

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 120 OF 2007

JAMES NYANJE KHATA APPELLANT

V E R S U S

MARCELLA OSUNDWA RESPONDENT

R U L I N G

By his application dated 23rd September, 2009 the applicant seeks to have the appeal herein be struck out with costs. The main grounds for the application are that the appeal was filed out of time and without leave and that the appellant is not candid in bringing this appeal. The applicant's position is that the Western Province Appeals Committee read its decision on 12th October 2006, the same day after it had deliberated on the appeal. Further, it is the appellant's position that the award was read by the court on 16th August 2007 which according to the applicant is not true. The appeal ought to have been filed sixty (60) days from 12/10/2006 when the Appeals Committee communicated to the parties in writing making 12/12/2006 as the last date of filing the appeal.

On his part, the appellant maintains that the appeal was properly filed within time. He states that the ruling of the Provincial Appeals Committee was delivered on 16th August 2007 and this is evidenced by a letter dated 16/8/2007 from the office of the Provincial Commissioner, Western Province.

The main issue for determination is whether the appeal was filed on time or not. **Section 8(9)** of the Land Disputes Tribunal Act number 18 of 1990 stipulates that after the Appeals Committee deliver its decision **“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 (60) days from the date of the decision complained of.”**

The record of the Western Province Appeals Committee shows that the matter was heard on 12th October 2006. The members signed the record on 12th October 2006. According to the applicant, the decision was delivered on the same day. The appellant annexed a letter dated 20th August 2007 addressed to the Kakamega High Court which states as follows:-

“This is to inform the Hon. Court that the verdict was read to the parties on 16th August 2007 and 60 days R/A explained.”

The proceedings in Miscellaneous Award number 77 of 2006 before the Chief Magistrate show that the Mumias Land Disputes Tribunal award was read by the court on 17th July 2006. On 26th November 2006 the registry fixed for reading the award from the Provincial Land Dispute Tribunal for the 15th/12/2006 and on that date the parties were advised that it was not necessary to appear in court for the reading of the award. However, on that day all the parties were absent and it is not indicated who appeared before the registry on 26/11/2006 and fixed the Provincial Appeal's Committee award for reading on 15/12/2006. On 19/12/2007, one Caleb from M/S Momanyi & Co. Advocates appeared before the registry and fixed the award for hearing on 23/4/2007. On the 23/4/2007, Mr. Ombito for the appellant attended court while there was no appearance for the respondent.

The main issue is how the Provincial Committee's award was filed in court and whether before it was filed the same had been read to the parties. Although the proceedings from the Provincial Appeals

Committee are brief, I am inclined to believe that the Committee heard the case the same day and its members kept waiting for the proceedings to be typed, read over to the parties and then signed off the record. Assuming that that was the case, then why would there be a letter written almost one year later indicating that the award was read on 16th August 2007. It is possible that one of the parties got a copy of the award that had not been read to the parties and filed it in court for adoption. It is equally not clear as to what transpired on 16th August 2007. The proceedings of that date are not annexed. I will however, not conclude that the letter of 20th August 2007 was written without supporting information.

The overriding objection in determining legal disputes is to have them fully heard and give parties opportunities to argue their case. In view of the fact that it is not clear whether the Provincial Appeals Committee read its award on 12/10/2006 or 16/8/2007, I will give the appellant the opportunity to argue his appeal and disallow the application seeking to have the appeal struck out. I do order that the application dated 23rd September 2009 be and is hereby dismissed. There shall be no order as to costs.

Delivered and dated at Kakamega this 28th day of March 2012

SAID J. CHITEMBWE

J U D G E