



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 61 of 2009

RONALD WANAKACHA 1ST APPELLANT

CHIKAMAI WANAKACHA 2ND APPELLANT

VERSUS

AYUB JOB OKUTOYI AMUKOWA RESPONDENT

JUDGMENT

1. This Appeal is brought forth on two grounds only viz;

1. The Western Provincial Land Disputes Appeals Committee erred in law by failing to constitute itself properly by allowing a chairperson and four (4) members to adjudicate upon the case instead of three (3) members only contrary to S. 9 (2) of the Land Disputes Tribunal Act No. 18 of 1990.

2. The Western Provincial Land Disputes Appeals Committee erred in law by allowing an unlawful award of the Kabras Division Land Disputes Tribunal to stand which award was not determined in accordance with any recognized customary law contrary to the mandatory provisions of S. 3 (7) of the Land Disputes Tribunals Act No. 18 of 1990.

2. Section 3 (1) and (7) of the Land Disputes Tribunals Act provides as follows;

"S.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.

(2)

(3)

(4)

(5)

(6)

(7) *The Tribunal shall adjudicate upon the claim*

and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party's witness or witnesses."

3. In interpreting the above sections in the context of this Appeal, the decision of the District Land Disputes Tribunal was as follows;

"Having heard and considered the representations of all the parties (and their witnesses) and having considered all the documents submitted to us (sale agreement, Summons by Chief, e.t.c.) we hereby decide as follows:

i) *AYUB JOB OKUTOYI AMUKOWA (claimant) is*

awarded 2½ acres portion of land.

ii) *FLOIS LIAKA JAFESA is awarded 1.00 acres.*

iii) *MUSOTSI MURUNGA is awarded 3.00 acres.*

iv) *And ALL ELEVEN (11) sons of the late ANDREW NANAKACHA are awarded 47.25 acres from parcel No. N.KABRAS/MALAVA/87.*

The Claimant Ayub Job Okutoyi Amukowa to file Succession cause in the High Court and should include all the beneficiaries of parcel No. K.Kabras/Malava/87 as above.

Whoever that is not satisfied with this ruling can appeal to Provincial Land Disputes Tribunal Committee within thirty (30) days herein."

4. On Appeal, the Provincial Appeals Committee's decision was as follows;

"In view of the observations we rule and order that:-

ii) *The appeal is dismissed due to lack of new evidence.*

iii) *The Kabras L.D. Tribunal court ruling stands.*

iv) *No costs award.*

v) *The parties to keep peace."*

5. To my mind and reading the decision of the Tribunal and committee, subject of the Appeal, it is obvious that there is merit in ground one of the Appeal. The members of the Tribunal who heard the dispute were five namely;

i) Rebecca Jendeka Evelia – Chairlady

ii) Sarah Nasimiyu Shallo - Member

iii) Wilson Ofunja - Member

iv) Salim Esegeri Bilali - Member

v) Jonathan Bomji - Member

6. S. 9 (2) of the Act is worded in mandatory terms and there is always good legal sense in limiting the number of arbiters in every dispute. Once the Tribunal was improperly constituted, it follows that its decision, whatever the merits, would be a nullity.

7. On ground two, it must always be noted that the mandate of any Tribunal created under the Land Disputes Tribunals Act is as elsewhere set out above. It is patently clear from the decision of the Tribunal and consequently that of the Committee that the issues in consent related to title and ownership to that land. Once the mandate and Jurisdiction is exceeded, again the ultimate decision would be

8. Without saying more, it follows that the Appeal before me is merited and is allowed as prayed. The decision of the Committee and the prior one by the Tribunal are both set aside and are dismissed.
9. Each party shall bear the costs of the Appeal as the error was made by the Tribunal in the first instance and perpetuated by the Committee in the appeal before it.
10. Orders accordingly.

Delivered, dated and signed at Kakamega this 16th day of June, 2010

ISAAC LENAOLA

J U D G E