



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 168 OF 2011

(An Appeal arising from the Decision of the Western Provincial

Appeals Committee delivered on 27th September, 2011

vide Appeal Case No. 135 of 2006)

BETWEEN

CLEMENT SATIA LUTALAYI 1ST APPELLANT

JOSINA NASIMIYU 2ND APPELLANT

SARAH TALAYI 3RD APPELLANT

VERSUS

MARY TABITHA MUSOTSI 1ST RESPONDENT

JOEL ALUBENGO TALAYI..... 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the decision of the Western Province Appeals Committee made on 27/9/2011 in appeal case No. 135 of 2006. In its decision, the Appeals Committee dismissed an appeal by **CLEMENT SOITA LUTAYI, JOSINA NASIMIYU** and **SARAH TALAYI**, (the appellants), in which they had sought the reversal of the award by Kabras Land Disputes Tribunal made in favour of **TABITHA MUSOTSI** and **JOEL ALUBENGO TALAYI**, (the respondents)

2. The Respondents had lodged a claim before Kabras Land Disputes Tribunal and asked the Tribunal;

- a) To determine the case and share the parcel of land on the ground;
- b) To deregister ownership of the three objectors (parcel No S/Kabras/Chesero/1668).
- c) Sub-divide parcel No. S/Kabras/Chesero/1668 to all beneficiaries and be registered (ownership).

3. After hearing the parties, the Tribunal granted the Respondents wish as follows;

RULING:

ELDERS AWARD IS AS FOLLOWS:

- 1) Joel Alebengo - 3.00 acres
- 2) Mary Musotsi - 2.5 acres
- 3) Albert Murabwa - 1.5 Acres
- 4) Philomena Woni Talayi - 1.5 Acres
- 5) Agnes Talayi - 1.00 Acres

Executive Officer Kakamega High Court to sign all relevant forms for transactions on behalf of the registered owner.

District Land Registrar Kakamega to issue new title Deeds as per the award.

4. It is this award that triggered the appeal to the Provincial Appeals Committee which was also dismissed prompting the present appeal to this court in which the appellants have raised five (5) Grounds of appeal as follows;

- 1. The decision of Western Provincial Appeals Committee offended the mandatory provisions of Section 8 (5) of the Land Disputes Tribunal Act (No. 18 of 1990).**
- 2. The Western Provincial Appeals Committee erred in law in upholding the decision of Kabras Land Disputes Tribunal vide Case No. 28 of 2005 which was bad in law.**
- 3. The Western Provincial Appeals Committee erred in law in upholding the decision of Kabras Land Disputes Tribunal when it was crystal clear that the Tribunal lack (sic) jurisdiction.**
- 4. The Western Provincial Appeals Committee erred in law in upholding a decision that was biased and likely to cause miscarriage of justice.**
- 5. The Western Provincial Appeals Committee decision offended the mandatory provision of Section 8 (7) of the Land Disputes Tribunal Act No. 18 of 1990.**

5. The appellants asked that their appeal be allowed and the decision of both the Kabras Land Disputes Tribunal and the Provincial Appeals Committee be set aside.

6. Parties filed written submissions which are on record. It has been submitted on behalf of the appellant that the Kabras Land Disputes Tribunal by dint of **Section 3 (1)** of the retired Land Disputes Act (No.18 of 1990), did not have jurisdiction to deregister ownership or to subdivide the land as it purported to do. According to the appellant's counsel, the Act was clear on the matters the Tribunal could adjudicate upon and the matter before it was not one of such matters.

7. For the respondents, it has been submitted that the Tribunal acted within the law and did not violate Section 3 (1) of the Act. According to counsel for the respondents, the claim before the

Tribunal was a claim to occupy and work or use land and that the Tribunal ascertained the portion to be occupied by each claimant. It was further submitted that since the claim was for occupation and use of land, the Tribunal was right in determining the actual size each party was entitled to and therefore the Tribunal did not err. He asked that the appeal be dismissed.

8. Mary Musotsi and Joseph Alubengo, the respondents herein, had lodged a claim by way of Complaint before Kabras Land Disputes Tribunal being No. 28/2005 claiming for a portion on parcel No. South Kabras/Chesero/1668 which belonged to one Nathan Lutalayi Murabwa, (now deceased). The deceased had several wives and had given land to his family members but remained the registered owner of the suit land. On demise, the appellants registered themselves as owners of the land by transmission leaving out the respondents. This prompted the respondents to file a claim before the tribunal each seeking a portion of the land as earlier reproduced hereinabove. The respondents had told the Tribunal that the suit land was a family land and that they were entitled to a share of the land as beneficiaries of the estate of the deceased, a claim the Tribunal acceded to. The appellants appeal to the Provincial Appeals Committee was declined forcing them to file this appeal before this court.

