



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**ENVIRONMENT & LAND COURT**

**APPEAL CASE NO.60 OF 2011**

**PELESIA ATIENO ONYANGO.....APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA.....1ST RESPONDENT**

**MALAKI NDONG'A OGWAYO.....2NND RESPONDENT**

**JUDGMENT**

1. **Pelesia Atieno Onyango**, the Appellant, filed this appeal against the decision of the Nyanza Provincial Land Dispute Appeals Committee of 16th February 2011 raising five grounds marked 1 to 5. The Appellant named the **Republic** and **Malaki Ndonga Ogwayo** as the 1st and 2nd Respondents. Grounds 1 to 3 deal with whether or not the Land Disputes Tribunal and Appeals Committee had jurisdiction under the Disputes Tribunal Act to determine the issue of ownership of registered land. The three grounds will be taken as one ground for the purposes of this judgment. The second and third grounds are ground 4 and 5 on the memorandum of appeal.
2. The 2nd Respondent filed a replying affidavit sworn on 28th February 2015 in which he states that the appeal should be dismissed with costs.
3. When the appeal came up for hearing on 19th October 2015 Counsel for the 1st Respondent conceded to the appeal. The Appellant relied on the grounds on the memorandum of appeal and the annexures thereto. The 2nd Respondent indicated that he was relying on the replying affidavit sworn on 28th February 2015.
4. That this being a second appeal, the court will only pronounce itself on matters of law raised in the appeal which are summarized as below:
  - (a) Did the Tribunal and the Appeals Committee have jurisdiction to determine the issue of ownership of land parcel **North Gem/Maliera/286** which is registered land?
  - (b) Were the Tribunal and the Appeals Committee properly constituted in accordance with the law when they heard and decided on the ownership of land parcel **North Gem/Maliera/286**? If not properly constituted, what is the legal effect on their decision.
  - (c) Was the appeal before the Appeals Committee time barred or filed out of time?
5. The court has carefully considered the grounds on this memorandum of appeal, the annexures

thereto, the 2nd Respondent's affidavit and come to the following consideration;

(a) That under section 3(1) of the repealed Land Disputes Tribunal Act under which the Land Disputes Tribunal and Provincial Land Disputes Appeals Committee drew their jurisdiction had limited their power to disputes "as to the division of, or the determination of boundaries to land including land held in common, a claim to occupy or work land or trespass to land."

The claim the Appellant had lodged with Siaya Land Disputes Tribunal and registered as case number **10 of 2008** was for ownership of registered land parcel **North Gem/Maliera/285**. The Tribunal order of 9th October 2008 included revoking, cancelling of the Respondent's names from the register of the land and substituting thereof the appellant's names. The Appellant's claim and Tribunal's order divesting the Respondent of the title to the suit land and vesting it on the Appellant was beyond the powers set out under Section 3(1) of the said Act and the award was therefore ultra vires, null and void ab initial. To the extent that the Appeal Committee decision of 16th February 2011 allowed the Respondent's appeal, their decision was therefore correct.

(b) That the composition of the Tribunal is set out under section 4(3) of the said Act. It has to consist of a Chairman and two or four elders bringing a total of either three or five in number. The copy of the Tribunal proceedings attached to the memorandum of appeal has the Chairman and three members making a total of four contrary to the provision of section 4(2) of the Act. The tribunal was therefore not properly constituted and their decision was made by a panel that was not known in law. In relation to the Appeals Committee, Section 9(2) of the Act required a panel of three members. The Appeals Committee proceedings attached to the memorandum of appeal was by a panel of three members and therefore constituted in accordance with the law.

(c) That a party to a dispute before the Tribunal was required by Section 8(1) to file an appeal with the Appeals Committee within 30 days of the decision. The Tribunal decision is dated 9th October 2008. The lower court proceedings in Siaya PMC Land Case No.102 of 2008 which are attached to the Memorandum of appeal indicates that the Tribunal's award was filed with the court on 5th December 2008 and adopted by the court on 20th January 2009. This court will take that date as the one on which the Tribunal's award was brought to the attention of the parties. The running of the 30 days within which to file the appeal started on that date. The appeal with the Appeals Committee was registered as case number 6 of 2009. The Appellant did not avail evidence to prove or support her claim that the appeal was filed outside the 30 days window.

6. That for reasons set out above the court finds that the Land Disputes Tribunal had no jurisdiction to determine the dispute filed by the Appellant before it. It had no jurisdiction to issue the orders divesting the title to the land from the Respondent and awarding it to the Appellant. The Appeals Committee was therefore right to allow the appeal filed by the Respondent but should have gone further to declare that the Tribunal had exceeded its powers and its decision was null and void. The

Appeals Committee should also have pronounced itself on the composition of the Tribunal and ruled that it was not properly constituted and its decision was therefore null and void. The court therefore allows the appeal as follows:

(a) The Siaya Land Disputes Tribunal was not properly constituted and acted beyond its powers and its award was null and void.

(b) That though the Provincial Land Disputes Appeals Committee decision to allow the appeal was correct, its order on ownership of the suit land was without jurisdiction.

(c) That the appeal is allowed with each party bearing their own costs.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and delivered this **28th day of February 2016**

In presence of;

APPELLANT PRESENT.

RESPONDENTS 2ND RESPONDENT PRESENT.

COUNSEL M/S Aliongo for 1st Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/1/2016**

28/1/2016

S.MKibunja J

Oyugi court clerk.

Appellant present

2nd respondent present

M/S Aliongo for 1st Respondent

Court: Judgment delivered in open court in presence of Appellant, 2nd Respondent and M/S Aliongo for 1st Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/1/2016**