



**IN THE COURT OF APPEAL**

**AT NYERI**

**Civil Appeal 153 of 2005**

**JAMES GAKONO NGUNGI ..... APPELLANT**

**AND**

**1. JANE NJOKI NGUGI**

**2. VERONIC MUTHONI NGUNGI ..... RESPONDENTS**

**(Appeal from a ruling of the High Court of Kenya at Embu (Omwitsa, C.A.) dated 7<sup>th</sup> June, 2001**

**in**

**H.C.C.C. NO. 25 OF 1999)**

**\*\*\*\*\***

**RULING OF THE COURT**

-  
On the 7<sup>th</sup> June, 2001, the superior court, (Omwitsa, Commissioner of Assize) sitting in Embu made the following order in *Civil Appeal No. 25 of 1999*:

**“Appeal rejected”.**

That terse order provoked the appeal before us as it was a summary rejection of an intended appeal which was laid before the said Commissioner of Assize from the Provincial Appeals Committee at *Nyeri, No. 135/99*. The Appeals tribunal had dismissed an appeal from the decision of Gichugu Land Disputes Tribunal awarding a portion of two acres to the 1<sup>st</sup> respondent here from land parcel No. Baragwi/Kariru/128 which was registered in the name of the appellant.

The land dispute commenced before Gichugu Land Disputes Tribunal on 3<sup>rd</sup> February, 1999 when the respondents herein filed a complaint against the applicant claiming that he held land parcel Baragwi/Kariru/128 in trust for them. They wanted the Trust ended and their rightful share of the land given to them. The Tribunal agreed with them and gave 2 Acres to the 1<sup>st</sup> respondent while the remaining 5.12. acres would remain with the appellant. It would appear that the award was read before the Senior Resident Magistrate’s Court at Kerugoya on 25<sup>th</sup> June, 1999, and that at the time of reading the award, judgment was also entered in accordance with the decision of the Tribunal. In the same breath however, an order was made for a right of appeal to the “*Provincial Land Disputes Officer Tribunal*” within 30 days. We are informed by both counsel before us that there is a stay of execution and the *status quo* has since been maintained.

The applicant appealed to the Provincial Appeals Committee at Nyeri in *Appeal No. 135/99* and the appeal was dismissed on 13<sup>th</sup> October, 1999. He appealed further to the High Court in *Civil Appeal No. 25 of 1999* filed on 12<sup>th</sup> November, 1999 setting out the following grounds of appeal:

**“(i) The Tribunal erred in law and misdirected itself in proceeding to hear and determine this matter whereas it had no Jurisdiction to do so.**

(ii) The Tribunal erred in law and fact in proceeding to award the respondents 2 acres out of land parcel No. Baragwi/Kariru/128 against the weight of evidence.

(iii) The Tribunal erred in law in calling for evidence on Appeal.

(iv) The Tribunal erred in finding that the respondent holds a portion of parcel of land No. Baragwi/ Kariru/128 in trust for the Respondents”.

That appeal could only have been filed pursuant to **Section 8 (9)** of the *Land Disputes Tribunal Act (Act No. 18 of 1990)* (“the Act”) which provides as follows:

**“Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of; provided that no appeal shall be admitted to hearing by the High Court unless a Judge of the court has certified that an issue of law (other than customary law) is involved:.**

It was incumbent upon the superior court to consider and determine in accordance with that section whether there was an issue of law involved and if so satisfied, issue a certificate accordingly. But the superior court did no such thing and instead, summarily rejected the appeal as stated earlier.

The appellant now tells us through learned counsel Miss. Kimani, that he was pre-empted from raising the issue of jurisdiction which is a weighty issue of law by the failure by the superior court to issue the requisite certificate under **Section 8 (9)** (supra). In her submission, the jurisdiction issue arises because under **Section 3** of the Act, the Tribunal’s jurisdiction is circumscribed and does not extend to considerations of Trust in Registered land or to determination of ownership of land where the land was registered.

For his part, learned counsel for the respondents, Mr. Magee contended that the summary rejection could only have been in accordance with **Section 8 (9)** of the Act although the superior court did not explicitly say so. It can be presumed. Furthermore, he submitted, the record shows that the Award by the Land Disputes Tribunal was made a judgment of the Court and it therefore ceased to exist before the appellant went to the Provincials Appeal Committee. There was a danger therefore that the courts may make orders in vain.

We have considered the issues raised on both sides of the argument and we are persuaded by the appellant that the superior court committed an error in principle which we must interfere with. The terse order which is being challenged is silent on the provisions of the law invoked. We do not agree, as we are invited to do by the respondent, that there is a presumption that the superior court invoked **Section 8 (9)** and declined to issue the certificate required under that section. There was no difficulty in so stating if the learned Commissioner of Assize was aware of the provisions of that section and intended to apply them. On the contrary, we suspect that the learned Commissioner of Assize erroneously invoked the provisions of **Section 79B** of the *Civil Procedure Act* which governs intended appeals from subordinate courts. We do not know whether the learned Commissioner of Assize, properly directing himself on the Memorandum of Appeal placed before him, would have decided that there was no issue of law raised and therefore declined to issue the necessary certificate. On the face of it, the issues raised are not frivolous and deserve due consideration.

In the result, we allow the appeal with the consequence that the appeal before the High Court shall be reinstated for consideration in accordance with the law. The appellant shall have the costs of the appeal.

**Dated and delivered at Nyeri this 19<sup>th</sup> day of November,2010.**

**M. OLE KEIWUA**

.....  
**JUDGE OF APPEAL**

**P. N. WAKI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR