



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 (Dimitro, C.A.) dated 17 June 2005)

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H.C.C.C. NO. 25 OF 1999

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JUDGMENT OF THE COURT

On the 7th June, 2001, the superior court, (Cmmtus, Commissioner of Assize) sitting in Embu made the following order in Civil Appeal No. 25 of 1999

Appeal rejected

This leave order provided the appeal before us as it was a summary rejection of an intended appeal which was held before the said Commissioner of Assize from the Provincial Appeals Committee at Ngari. No. 13550. The Appeals Tribunal had dismissed an appeal from the decision of Gichugu Land Chieftain Tribunal awarding a portion of two acres to the 1st respondent here from land parcel No. Baragwi/Kariu/128 which was registered in the name of the appellants.

The land dispute commenced before Gichugu Land Chieftain Tribunal on 17th February, 1999 when the respondents herein filed a complaint against the applicant claiming that he had land parcel Baragwi/Kariu/128 in trust for them. They wanted the Trust ended and their right/ share of the land given to them. The Tribunal agreed with them and gave 2 Acres to the 1st respondent while the remaining 5.12 acres would remain with the applicant. It would appear that the award was read before the Senior Resident Magistrate's Court at Kericho on 25th 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 month however, an order was made for a right of appeal to the 'Provincial Land Chieftain Tribunal' within 30 days. We are informed by both counsel before us that there is a slip of execution and the award apart has never been implemented.

The applicant appealed to the Provincial Appeals Committee at Ngari in Appeal No. 13550 and the appeal was dismissed on 13th October, 1999. He appealed further to the High Court in Civil Appeal No. 25 of 1999 filed on 12th November, 1999 setting out the following grounds of appeal:

(1) The Tribunal erred in law and misdirected itself in proceeding to hear and determine this matter whereas it had no jurisdiction to do so.

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

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

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

This appeal could only have been filed pursuant to Section 9 (b) of the Land Chieftain Tribunal Act (Act No. 18 of 1992) (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 relies on through learned counsel Mwa, 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 (2)** (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. Mugege contended that the summary rejection could only have been in accordance with **Section 4 (2)** 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 Provincial 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 overturn with. The writ order which is being challenged is silent on the provisions of the law involved. We do not agree, as we are invited to do by the respondents, that there is a presumption that the superior court invoked **Section 8 (2)** and declined to issue the certificate required under that section. There was no difficulty in so stating if the learned Commissioner of Appeals was aware of the provisions of the section and intended to apply them. On the contrary, we suspect that the learned Commissioner of Appeals erroneously invoked the provisions of **Section 70B** of the Civil Procedure Act which governs intended appeals from subordinate courts. We do not know whether the learned Commissioner of Appeals, 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 appellants shall have the costs of the appeal.

Dated and delivered at Nairobi this 19th day of November 2010.

H. OLE KESHTIA

JUDGE OF APPEAL

P. N. WAKI

JUDGE OF APPEAL

AL-KADIR VISRAM

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

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