9. This being a second appeal, by dint of **Section 8 (9)** of the retired Act this court will only entertain the appeal on a point of law. **Section 8 (9)** provided as follows;

S. 8 (9) "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."

10. The appellants have complained on ground 1 of the appeal that the Appeals Committee's decision offended **Section 8 (5)** of the retired Act. **Subsection (5)** is to the effect that an appeal should be heard by a Committee comprised of three members appointed in accordance with **Section 9** of the Act. The Provincial Appeals Committee's decision was signed by the Chairman and four other members making the number five (5). This is in violation of **Section 8 (5)** of the Act. **Section 9 (2)** of the Act is also clear that the Appeals Committee shall sit in a panel of three members. In the case of this appeal, the Appeals Committee was comprised of Five (5) members which was contrary to law and this ground of appeal is therefore well founded and must succeed.

11. It has also been submitted on behalf of the appellants at ground 3 of the appeal, that the Kabras Land Disputes Tribunal acted outside its jurisdiction and that the Provincial Appeals Committee erred in law by upholding that decision. Kabras Land Disputes Tribunal in its award ordered that parcel No. South Kabras/Chesero/1668 be subdivided into five portions and shared out so that Joel Alebengo gets 3 acres, Mary Musotsi 2.5 acres, Albert Murabwa 1.5 acres, Philomena Woni Talayi 1.5 acres and Agnes Talayi 1.00 acres.

12. From the evidence tendered before the Tribunal, the appellants are the registered proprietors of parcel of land No. South Kabras/Chesero/1668. This can be seen from a Search produced before the Tribunal and dated 15/6/2005 which showed that parcel No. South Kabras/Chesero/1668 was registered in the names of Clement S. Lutalayi, Josina N. N. Tawai and Talayi Sarah. They were registered as proprietors on 4/3/2002 and a Title Deed issued in their names on 7/3/2002.

13. This being a registered land under the retired Registered Land Act, (Cap. 300), Laws of Kenya, the Tribunal was wrong to order sub-division of a registered land thus interfering with proprietorship of the appellants. By ordering sub-division and transfer of the appellants' land into the names of the respondents, the Tribunal acted outside its jurisdiction. The Tribunal was dealing with a claim to land which it was excluded from entertaining. Its action was therefore contrary to law and exceeded its mandate and jurisdiction.

14. My finding is fortified by the decision in the case of **Ololunga Land Disputes Tribunal Ex-parte Isaiah Kiplangat Cheluget (NB HC Misc. Application No. 926/1999)**, in which **Aganyanya, J.** (as he then was) held as follows;

“Under the Land Disputes Act (No. 18 of 1990) the functions of the tribunal are limited to the division of, or the determination of boundaries to land including land held in common, a claim to occupy or work on land or trespass to land. (See Section 3 (1) of the Act). What the tribunal in the case subject to this application engaged itself in, would end up with rectification of the register but in the circumstances prevailing herein this would go against the spirit of Section 143 (1) of the registered land Act Cap.300.

..when the (Land Dispute Act gives a member of the tribunal power to decide on the division or occupation of land it is not saying that the tribunal should encroach on land registered in individual name and begin dividing it for the benefit and occupation of third parties ... The tribunal has no jurisdiction to change the position for a registered land...”

15. Further in the case of **Jotham Amunavi –vs- The Chairman, Sabatia Division Land Disputes Tribunal and Another – Civil Appeal No. 256 of 2003 cited in Republic –vs- Kiambu District Land Disputes Tribunal & Ano. Exparte Teresiah Wambui Gikuna & Another JR ELC No. 13 of 2011** it was held that;

“If the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels, opening a register in respect of each subdivision and thereafter the transfer of the subdivision of half acre, it is clear that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of Section 3 (1) of the land Disputes Tribunal Act, as such disputes can only be tried by the High Court or by the Resident Magistrate’s Court in cases where such latter court has jurisdiction.”

16. That being the legal position, the Western Province Appeals Committee was wrong in upholding the decision of Kabras Land Disputes Tribunal and just like the Tribunal, fell in error, The Appeals Committee was under obligation to ensure that the decision of the tribunal was in accordance with the law but since this was not the case, its decision to uphold an award made without jurisdiction was wrong and must be interfered with.

17. An award that was made without jurisdiction is unlawful. The Appeals Committee adopted this award and as complained of by the appellants in the 2nd ground of appeal, the decision of the Tribunal was bad in law by virtue of having been made without jurisdiction and the Appeals Committee was in error in adopting it.

18. Having determined that the decision of Kabras Land Disputes Tribunal was made without jurisdiction and that the Appeals Committee was wrong in upholding that decision, I do not think it is necessary for me to pronounce myself on the 5th ground of appeal that the Appeals Committee offended Section 8 (7) of the Act for not giving reasons for its decision. Those reasons would still be unlawful.

19. Consequently, this appeal succeeds and the decisions of Kabras Land Disputes Tribunal made on 14/6/2006 in Tribunal case No. 28 of 2005 and Western Province Appeals Committee made on 27/9/2011 in appeal case No. 135 of 2006 are hereby set aside. The order made for subdivision of parcel No. South Kabras/Chesero/1668 is also rescinded.

20. There will be no order as to costs.

Dated and delivered at Kakamega this 25th day of March, 2015

E. C. MWITA

JUDGE