



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Appeal 33 of 2012**

**ASMAN AMAKECHO MBAYA ..... APPELLANT**

**V E R S U S**

**HAMISI JUMA MBAYA ..... RESPONDENT**

**(Appeal arising from the ruling of {HON. W. N. WANDERA, PM} dated 2.3.2012 in Mumias  
Principal Magistrate's Court in Misc. Award No.1 of 2012)**

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

This is an appeal from the ruling of Hon. W.N. Wandera, P.M. delivered on the 2<sup>nd</sup> of March 2012 in Mumias Misc. Award No. 1 of 2012. The learned magistrate dismissed the appellant's preliminary objection that had sought to have the court not to adopt the award of the panel of elders in claim number 14 of 2011 from the Mumias Land Disputes Tribunal. The grounds of appeal are that the trial magistrate totally misunderstood the provisions of the Environment and Land Act 2012, that the land disputes tribunal had ceased to exist, the claim before the tribunal was null and void and that the dispute was heard under a repealed law. The appellant further contends that the trial court misunderstood the gazette notice number 1617 issued by the Chief Justice of Kenya on the 9.2.2012.

Parties agreed to proceed by way of written submissions. The appellant's submissions expound on the above grounds and contend that the respondent had no legal capacity to file a claim under a repealed act. His claimed was lodged before the Mumias Land Disputes tribunal in November 2011 when the Land Disputes Tribunal Act had ceased to exist. Therefore the tribunal was not operational and its proceedings are a nullity. The gazette notice by the Chief Justice was merely intended to bring order to the courts in relation to land cases pending before court. Fresh matters according to the notice were to be handled by the courts. On his part the respondent submits that the appellant ought to have appealed against the decision of the Land Disputes Tribunal to the Provincial Appeals Committee within 30 days. The work of the subordinate court was to merely adopt the award and that was all. The transitional provision made by the Chief Justice by way of the gazette notice number 1617 indicated that all proceedings pending before the Court of Appeal, High Court and subordinate court should continue to be heard by the court of tribunal. The case before the learned magistrate was from the tribunal and there was no appeal against the decision of the tribunal, neither was there an application for judicial review and the court had no alternative but to adopt the proceedings as judgment of the court. Counsel further submits that the appellant ought to have obtained leave of the court before this appeal was filed. Since no leave was obtained then the appeal should be dismissed.

The record of appeal shows that the respondent herein filed claim number 14 of 2011 before the Mumias Land Disputes Tribunal claiming a portion of plot number **S/WANGA/LUREKO/706**. The parties herein are brothers. The claim seems to have been filed in November 2011 although the original stamp of the tribunal does not indicate when it was filed. However, there is enough evidence on record to show that the claim must have been filed around November 2011. On 19.10.2011 the Mumias District Officer wrote to the District Land Registrar Kakamega asking him to place a restriction against the suit property reason being that the appellant had refused to share it with his brother, the respondent. A restriction was indeed registered on the 25.11.2011. On the 25.10.2011 the Lureko location chief wrote to the Mumias Division Land Disputes Tribunal indicating that he had tried to resolve the dispute between the two brothers but had failed and the matter was taken over by the District Officer. Further on the 17.10.2011 the Mumias District Officer wrote to the District Land Registrar Kakamega asking him to assist the respondent. The title of the letter was that the respondent was to file a case with the Land

Disputes Tribunal. On the 24.10.2011 Mr. A.M. Wekesa wrote on behalf of the Mumias District Commissioner asking the Mumias Division District officer to convene a tribunal and have the dispute in relation to the suit property heard.

The proceedings before the tribunal show that the case was heard on the 9.11.2011 and it was adjourned to 16.11.2011. The tribunal visited the suit property on the 7.12.2011 and a decision was made on the 21.12.2011. The tribunal ordered that the District Registrar cancel the sub-division of the suit property into plot numbers **S/WANGA/LUREKO/3689** to **3700**. The tribunal further resolved that plot number **S/WANGA/LUREKO/706** be divided into two equal portions between the two parties.

The appellant contends that the proceedings before the tribunal were a nullity as the same were conducted when the tribunals had been stopped from operating. The Land Disputes Tribunal act 18 of 1990 was repealed by the Environment and Land Court Act No. 19 of 2011. Section 31 of that Act repealed the Land Disputes Tribunal Act. The new Act was assented to by the President on the 27.8.2011 and it came into force on the 30.8.2011. It is clear from the above analysis that the respondent's claim was filed before the tribunal in November 2011. The effect of the coming into force of the new Act was that the Land Disputes Tribunals were to stop from operating as the Land Disputes Tribunal Act was repealed by the Environment and Land Court Act. As of 1.10.2011 the tribunals ceased to exist. It therefore follows that when the tribunal decided to sit on the 9.11.2011 and deliberate on the dispute between the parties it lacked the jurisdiction to determine the dispute. I do agree with the contentions of the appellant that the entire proceedings before the tribunal are a nullity. Counsel for the respondent maintains that the guidelines given by the Chief Justice allowed pending matters to be heard and determined before the courts or tribunals where they had been filed. Those guidelines do not empower a tribunal whose mandate has been repealed to sit and deliberate on a dispute. The guidelines were merely intended to have a smooth transition of cases pending before the court to the newly established Land and Environment Court. What the Mumias Tribunal did was to have a new matter filed and heard after the tribunals had been repealed. The new Act did not outlaw the hearing of part-heard matters before the subordinate court or the other formal courts. Section 30 of the new Act provides as follows:

### **Transitional**

**30. (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the environment and Land Court established under the Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar**

The essence of the above section does not give land disputes tribunal the mandate to hear new matters in the pretext that the Land and Environment Court had not yet been established. The basis upon which the tribunals had jurisdiction was the Land Disputes Tribunal Act and the same was repealed by the coming into force of the Environment and Land Court Act. Since the new Act repealed the Land Disputes Tribunal Act it automatically follows that the tribunals ceased to exist upon coming into force of the new Act. Since the commencement date was 30.8.2011, I do find that the Mumias Land disputes Tribunal lacked jurisdiction to hear the dispute in November 2011 as it had ceased to exist.

The trial magistrate did misinterpret the guidelines issued by the Chief Justice. Those guidelines were not meant to resuscitate an existent tribunal. The trial magistrate had no jurisdiction to adopt an award from a tribunal that had stopped operating. With regard to the issue of leave to appeal I do find that the appellant had the right to appeal from the order of the court or the tribunal. Since the Land Disputes Appeals Committees were also established under the Land Disputes Act the appellant could not have filed an appeal before the Appeals Committee as the same had already ceased to exist. The trial magistrate ought to have declined from adopting the award as there was no award to be adopted.

In the end, I do find that the appeal is merited and the same is allowed. The decision of the Mumias Division Land Disputes Tribunal and that of the Mumias Principal Magistrate in Miscellaneous Award No. 1 of 2012 are hereby set aside. Parties herein are brothers and from the proceedings before the tribunal it is established that the appellant was willing to give a portion of the land to the respondent. This

is a matter that could have been settled amicably between the parties. The respondent tried to use the local administration to obtain his share of the land. However, that process was unlawful and is back to square one. This judgment should not be interpreted to mean that the respondent should vacate the suit land. The appeal is hereby allowed. Since parties are brothers each shall meet his own costs.

*Delivered, dated and signed at Kakamega this 20<sup>th</sup> day of March 2013*

**SAID J. CHITEMBWE**  
**J U D G E**