REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUSIA.

HIGH COURT CIVIL APPEAL NO. 1 OF 2009.

JOHN MESHACK MAKOKHA.....APPLICANT

VERSUS

WYCLIFFE OTHIAMBO NABWIRE.....1ST RESPONDENT

JOHNSTONE ODUORI WABWIRE.....2ND RESPONDENT

J U DGMENT

1. The appeal herein arises from the decision of Provincial Land Disputes Appeals Tribunal, Kakamega dated 7/8/2009. The decision was as follows:

(a) The appeal is allowed.

(b) The Nambale Land Dispute Tribunal elders court ruling is reyoked.

(c) The parties to share land as follows:

John Makokha 18.50 Ha. Wycliffee Ojiambo Nabwire and Johnstone Odwori Nabwire 8.00 Ha.

(d) The parties to invite District Surveyors to implement the order and share costs"

2. The disputants were **JOHN MESHACK MAKOKHA,** who was the appellant, and **WYCLIFFEE ODHIAMBO NAMBWIRE** and **JOHNSTONE ODUORI NAMBWIRE,** who were the respondents. The dispute related to land parcels NO'S BUKHAYO/EBUSIBWABO/520 and 521.Land parcel NO. BUKHAYO/EBUSIBWABO/521 MEASURES 22.66 ha and is registered in the name of the appellant-JOHN MESHACK MAKHOHA. Land parcel NO. BUKHAYO/EBUSIBWA/520 measures 3.8 Ha and is for the two respondents -WYCLIFF OJIAMBO NAMBWIRE and JOHNSTONE ODUORI NAMBWIRE.

3. The dispute had started earlier at BUSIA - NAMBALE LAND DISPUTES TRIBUNAL where the two respondents who were claimants there, had complained that the appellant who was objector, had short-changed them in the ownership of the two parcels of land.The respondents arguments before the first tribunal was simple, they were children of the same father and they were entitled to share the whole land equally. But the appeallant had gone ahead to register himself as owner of 22.66Ha leaving the respondentswith a mere 3.8 Ha.

4. The first tribunal had the matter and found that the appellant had a justifiable basis for doing what he did. And the basis was that an old boundary existed clearly showing what the appellant was entitled to and what the respondents could claim as their own. The respondents claim was dismissed and they appealed to the second (or appellate) tribunal.

5.The decision of the appellate tribunal essentially over turned the decision of the first tribunal and found that the two respondents herein were entitled to more. That is why their entitlement was increased from 3.84 Ha to 8.00 Ha. The appellant was dissatisfied and he appealed here.

6.The grounds of appeal are as follows:

I. That the tribunal erred in law by entertaining a claim for subdivision/ownership and ordering for subdivision and ownership **', the parties to share land as follows",** when it lacked jurisdiction.

II. That the tribunal erred in law in entertaining a claim which was time barred.

III. That the tribunal erred in law in entertaining a claim challenging first registration of the aforesaid parcels of land.

IV. That the tribunal erred in law in failure to appreciate that the respondents herein had no cause of action against the appellant.

V. That the tribunal erred in law in failure to find that the respondents herein lacked capacity to make the claim.

VI. That the tribunal erred in failure to find that the appeal was incompetent and ought to have been rejected summarily.

VII. That the decision of the tribunal was a nullity.

Reasons whereof the appellant prays that;

a) This appeal be allowed.

b)The appeal Tribunal committee decision be quashed.

c) The respondents to pay costs of the appeal,the appeals committee and Division Tribunal

7. The appeal was canvassed by way of written submissions. The appellants submissions were filed on 3/11/2014 while the respondents filed their submissions on 11/11/2014. The appelant pointed out the mandate of the tribunal and then went on to attempt a demonstration of the shortcomings of its decision. The mandate consisted in handling and determination of cases involving.

a)The division of, or determination of boundaries to land, including land held in common.

b) A claim to work or occupy land.

c) Trespass to land.

That was the mandate spelt out in section 3 (1) the Land Dispute Tribunals Act (now repealed).

8. The appellant then argued that the tribunal went beyond its mandate. It dealt with the issue of title to land, a mandate not conferred on it. A further argument was that the respondents appeal, to the tribunal was time barred. And in order to conceal this fact, the respondents appeal was given NO 37A of 2008. According to the appellant there must have been appeal NO.37 of 2008 and appeal, NO 38 of 2008. Appeal NO. 37A of 2008 was sneaked in between these two to appear as if it was within time .And

according to the appellant the mandatory period for appealing was 30 days. And by bringing the appeal outside the 30days allowed, the appeal according to appellants submissions, was rendered nugatory.

9. The appellant also argued that the ownership of the land by him was through first registration. His position was that the tribunal could not interfere with such ownership. It was argued further that the respondents had no cause of action. The appellant has had vacant possession of the land since 1967. The respondents have never stayed or laid claim to the land until year 2007. This being the case, their claim is time-barred.

