



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL 48 OF 2010

SILAS OMUKULA ANDENYI..... APPELLANT

V E R S U S

ELSEBA WERE AMBUNDO RESPONDENT

JUDGMENT

This is an appeal from the decision of the Western Provincial Appeals Committee relating to Plot No. **N.KISA/SHIBINGA/1257** measuring 6.5 acres. The matter started before the Khwisero Land Disputes Tribunal vide case number 8 of 2005 where the appellant was the defendant and the respondent was the plaintiff. The main grounds of appeal are that:-

- 1. Both the Provincial Appeal Committee and the Khwisero Land Disputes Tribunal had no jurisdiction to hear the matter.*
- 2. The Provincial Appeal Committee erred in law by applying customary law in reaching their decision.*
- 3. The Provincial Appeals Committee panel that heard the appeal was unlawfully constituted.*

Counsel for the appellant submitted that the property in dispute is registered in the names of the appellant. The respondent is a sister in-law to the appellant. The Khwisero Land Disputes Tribunal resolved that the suit land be divided into two equal portions and one portion to be given to the respondent. This was outside the jurisdiction of the tribunals as stated in Section 3 of the Land Disputes Tribunals Act, No. 18 of 1990. Counsel further submitted that the appeals committee applied customary law which should not have been the case. Finally, the panel of the appeals committee was composed of five (5) members instead of three (3) contrary to the provisions of **Section 9(2)** of the said Act.

On her part the respondent submitted that she is in agreement with the decisions of both tribunals. The land belongs to the family and the appellant's father had divided it into three acres for each son. The appellant was given the land so that he could divide and distribute. When the appellant's brother who the respondent's husband died the appellant chased her away.

From the proceedings before the Khwisero Land Disputes Tribunal the respondent testified that when her husband died the appellant chased her away. The matter was referred to the relatives who gave her the land. Before her husband died there was no dispute. The respondent's father in-law had two sons, the appellant and the respondent's husband. The appellant's evidence before the tribunal was that his father

died in 1986 and his brother died in the year 2001. He did not know why his sister in-law was claiming the land. His late father had told him to give out one acre to the elder son of his brother which he was willing to give.

The Khwisero Land Disputes Tribunal concluded that Plot No. **KISA/ESHIBINGA/1257** belonged to ERNEST AMBUNDO ADENYI (deceased) who is the appellant's father. The deceased had two sons and one of them passed away. The appellant took advantage of the death of his brother and chased away the respondent. The tribunal ordered that the land be divided into two equal portions each measuring 3 ¼ acres and directed the Executive Officer of the High Court to sign all relevant documents for the sub-division to be effected. Being dissatisfied with that decision the appellant herein filed his appeal vide case number 17 of 2006 before the Western Provincial Disputes Appeals Committee.

The appeals committee noted that the plot was family land and the appellant and his late brother lived and used the land peacefully before their father died in 1986. The appellant's late father had put boundaries dividing the land for his two sons with each getting 3 acres. A portion measuring 0.5 acres was given to AMAKUCHE PRIMARY SCHOOL. The appeals committee found that the decision of the Khwisero Land Disputes Tribunal was proper and dismissed the appeal.

The two grounds of appeal by the appellant that the panel was unlawfully constituted having been composed of five members instead of four is not fatal to the decision of that committee. There is no evidence that due to the number of the panel members the appellant was prejudiced. At times judges sit in panels of three to hear a matter which could have been heard by a single judge and that does not make the decision of three judge bench unlawful. As to the ground that the appeals committee relied on customary law Section 7 of the Land Disputes Tribunal Act (now repealed) provides that the tribunal shall adjudicate upon any claim and reach a decision in accordance with recognized customary law. Under that provision it is evident that the Land Disputes Tribunal had legal authority to be guided by customary law.

The other ground of appeal is that the tribunals lacked jurisdiction as the land is registered in the name of the appellant. The jurisdiction of the land disputes tribunal is provided for under **Section 3 (1)** of the Act which states 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.”

Given the facts of this case before both tribunals I am satisfied that the respondent herein had a valid complaint. It is established that the land originally belonged to the appellant's father who had two sons and the land was divided into two portions for each son. Part of the land measuring 0.5 acres was given to a school. I do find that both tribunals exceeded their powers by ordering the alteration of the title deed for the suit land by ordering that it be sub-divided into two portions. However, the conclusion of the tribunals that the respondent was entitled to occupy the land was valid and within the jurisdiction of both tribunals. I do hold that each of the two parties are entitled to occupy the suit land and the fact that the appellant is the registered owner does not give him a license to evict or chase away the respondent who his sister in-law. The evidence shows that the appellant's late father had divided the land for his two sons and the two sons lived peacefully together.

I do find that there is no winner in this appeal as each of the parties herein is entitled to occupy and utilize the suit land. The decision by the two tribunals that the land be sub-divided is hereby set aside and replaced with an order that each of the parties herein utilize three acres out of plot number **N.KISA/ESHIBINGA/1257**. Each party is at liberty to file a proper suit before the High Court for purposes of obtaining a title deed for his/her respective portion. There shall be no orders as to costs.

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

SAID J. CHITEMBWE
J U D G E