) The applicants had failed to explain to the court the legal effect of entering judgment in accordance with an award from a Provincial Land Disputes Appeals Committee where there already existed court judgment based on an award from a Land Disputes Tribunal in the same case concerning the same subject matter and on the same issues between the same parties.

(vi) The proceedings from the Provincial Land Disputes Appeals Committee did not show on the face of those proceedings how that committee acted against the principle of natural justice.

4. Being dissatisfied with that ruling, the appellant preferred an appeal to this Court which was filed by the firm of **Kibuka Wachira & Company Advocates**. They raised 8 grounds of appeal which are as follows:

“1. The learned judge erred in law and in fact in concluding that the information contained in the annexures to the application concerning the history of these parcels of land was not relevant or sufficient for the purpose of the application before him.

2. That the learned judge erred in making a finding that there was no application seeking entering of judgment of the Central Province Land Disputes Appeals Committee's Award in Nyeri Chief Magistrate's Court Award No. 31 of 2001 and yet the application by the 4th respondent dated 13th March, 2002 was seeking the same.

3. That the learned judge ought to have noted from the contents that the entire

application was challenging the awards of both the District Lands Tribunal and the Central Province Land Disputes Appeals Committee and therefore the appellant did not refuse to disclose any information.

4. The appellants in their pleadings were very explicit and disclosed all material evidence; the judge showed open bias against them in his findings.

5. The appellants were the respondents in both the Tribunal and the Appeals Committee and could not be accused of supporting any of the awards.

6. The learned judge erred in law and in fact in deciding that the appellants did not state the provisions of the Land Disputes Act that ousts the jurisdiction of the Tribunals from hearing matters of trust and fraud and yet this is the trite law.

7. The learned judge erred in law and in fact in concluding that the appellants were both selective in challenging the awards and yet it is on record that they stated that the Tribunal and the Appeals Committee acted ultra vires their jurisdiction

8. The learned judge erred in law and in fact in concluding that the 2nd and 3rd appellants were represented by Gatandi Wambugu during the hearing of the appeal before the Appeals Committee and yet he was one of those coming back to claim land which they had already sold to the 1st appellant and therefore he was against the appellants.”

5. When the appeal came up for hearing, **Mr. Wachira**, the appellant’s learned counsel, started by giving a brief historical background of the land dispute. He stated that the late Gatandi Wambugu, who died in 1953 or thereabout, had five sons. During land consolidation exercise Wambugu Gatandi had died and the parcel of land that he owned at Nyeri was consolidated by his first two sons, Gatandi Wambugu and Karimi Wambugu as trustees for the family of their late father. Two parcels of land no. **Chinga/Gikigie/68** and **Chinga/Gikigie/69** were registered in the respective names of the two sons. Thereafter the two sons moved to the Rift Valley and settled there. After sometime, one other son, Benjamin Ngatia Wambugu, the 4th respondent herein, also followed his two brothers and settled in the Rift Valley.

6. In the course of time, the 1st and the 2nd born sons sold parcels Nos. 68 and 69 to Wachira Wambugu, the 1st appellant herein.

7. In 1985 or thereabout Wachira Wambugu subdivided the two parcels of land and transferred resultant portions of land to his sons, the 2nd and 3rd appellants.

8. In the year 2000 the 4th respondent went to Othaya District Land Tribunal and filed a case against his three brothers and two nephews, **Tribunal Case No. 10 of 2000, Benjamin Karimi Ngatia Wambugu v Gatandi Wambugu, Karimi Wambugu, Wachira Wambugu, Ngahu Wachira and Wambugu Wachira**. He claimed he was entitled to a share of his late father’s land as he had got none.