10. More arguments were further availed, one of them being that the father to the appellant and the respondents, one Nabwire, died when there was a clear boundary demarcating both portions of land. The father had two wives, and therefore two families. One wife had settled with the father on one portion. The other wife had settled on the other portion with her children. The respondents, appellants seem to argue, could only claim where their father had settled. They had no Locus Standi to claim the other portion.

11. The respondents on the other hand argued that the proceedings before the tribunal were perfectly within the law .They focused on boundary and trespass. And the appeal tribunal evaluated the evidence before the first tribunal well and made a decision. According to the respondents, they were properly before the tribunal, had locus-standi, and the evidence given was within the legal mandate given to the tribunal. They were not time barred and the tribunal properly handled the issue of registration of land. The respondent ultimately urged the court to dismiss this appeal.

12. I have had a look at the entire case, the record of appeal and the rival submissions. The appeals tribunal increased the size of the respondents land from 3.84 Ha to 8.00 Ha. The appellant correctly outlined the jurisdiction of the tribunal. That jurisdiction does not include power to award land or a mandate to increase somebody's ownership. And the appeals tribunal did not have an inherent jurisdiction of its own. It could only do what the applicable statute allowed it to do. Where then did it get the power to increase the respondents land? It is plain to me that the tribunal acted without jurisdiction.

13. But the respondents view of this issue is a bit baffling. It submitted that the appellant's position is an attempt to **“oust the legal and territorial jurisdiction of a body established by a statute enacted by parliament"**

Wrong; the appellant has not suggested that the tribunal was territorially out of place. It was not suggested also that the tribunal was not a legal body. He is simply saying that the tribunal acted without a legal mandate. And he is right on this score.

14. The appellant also raised the issue of time. The issue was raised in two

perspectives: first, the appeal was filed out of time. Second, appellant has held the title since 1962 and as the suit was filed in year 2007,it was time barred.

15. It is difficult to agree with the appellant on the issue of time. And here is why. The basis for saying that the appeal was filed out time is that the appeal was filed as NO. 37A. According to the appellant, there was appeal NO. 37 and appeal NO. 38. The appellant speculated that the sneaking of 37A between NO.37 and 38 meant that the appeal was being filed out of time.No other explanation was proffered.

16. One would have expected that the appellant would give clear information on the tribunal's system of numbering the appeals before it. As things stand, one cannot tell whether that is how the tribunal used to allocate numbers to its matters or whether NO. 37 A was an improper insertion between number 37 and 38. And when one is taking of time, one needs to talk of dates, not numbers. Dates needed to be given to show that the appeal was filed outside the 30 days time frame allowed by law. This was not done. The appellant simply expected the court to accept his speculation as gospel truth.

17. The other averment relating to time is that the appellant became owner in 1967 .No evidence is on record to support this. A reading of the deliberations of the appellate tribunal shows that the registered

owners before the appellant were Wickliff Ojiambo Nabwire, Johnstone Odwori Nabwire and John Nabwire. They became such owners in 1971 but records were changed in year 2007 to show that the appellant had become the new owner of parcel NO. 521 measuring 22.66 Ha.

18.The appellant was therefore wrong on the aspect of time and his position is rejected.

19. The appellant would also like to be viewed as the first registered owner of the land. As pointed out, there were people registered as owners in year 1971.The appellant became registered owner in the year 2007.How then can he be treated as the first registered owner? The submission that the appellant was such owner is a misrepresentation and if it is not ,then all the necessary details to show it were not availed to prove the point.

20. A further point raised was that the respondents had no cause of action against the appellant. According to the appellant, the respondents mother was settled in one portion.The portion seems to be parcel No.520.The appellant on the other hand was on parcel No. 521. The respondents argued the appellant had no business claiming parcel BO.521.

21. The appellant seem not to reckon with the position of the respondents. According to the dents, the land belonged to their late father. That father was the appellants father too. The respondents arguments was that they were all equally entitled to the land.

22. It is actually a matter of evidence as to which of these two positions is the correct position. The appellate tribunal seems to have been persuaded by the respondents position. The appellant needed to demonstrate well that this position was wrong.

23. It is important to note that the only important point for determination in this appeal was ground one. That is the ground that dealt with jurisdiction. It is a point of law. This is the only ground that the appellant proved well. He failed to prove the other grounds. In fact some of the grounds seemed to require canvassing of evidence. The law applicable at the time only allowed the court to consider the appeal on points of law only.

24. When all is considered however the appeal herein succeeds because the appellants tribunals ultimate decision was covered by ground one and that ground has succeeded. The appeal is successful but when it comes to the issue of costs, the court realizes that this is a delicate family matter. And the success is largely due to the fact that the matter was taken to a forum without jurisdiction. Each side therefore will bear its own costs.

25. The parties may consider taking the matter to a forum which will not be constrained by issues of jurisdiction. This however is a suggestion and should not be construed as an order or a directive.

A.K.KANIARU

JUDGE

DATED AND DELIVERED ON 18TH DAY OF AUGUST 2016.

IN THE PRESENCE OF :

PLAINTIFF……

DEFENDANT……

JUDGE