REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL 64 OF 1999

MUYEKHO CHIKAMAYI ……. APPELLANT

V E R S U S

WILSON MAKUMU SAVUNI ……. RESPONDENT

J U D G M E N T

This an appeal from the decision of Western Provincial Appeals Committee delivered on 26th November 1998. The appellant listed four grounds of appeal which are that:-

1. The appeals committee's decision is at variance with evidence on record.

2.The committee erred in law by ordering the appellant to transfer five acres of his land parcel number N. KABRAS/MALAVA/2338 to the respondent's son and the appellant's step mother both of whom were not parties to the dispute.

3.The tribunal granted prayers which had not been prayed for.

4.The committee did not evaluate the evidence properly.

Counsel for the appellant submitted that the committee failed to make a determination of any of the issues before it. In its verdict the committee found that there existed **N.KABRAS/MALAVA/2338** in the names of the appellant and that all was peaceful yet the tribunal made an order for the sub-division of the same title a prayer which was not sought for. Counsel further submitted that the respondent's step son and the appellant's step mother were not parties to the dispute. The issue of subdivision was never one of the issues for determination by the appeals committee.

Counsel for the respondent submitted that the Kabras Land Disputes Tribunal heard the parties and found in favour of the respondent. The Western Provincial Appeal Committee concurred with the Kabras Land Disputes Tribunal. The first tribunal had the opportunity to hear the initial boundary evidence and its findings were justified.

The record of the Kabras Land Disputes Tribunal show that the dispute was inrelation to N.KABRAS/MALAVA/2338. Wilson Makumu Savuni was the defendant. The plaintiff's claim before the tribunal was that his late father gave him 10 acres of land. This being parcel number MALAVA/190. Another parcel of land measuring 7 acres being plot number MALAVA/193 was given to

the defendant, who is his brother (the appellant herein). The plaintiff further claimed that their late father called them one day and told them he wanted to transfer plot number MALAVA/2338 to the two parties. The family agreed to have the property transferred to the name of the appellant who was the eldest son. He was to hold as trustee for him to give the plaintiff his share in future. The verdict of the tribunal was that the plaintiff was awarded 9 acres out of plot N.KABRAS/MALAVA/2338 and the remaining 10.8 acres was awarded to the appellant herein.

The appellant filed an appeal before the Western Provincial Land Disputes Committee. The committee deliberated on the appeal on 26th November 1998 and its verdict was that the appellant was to subdivide the suit land and give 3 acres to a widow who had no child and 2 acres to the son of his brother Wilson Makumi Savuni. Being dissatisfied with the decision the appellant preferred this appeal.

The Land Disputes Tribunal derive their jurisdiction from the Land Disputes Tribunals Act (No.18 of 1990) (now repealed). Section 3(1) of the Act provides as follows:-

3. (1) ***Subject to this Act, all cases of a civil nature involving a dispute as to-***

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

(b) a claim to occupy or work land: or

(c) trespass to land shall be heard and determined by a Tribunal established under Section 4."

From the proceedings before the Kabras Land Disputes Tribunal the plaintiff was seeking ownership of land, his claim being that the appellant herein was registered as the proprietor of N.KABRAS/MALAVA/2338 in trust for himself and the plaintiff. That claim resulted into an order subdividing the suit property. The main issue is whether the tribunal had jurisdiction to entertain that claim. According to the proceedings of the Malava Land Disputes Tribunal, the tribunal held that plot number KABRAS/MALAVA/2338 measuring 7.92 Ha. (about 21 acres) was registered in the name of the appellant in trust for himself and for his younger brother, the respondent herein. The tribunal went ahead and ordered that the above property be sub-divided and 9 acres be given to the respondent and the appellant to take 10.8 acres. The tribunal ordered the cancellation of title deed number KABRAS/MALAVA/2338.

The Western Province Appeals Committee deliberated on the appeal by the appellant herein and resolved that five acres of the suit land be given to their father's widow (three acres) and to the son of the respondent (2 acres).

From the proceedings of both tribunals it is established that each of the parties herein was given land by their deceased father. According to the appellant in his evidence before the appeals committee he has 19 acres of land while his brother has 16 acres. According to the appellant before his late father died he was told to give to his step mother three acres of land which he did. The respondent testified that he was given plot number MALAVA/190 measuring 10 acres and another parcel of land MALAVA/193 measuring 7 acres was given to the appellant. Plot No. MALAVA/2338 measuring 24 acres belonged to their late father where the deceased was occupying with one of his younger wives. After the death of their father the parties' step mother claimed six acres out of plot number 2338 but the elders gave her three acres and the remaining portion of 21 acres was to be shared equally amongst the two brothers. However, the appellant gave the respondent's son three acres and gave the remaining portion to his children. This led to the respondent filing the claim before the Malava Land Disputes Tribunal.

Given the history of the matter, it is clear that plot number**KABRAS/MALAVA/2338** is registered in the names of the appellant. The Malava Land Disputes Tribunal held that that registration was in trust for both parties herein. The main issue is whether the tribunal could entertain a dispute based on a claim of trust ownership. I do find that the tribunal lacked jurisdiction to entertain that claim. Whereas it could have been possible that the suit land was family land, issues revolving around trust ownership have to be deliberated upon by the High Court. The two tribunals therefore lacked jurisdiction to excise part of the

appellant's land and give it to third parties. If the respondent has any claim against the appellant he should file a suit in court to prove his claim. The claim before the two tribunals was not for trespass, right of occupation or work on land or not one of division of land or determination of boundaries. Even if the tribunals ordered for the division of the land that was outside their jurisdiction as the land is registered in the appellant's name and it is only a court of law which can determine whether the appellant was registered as the proprietor for his own benefit and in trust for the respondent.

In the end I do find that the appeal has merit and the same is allowed. The decision of the Malava Land Disputes Tribunal and the Western Provincial Appeals Committee and all consequential orders are hereby set aside. If the respondent has any claim of ownership for plot number **KABRAS/MALAVA/2338** he should file his claim before the High Court. Since parties herein are brothers I do order that each meet his own costs.

Delivered, dated and signed at Kakamega this 22nd day of May 2012

SAID J. CHITEMBWE
J U D G E