9. The Tribunal held that Gatandi Wambugu was registered as trustee of his late father’s land on behalf of himself and the claimant. Further, Karimi Wambugu was registered as a trustee of his late father’s land for his own benefit and that of Muriithi Wambugu. The Tribunal further held that Gatandi Wambugu and Karimi Wambugu sold Chinga/Gikigie/68 and 69 to their brother, Wachira Wambugu. In the circumstances, the complainant, Benjamin Ngatia Wambugu, was entitled to a portion of the land, Chinga/Gikigie/68 from Gatandi Wambugu. Gatandi Wambugu had sold the whole of that parcel of land to Wachira Wambugu. They ordered Gatandi Wambugu to compensate the claimant with another parcel of land equal to the one he had sold without the claimant’s knowledge.

10. The award was filed in Chief Magistrate’s Court at Nyeri and was adopted as an order of the court on 9th July, 2001. But before that Gatandi Wambugu had filed an appeal to the Nyeri Province Appeals

Committee, which committee, upon considering the appeal, set aside the award on 6th of March, 2002. The Appeals Committee ordered that the resultant subdivisions from **Chinga/Gikigie/68 and 69** that is, **Parcels Nos. 939, 940, 941 and 942** measuring a total of 7.7 acres be shared equally among Gatandi Wambugu, Karimi Wambugu, Jacinta Njoki w/o Muriithi in place of her deceased husband, John Muriithi and Ngatia Wambugu. The Appeals Committee also made the following orders:

“The Executive Officer at Nyeri P.M.’s Law Court is requested to sign the necessary documents to facilitate subdivision of the Land Nos. 68 and 69, MITAI- CHINGA/GIKIGIE/939, 940, 941 and 942 which is presently registered in the names of Gatandi Wambugu and Karimi Wambugu as follows:

Parcel No. 68 (939/940) Gatandi Wambugu -3.47 acres

Parcel No. 69 (941/942) Karimi Wambugu – 4.27 acres

7.47 acres

Therefore both Benjamin Ngatia Knoxwel Wambugu and John Muriithi should be given land out of Parcel No. 68 (939/940) and Parcel No. 69 (941/942) equally after subdivision of the above parcels in equal shares according to the decision contained in family report shown in the award which has been adopted by the Provincial Appeals Committee in toto.”

11. The appellants were dissatisfied with that award and moved to the High Court and filed the Judicial Review proceedings to quash the decision.

12. In the affidavit sworn by the appellants in support of the Judicial Review application, the appellants explained to the court the salient facts of the land dispute and stated in particular that Parcels Nos. Chinga/Gikigie 941, 942, 939 and 940 were resultant subdivisions of land Parcel Nos. Chinga/Gikigie/68 and 69 whose first registered owners were Gatandi Wambugu and Karimi Wambugu. The two were appellants’ elder paternal uncles.

13. The appellants further averred that:

“3. The above mentioned first registered owners sold and transferred their respective parcels in 1965 and 1966 to the first applicant herein, Wachira Wambugu.

5. The first applicant transferred these parcels of land to the 2nd and 3rd applicants who are his sons in 1995 and title deeds were issued.”

14. The appellants had contended that both the Othaya Land Dispute Tribunal and the Central Province Land Disputes Appeals Tribunal acted ultra vires the Land Disputes Tribunal Act by entertaining a claim based on alleged trust and fraud. They further contended that the two bodies aforesaid also acted in excess of their jurisdiction by challenging and disregarding valid sale transactions. The appellants had also annexed copies of land certificates for all the aforesaid subdivisions including photocopies of transfer in respect of Chinga/Gikigie/68 and 69 as well as the proceedings and award of the Othaya Land Disputes Tribunal and the Central Province Land Disputes Appeals Committee.

15. It is on that basis that Mr. Wachira submitted that the learned judge erred in law and in fact in holding that the appellants had not given relevant information of all material for the purpose of the Judicial Review application as stated in ground one of the appeal.

16. Regarding grounds 2 and 3 of the appeal, Mr. Wachira referred this court to page 44 of the record which showed that Benjamin Knoxwell Ngatia Wambugu had filed an application seeking, inter alia, that judgment be entered in terms of the Central Provincial Land Disputes Appeals Committee Case No. 14 of 2001.

