



Case Number:	Civil Appeal 153 of 2005
Date Delivered:	19 Nov 2010
Case Class:	Civil
Court:	Court of Appeal at Nyeri
Case Action:	Ruling
Judge:	Moiyo Matayia Ole Keiwua, Alnashir Ramazanali Magan Visram, Philip Nyamu Waki
Citation:	James Gakono Ngungi v Jane Njoki Ngugi & another [2010] eKLR
Advocates:	-
Case Summary:	Civil Practice and Procedure – appeal – appeal against the decision of the superior court summarily rejecting an intended appeal laid before the said Commissioner of Assize – jurisdiction of Land tribunals in dealing with disputes - manner in which appeals from Land Disputes tribunals ought to be filed – court consideration – whether the superior court misdirected itself in principle in dismissing the matter
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-

Sum Awarded:

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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 (Omukia, C.A.) dated 7th June, 2005)

is

H.C.C. NO. 25 OF 1999

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REPLY OF THE COURT

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

"Appeal rejected".

The same order provided the appeal before us as it was a summary rejection of an intended appeal which was laid before the said Commissioner of Appeals from the Provincial Appeals Committee in Ngari, No. 13559. The Appeals Tribunal had dismissed an appeal from the decision of Gichugu Land Disputes Tribunal awarding a portion of two acres to the 1st respondent here from land parcel No. Baragwet/Karitu/128 which was registered in the name of the appellant.

The land dispute commenced before Gichugu Land Disputes Tribunal on 2nd February, 1999 when the respondents herein filed a complaint against the applicant claiming that he held land parcel Baragwet/Karitu/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 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 20th 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 award quo has since been maintained.

The applicant appealed to the Provincial Appeals Committee in Ngari in Appeal No. 13559 and the appeal was dismissed on 17th 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 entrenches 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. Baragwet/Karitu/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. Baragwet/Karitu/128 in trust for the Respondents.

The appeal could only have been filed pursuant to Section 8(6) of the Land Disputes Tribunal Act (Act No. 18 of 1995) (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. Karani, 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) (b)(ii). In her submission, the jurisdiction issue arose 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. Mwangi contended that the summary rejection could only have been in accordance with Section 8 (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 interfere with. The error under which is being challenged is clear on the provisions of the law involved. 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 (2) and declined to issue the certificate required under that section. There was no difficulty in so doing if the learned Commissioner of Appeals was aware of the provisions of that section and intended to apply them. On the contrary, we suspect that the learned Commissioner of Appeals erroneously invoked the provisions of Section 7(2) of the Civil Procedure Act which governs 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 appellant shall have the costs of the appeal.

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

M. OLE KEMUA

JUDGE OF APPEAL

P. N. WANGI

JUDGE OF APPEAL

ALMASHUR YUSUF

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

[\[Signature\]](#)



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