



**COPY**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 201 OF 2008**

**LUCAS MWAKINA JUSTO ..... APPELLANT**

**- VERSUS-**

**ALPHONSE M. MWALIMO ..... RESPONDENT**

**JUDGEMENT**

[1] The applicant raised five grounds of appeal in his amended grounds of appeal filed in court on 9th of October, 2012. Of all these grounds I find ground number one (1) pertinent in this appeal because it raises the issue of jurisdiction since it is alleged that the tribunal had no jurisdiction to deal with title to land.

The other issue that is pertinent, raised by the respondent is whether or not there is a valid appeal in view of the fact it is alleged that under Section 8(9) of the Land Disputes Tribunal Act that no appeal lies since no Judge has certified that an issue of law (other than customary law) is involved.

These two issues to my mind once determined one way or the other will comprehensively and finally determine this appeal. The issue of admission should come first, as it should before any appeal is admitted.

Is there a valid appeal in this case?

Sec 8(9) of the Act provides as follows.

*"provided that no appeal shall be admitted to hearing by the High Court unless a Judge of the court has certified that issue of law (other than customary law) is involved."*

To the best of my search on this file, the appeal herein does not appear to have been admitted for hearing at all. Is this fatal to the filed appeal? **In Ncarubi Mberia v Geoffrey Mugambi John Meru Civil Appeal No. 2 of 2004** the court said

*"The fact that the parties have now submitted in writing in respect of this appeal before the appeal is*

*admitted for hearing is not prejudicial in my view. There will be no prejudice suffered by either party if at this point in time I make a finding that the appeal does raise a point of law and I do admit the appeal for hearing."*

The court relied on ***Solomon M' Irura Mathiu v Stanley M'Ikiara Civil Appeal No. 52 of 2003*** where the court held that proceeding before a certificate under proviso to section 8 (9) of the Land Disputes Tribunal Act was issued, where the Appeal involves a point of law is not fatal. The appeal herein raised a point of law in its first ground of appeal namely jurisdiction.

I find that the appeal herein is based on a point of law and I consequently admit the same for hearing.

The other issue is whether the tribunal had jurisdiction when it decided to award six acres to the plaintiff.

Section 3 of the Land Disputes Tribunal Act provides as follows;

*3(1) subject to this Act, all cases of civil nature involving disputes as to -*

*(a) the division of a or determination of boundaries to land, including land held in common.*

*(b) a claim to occupy work land; or*

*(c) trespass to land*

*shall be heard and determined by a tribunal established under Section 4 ( of the act).*

The above section does not empower the tribunal to determine title to land as they did in this case. There are a myriad of judgments on this point that have been handed down by the Court of Appeal and the High Court and that the law is settled. The website is full of those rulings and judgments. The tribunal therefore lacked jurisdiction when it awarded six (6) acres to the respondent. The Provincial Appeals Tribunal was wrong when it dismissed the applicants appeal and confirmed the tribunal award. The end result is that this appeal is allowed both the Provincial Appeal Tribunal and the Land Disputes Tribunals award are set aside with costs to the applicants.

**Dated and delivered in open court at Mombasa this 20th day of June, 2014.**

**S. MUKUNYA**

**JUDGE**

**20.6.2014**

In the presence of:

Wachira advocate for plaintiff/respondent

Magollo advocate for defendant/applicant