17. Arguing ground 4 of the appeal, counsel submitted that from the way the learned judge drafted his ruling by first dismissing the application and then giving reasons for so doing, it was evident that he was biased against the appellants.

18. On ground 8, Mr. Wachira submitted that the appellants were not given any chance to face the Appeals Committee. However, the record of appeal at page 118 shows that Gatandi Wambugu briefly spoke on behalf of the appellants. He said that their mother had indicated that Muriithi and Ngatia should be given a portion of his father's land. She reiterated that if Ngatia Wambugu were to acquire the share of the land, it ought to be hived off for to him from Parcel No. 68 together with his brother, Muriithi.

19. **Mrs. Gathangu** for the 1st, 2nd and 3rd respondents opposed the application. She submitted that what the appellants were seeking in the Judicial Review proceedings was an order to quash the decision of the Appeals Committee but not the Othaya Land Disputes Tribunal's award which had already been adopted as an order of the court. They did not disclose that information in their affidavit filed in support of their application before the High Court. Counsel further contended that the appeals committee had jurisdiction to deal with issues to do with customary law including trust. She cited **Section 8 (10) of the Land Disputes Tribunal Act**. She cited this Court's decision in **TIMOTHY KAGONDU MURIUKI & OTHERS vs CENTRAL PROVINCE LAND DISPUTES APPEALS COMMITTEE & OTHERS, Civil Appeal No. 195 of 2009** to buttress her submission that the Appeals Committee had such jurisdiction. Ms. Gathangu however conceded that the Appeals Committee did not have jurisdiction to order cancellation of titles. That argument was not advanced before the learned Judge. She urged the court to dismiss the appeal.

20. In his brief reply, **Mr. Mwaura** for the 4th respondent opposed the appeal. He submitted that the evidence on record does not demonstrate that there was any sale agreement between Wachira Gatandi and Wambugu which could have led to subdivisions Nos. Chinga/Gikige 939, 940, 941 and 942. Counsel further submitted that it had not been demonstrated that the learned Judge was biased against the appellants. He stated that the Judge gave sufficient reasons for dismissing the Judicial Review application, having considered all the averments made by the parties and the submissions by counsel.

21. Lastly, Mr. Mwaura submitted that the 4th respondent was entitled to a share of the land as ordered by the Appeals Committee because the original land was ancestral land.

22. We have considered the rival arguments raised by counsel and we will now proceed to address the relevant grounds of appeal.

23. The Notice of Motion filed by the appellants in the Judicial Review matter sought two substantive orders. Firstly, an order of **certiorari** to quash the decision of the Central Province Land Disputes Appeals Committee award and secondly, an order of **prohibition** to restrain the Nyeri Chief Magistrate's Court from adopting the award of the Central Province Land Disputes Appeals Committee as an order of the court. It is therefore clear that the appellants did not seek to disturb the award of the Othaya Land Disputes Tribunal.

24. In the ex parte application for leave to commence the Judicial Review proceedings at pages 80 and 81 of the record of appeal, the appellant had sought leave to apply for an order of **"Certiorari and prohibition to quash the decision of the Othaya Land Disputes Tribunal and the Central Province Land Disputes Appeals Committee's award and stop the Nyeri Chief Magistrate's Court from entering/executing judgment based on these awards in respect of parcels of land no. Chinge/Gikigie/941, 942, 939 and 940."** However, in the substantive application, the applicants did not question the award of the Othaya District land Disputes Tribunal. Ground 3 of the appeal cannot therefore stand. The learned Judge could not determine a prayer that had not been sought.

25. Regarding ground 1 of the appeal, the appellants had annexed to their affidavit in support of the application for leave certified copies of Chinga/Gikigie/939, 940, 941 and 942 (see pages 89 to 96 of the record of appeal. Certified copies of the transfers of parent titles, parcels numbers Chinga/Gikigie/68 and 69 had also been exhibited. It was therefore incorrect for the learned Judge to hold that the appellants had

failed to produce all the relevant information regarding the properties in dispute.

