



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Appeal 78 of 2007**

**ELIAKIM OBUTSIKO ..... 1<sup>ST</sup> APPELLANT**

**GILBERT OMUSALI ..... 2<sup>ND</sup> APPELLANT**

**JAMES OMUSALI ..... 3<sup>RD</sup> APPELLANT**

**V E R S U S**

**FANUEL ONGENGE MABAHA ..... RESPONDENT**

**J U D G M E N T**

This appeal emanates from the decision of the Western Provincial Appeals Committee in case number 84 of 2001. The grounds of appeal are that the Appeals Committee did not allow the appellants to state their case, only two members sat in the appeal without the chairman, the respondent's claim was time barred, the committee lacked jurisdiction to hear the dispute, that there was no award capable of being appealed from as the initial award was void ab – ignition, that the respondent's claim was allowed against the weight of evidence on record.

Mr. Nyanga, counsel for the appellants and the respondent agreed to proceed by way of written submissions. The first and third appellants are since deceased and only the 2<sup>nd</sup> appellant is alive.

I have read the submissions by the appellant and the same mainly expound on the grounds of appeal. It is submitted that the appellants were not allowed to argue their case before the Appeals Committee. The respondent purported to have bought land in 1985 yet the claim was filed in 2011 and therefore time barred. The 1<sup>st</sup> appellant was the registered owner of plot number **BUNYORE/EBUBAYI/1086** while the 2<sup>nd</sup> appellant owned plot number **EAST BUNYORE/EBUBAYI/1087**. The respondent's claim was for ownership of the land and therefore outside the jurisdiction of the Tribunals. Further, the award by the Emuhaya Land Disputes Tribunal was not a verdict.

On his part, the respondent submits that the claim was a boundary dispute. He was living on the land and the appellant found him already settled on the land. The respondent destroyed the common boundary on the land. It is the respondent's position that his claim is based on his continued use and occupation of the lower parts of the three pieces of land and his claim is not based on contract.

The proceedings before the Emuhaya Land Disputes Tribunal show that the dispute involved plot numbers **E/BUNYORE/EBUBAYI/1082, 1087 and 1088**. The respondent herein was the claimant. His evidence before the Tribunal is that he bought lower parts of the three parcels from the wife of one **JACKSON MIKOYO** who had dug a trench to make water pass but had been compensated for her

work. This was in 1985. The three appellants were the owners of the three parcels of land that were running from the upper section to the stream. The respondent lined up several witnesses including the village elder who concurred with his claim. The appellant did not testify and the court concluded by making a recommendation as follows:

**1. From the evidence given by the witnesses above who are the neighbours of FANUEL O. MABAHA. It is true that he bought the lower parts of land 1086, 1087 and 1088 from Mrs. Jackson Mikoye who had drained the water from the swampy place. But Jackson Mikoye had no number of the part he owned.**

**2. Eliakim Obutsiko No.1086 stated that his land had only one number from upper to lower section.**

**GILBERT OMUTSIMBO OMUSALI stated that he bought both upper and lower parts of land n. 1087**

**James Onyango Omusali Ambitsi informed the court that when he bought land no.1088, he was not told that there was someone owning the lower part.**

**3. As per surveyor's map the lands no. 1086, 1087 and 1088 have no boundary showing the upper and lower parts.**

The Western Provincial Appeals Committee's proceedings other than capturing the parties are as follows:

#### **FINDINGS**

**Evidence available shows that there is no boundary marking as per surveyor's map showing the lower and upper parts of land Nos.1086, 1087 and 1088. And if there was a locally set boundary separating lower part from the upper part, then this should apply."**

#### **ORDER**

**Appeal is allowed with costs. FANUEL was allowed to own lower parts of the land in dispute because he dug the trench to enable water to pass from the swampy place.**

The respondent herein was the appellant before the Western Appeals Committee. The respondent maintains that his claim is based on his continued use and occupation of the lower parts of the subject three plots. If this is so, then the claim is for adverse possession. The claim ought to have been determined by the High Court and not the Tribunal.

From the proceedings before the Emuhaya Land Disputes Tribunal, it is not clear whether the respondent's claim was a boundary dispute or a claim to occupy land. The respondent's own plot number is not given. He only claims to have bought the lower parts of the land. The appellants were the registered owners of the land and there was no evidence that they had sold to the respondent. More still, if the respondent's claim was that he had bought land from the wife of **JACKSON MIKOYO**, he should have claimed against that person.

The recommendation by the Emuhaya Land Disputes Tribunals the surveyor's map has no boundary showing the upper and lower parts are ambiguous. The Tribunal could not purport to give itself the role of the Surveyor without calling for expert opinion from the surveyor. There is no evidence on record that the Tribunal visited the land. It is noted in the recommendations that **JACKSON MIKOYE** had no plot number of the part he owned.

I do find that the two Tribunals lacked jurisdiction to determine the dispute. If it was a boundary dispute, the respondent can call in the surveyors and fix the boundaries of the three plots owned by the appellants. It appears that the portion claimed by the respondent could be a riparian reserve and not part

of the appellant's land. However, that cannot be determined by the Tribunal. And if it is a riparian reserve, then the respondent has no right to claim it.

The verdict of the Emuhaya Land Disputes Tribunal and the Appeal Committee were made without jurisdiction. The same are also not capable of implementation. How will the recommendations be implemented. It is not clear whether by implementing the recommendations the appellants' land would be affected. The effect would be to claim the appellants' land without any lawful reason.

In the end, I do find that the entire proceedings before the two Tribunals were done without jurisdiction. The end result was a miscarriage of justice and there was no dispute. The respondent appealed to the Appeals Committee and it is not clear who had won before the Emuhaya Tribunal. The purported boundaries that were destroyed do not indicate it was a boundary between which plot number owned by the respondent. The appeal is merited and the same is allowed. Each party shall meet his own costs.

*Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of February 2013*

**SAID J. CHITEMBWE**

**J U D G E**