



REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 23 of 2007

(An appeal from the decision of the Western Province Land Appeals

Committee made on 12/10/2006 and read to parties in

KAKAMEGA CMCC MISC. Award No. 129 of 2004)

PHILLIP NYANGWESO KHATERA APPELLANT

VERSUS

WILLIAN SHIMONYERE RESPONDENT

JUDGMENT

The appellant, **PHILIP NYANGWESO KHATERA** has raised six grounds of appeal as follows:-

- “1. That the Appeal Committee erred by not holding that the respondent had no *locus standi* to agitate any claim on behalf of Embwamba Baptist Church.
2. The Appeals Committee decision did not give any reasons to back up their findings or the findings of the Land Disputes Tribunal.
3. The Appeals Committee grossly erred in law by relying on the so called surveyor whose report was never produced as part of the exhibits before the land disputes tribunal or before the committee.
4. The Appeals Committee members exhibited actual bias against the Appellant.
5. The Appeals Committee was improperly constituted.
6. The land Appeals Committee grossly erred by entertaining a matter for which they had no jurisdiction.”

The background to this appeal is that on 10.11.2004, the Kakamega Municipality Division Tribunal ordered the appellant to revert to the original boundary and to meet the costs incurred in the proceedings. The appellant was aggrieved by the decision and appealed to the Provincial Appeals Committee. The Provincial Appeals Committee upheld the decision of the Kakamega Municipality Division Tribunal.

The reverting of the original boundary meant that the boundary was moved to the appellant’s side by about 45 metres. This followed a visit to the site by a surveyor who carried out survey works between L.P.NO. BUTSOTSO/INDANGALASIA/574 and BUTSOTSO/INDANGALASIA/293 which had a

boundary dispute.

One of the grounds of appeal is that the respondent had no *locus standi* to agitate any claim on behalf of Ebwamba Baptist Church. The church is the occupier of L.P. NO. BUTSOTSO/INDANGALASIA/574. The said EILLIAM SHIMONYERE testified before the Tribunal that he was the pastor of the said church. The issue of *locus standi* did not arise before the Tribunal. In any case the Tribunal was conducting the proceedings in accordance with customary law. **Section 8 (7)** of the Land Disputes Tribunals Act 1990 provides as follows:-

“After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision.”

The Tribunal gave its reasons for the decision arrived at. The Tribunal in its verdict observed that the evidence adduced before it had confirmed that L.P. NO. BUTSOTSO/INDANGALASIA/574 belonged to the church and that the measurements taken at the scene confirmed that the appellant had trespassed onto the land belonging to the church by about 45 metres, hence the decision for the appellant to revert to the original boundary. The Appeals Committee was in agreement with the Kakamega Municipality Division Land Disputes Tribunal. This includes the reasons given by Kakamega Municipal Division Land Disputes Tribunal in its decision. No report of the surveyor was mentioned in the Kakamega Municipality Division Land Disputes Tribunal as the surveyor work was carried out in the presence of the Tribunal members.

The appellant’s counsel’s submissions have not demonstrated any bias by the Appeals Committee. The issue of bias and that of lack of jurisdiction seems to have been abandoned as the same have not been mentioned in the submissions.

On the issue of the composition of the Appeals Committee, the same was comprised of six members. This violated the Provisions of **Section 8 (5)** of the Land Disputes Tribunals Act 1990 which provides as follows:-

“The appeal shall then be determined by the Appeals Committee, which shall consist of three members appointed under section 9.”

Section 9 (2) of the Land Disputes Tribunals Act was also contravened. The same provides as follows:-

“For the purpose of hearing appeals from Tribunals in the Province for which the Committee is constituted the Committee shall sit in a panel of three members and in such places as may be determined by the Provincial Commissioner.”

The claim before the Tribunal was a boundary dispute. Although the Tribunal had the mandate to entertain the boundary dispute, the Appeals Committee was illegally constituted. The appellant therefore did not have an opportunity to have his appeal properly heard as provided under the Land Disputes Tribunals Act, 1990.

Under Section 8 (8) of the Land Disputes Tribunals Act, 1990 the Appeals Committee’s decision on any issue of fact is final and no appeal can lie therefrom. Under Section 8 (9) of the Land Disputes Tribunals Act, 1990, appeals to the High Court are only on points of law.

Due to the illegality of the constituted Appeals Committee, the process was flawed and the decision of the said Committee is null and void.

The Appeal is therefore allowed. The dispute remains undetermined. Each party to meet own costs.

Delivered, dated and signed in open court at Kakamega this 24th day of September, 2012

B. THURANIRA JADEN

JUDGE