26. Turning to ground 2 of the appeal, it is true that the appellants had not prayed for entry of judgment in terms of the award by the Provincial Appeals Committee. It is the 4th respondent who had made such a plea. The application had been filed in the Chief Magistrate's Court at Nyeri. The appellants had wrongly referred to the decision of the Appeals Committee as Award No. 31 of 2001, Nyeri, which was not correct. The cited decision was that of the Othaya District Land Tribunal. The Provincial Appeals Committee case was No. 14 of 2001.

27. Regarding ground 4 of the appeal that faulted the learned Judge of bias, we do not think that there was sufficient evidence to demonstrate that indeed the learned Judge was biased against the appellants. He may have adopted a rather unconventional way of writing a ruling where he first dismissed the appellants' application then stated the reasons therefore but that *per se* does not mean that he was biased against the appellants.

28. Looking at the remaining grounds of appeal, the only ones that require careful consideration are grounds 6 and 7 that raised the issue of jurisdiction of both the Othaya District Land Tribunal and the Provincial Land Disputes Appeals Committee. **Section 3 (1) of the Land Disputes Tribunal Act** (now repealed) limits the tribunal's jurisdiction to:

“(a) The division of or the determination of boundaries to land including land held in common;

(b) A claim to occupy or work led; or

(c) Trespass to land.”

29. A Land Disputes Tribunal was not vested with power to determine claims of ownership of registered land. The learned Judge in **WAMWEA v CATHOLIC DIOCESE OF MURANG'A REGISTERED TRUSTEES, [2003] KLR 389** correctly held that:

“Disputes over title to land are not within the jurisdiction of Tribunals and Land Appeal Committees. It can also be said that disputes over contracts are not under that jurisdiction.”

Equally, such a Tribunal did not have jurisdiction to determine claims based on alleged trust or determine whether land ownership had been procured fraudulently. Such claims could only have been referred to the High Court. In **MWANGI & ANOTHER v MWANGI, [1986] KLR 328**, it was held that Kikuyu Customary Law recognizes the law of trusts and so does the Registered Land Act. These are, however, issues that could not be dealt with by a Land Tribunal or an Appeals Committee. Further, in **MUKANGU v MBUI [2004] 2 KLR, 256**, this Court held that rights under customary law are subject to rights under written law and are excluded under the clear language of **Sections 27 and 28** of the **Registered Land Act**. In addition, it was recognized that although customary law rights are extinguished upon registration of land and that such rights are not overriding interests under **Section 30** of the **Act**, the same registration recognizes trusts in general terms without specifically excluding trusts originating from customary law.

30. The Othaya District Land Disputes Tribunal recognized that land parcels numbers Chinga/Gikigie/68 and 69, initially having been registered in the names of Gatandi Wambugu and Karimi respectively and thereafter subdivided into four subdivisions which were transferred and registered in the names of the second and third appellants, it could not issue any orders to vary that registration. The Tribunal therefore made a declaratory finding that, the 4th respondent, having not been given a share of his late father's ancestral land, should be compensated by Gatandi Wambugu. We think that was a sound finding which was made within the Tribunal's jurisdiction. It was upto the claimant, we think, to take appropriate legal action to pursue his right, perhaps by filing a suit in the High Court.

31. On the other hand, the Central Provincial Land Disputes Appeals Committee, without jurisdiction, made orders whose execution would have amounted to cancellation of titles in respect of parcels numbers **Chinga/Gikige 939, 940, 941 and 942**. The orders must be and are hereby set aside.

32. Not without considerable sympathy to the 4th respondent, who has been trying to get his rightful share of his late father's property, we must allow this appeal for reasons stated herein above. Each party shall bear its own costs of the appeal.

Dated and delivered at Nyeri this 21st day of November, 2013.

M. K. KOOME

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR

/dkm