



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

JUDICIAL REVIEW NO. 43 OF 2009

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

**IN THE MATTER OF THE PROVINCIAL LAND DISPUTE APPEALS TRIBUNAL CASE NO.
78/08**

AND

IN THE MATTER OF KAKAMEGA CM.MISC. AWARD NO. 148/08

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**THE CHAIRMAN PROVINCIAL LAND DISPUTE APPEALS
COMMITTEERESPONDENT**

AND

JOSEPH YESWA ANEKHA INTERESTED PARTY

EX PARTE

1. **BENGO MUNYASA**
2. **JAIRUS LOBONGA**
3. **GERALD ANDATI**
4. **CHRISTINE KNIGHT MAJANI**

RULING

1. The Notice of Motion dated 17.11.2001 is premised on the provisions of **Order LIII Rules 3(1)** of the Civil Procedure Rules and the ex-parte Applicants seek the following orders;

1. **THAT** the Ex-parte Applicants **BENGO MUNYASA, JAIRUS LOBONGA, GERALD ANDATI KONYA** and **CHRISTINE KNIGHT MAJANI** be granted order of CERTIORARI to issue and remove into this court and quash the decision of the Provincial Land Dispute Tribunal No. 78 of 2008 upholding the decision of Lurambi Land Disputes Tribunal case No. 100 of 2008 and all other consequential orders thereto in Kakamega Chief Magistrate Misc. Application No. 148 of 2008 in respect of land parcels No. **BUTSOTSO/SHIBEYE/1496, BUTSOTSO/SHIBEYE/1497** and **BUTSOTSO/SHIBEYE/1498**.

2. **THAT** the interested party herein JOSPH ANEKHA be condemned to pay costs of this application

3. From the grounds in support, the Verifying Affidavit and its annexures as well as the submissions made, only one point has been advanced; that the Western Provincial Appeals Committee had no mandate and/or Jurisdiction to determine the appeal before it because the nullification of titles lawfully issued was not within its jurisdiction.

4. I note that the registered owners of land parcels Nos. Butsotso/Shibeye/1496, 1497 and 1498 are the 1st, 3rd and 4th Applicants' respectively. In Lurambi Land Disputes Tribunal Case No. 100 of 2008, they were the Respondents in a claim instituted by Joseph Yeswa Anekha, the present Interested Party. In its decision dated 5.8.2008, the Tribunal stated as follows;

“Having heard and having received representation from all parties, the tribunal has come up with the following ruling.

That succession should be carried out by all the parties in the dispute namely;

1. ***Joseph Yeswa Anekha***
2. ***Silas Pengo – Butsotso/Shibeye/1497***
3. ***Jairus Lurita – Butsotso/Shibeye/1496***
4. ***Gerald Andati – Butsotso/Shibeye/1498***

The tribunal also rules that existing titles namely 1496, 1497 and 1498 be nullified back to the original number Butsotso/Shibeye/56.

That Joseph Yeswa Anekha becomes the administrator of the land B/S/56 and led other three parties namely Pengo, Luvita and Gerald to embark on succession process. District Land Registrar and surveyor to carry out the exercise after succession as follows:-

1. ***Joseph Yeswa Anekha – ½ acre (half acre)***

2. ***Jairus Lurita – ½ acre (half acre)***

3. ***Silas Pengo – 1 ¼ acre (one and quarter acre)***

4. ***Gerald Andati – the remaining portion or piece of land.***

Any aggrieved party is free to appeal P.L.D. tribunal within a period of thirty days from the date of pronouncing the verdict.”

5. The 1st, 3rd and 4th Applicants then appealed to the Western Provincial Land Appeals Committee in its Appeal No. 78/2008 and the appeal was dismissed and the Tribunal’s award was upheld on 11.6.2009.

6. No Appeal was filed to this court pursuant to **S.8(9)** of the Land Disputes Tribunals Act, No.18 of 1990 but the present proceedings were instead instituted.

7. I must address the above issue first because it is pertinent. I say so because S.8 (9) of the Act provides as follows;

“S.8 (9) 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 days from the date of the decision complained of:

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.”

8. The presumption of the law is that an appeal from the Committee must be on a point of law only, the other presumption being that the Committee will have been clothed with jurisdiction to determine the matter. It is now argued that although the Committee had the jurisdiction to determine the matter **qua** committee, it had no jurisdiction to determine the particular matter that it purported to determine. Should that point have been raised by way of an appeal or Judicial Review proceedings?

9. To my mind, the issue of Jurisdiction ought to have been raised either before the Land Disputes Tribunal or as a point of appeal to the Committee. From the record, it was never raised before the Tribunal but it was raised before the Committee but the Committee did not address the issue during the formulation of its “**verdict**”.

10. Jurisdiction is a point of law and could properly be raised as an issue by the offended party in an appeal under S. 8(9) aforesaid. In Colletta Osyambu Khaemba – Kakamega H.C.Misc. Civil Application No. 21/2005 it was held as follows;

“It is also a correct proposition of the law that where a matter is a public law one as distinct from private law, judicial review will be available to the aggrieved party. Judicial review, however, is not concerned with merits of decisions of statutory bodies or tribunals, but rather with public rights and decision-making process. Where the decision is wrong, the manner of challenging it is through an appeal. This court does not in judicial review exercise or usurp the function or power of an appellate court in that regard. Rather, it exercises its original supervisory jurisdiction conferred on it by Section 8 of the Law Reform Act, Chapter 26 of the Laws of Kenya. The rationale behind this principle is that the High Court is entrusted by the law with the task of ensuring that an individual does receive fair treatment and that the authority concerned acts within the law. This court will not be concerned whether the authority involved made a good decision or not providing that the decision was authorized by the law and the individual was given fair treatment and the rules of fair play and natural justice were adhered to. In determining whether or not the decision making process was conducted in accordance with the law, the court will, inter alia, ascertain if there was failure by the concerned authority to act fairly and to observe the principles of national justice; the principles relating to bias; bad faith; irrational decisions which may amount to unreasonable decision; or whether the concerned authority took irrelevant considerations into account or failed to take into account relevant considerations thus making the decision making process wanting and therefore amenable to judicial review.”

11. I am wholly persuaded by the above erudite finding and I am convinced that when the Applicants submitted themselves to the Appeals Committee they knew that it had jurisdiction to determine an appeal from the Tribunal. If the Committee failed to determine the issues, then an appeal to this court would have been the correct procedure to challenge failure by the Committee to do so. As it is, there is no argument that the Committee in any way acted in excess of its Jurisdiction as an appellate body. Whether in fact it upheld a decision made by a body without Jurisdiction does not of itself divest the Committee of Jurisdiction to hear an appeal in the manner that it did.

12. I am aware that the Applicants filed the present proceedings in person but whether or not they actually have the right to the land in question is not a matter for this court to determine. Perhaps they do but once they chose the path of Judicial Review, then the merits of their case becomes irrelevant.

13. In the end, once I have ruled that the one issue raised in this matter is not properly before this court, it follows that the Notice of Mention dated 17.11.2009 must be dismissed with no order as to costs.

14. Orders accordingly.

Delivered, dated and signed at Kakamega this 14th day of October, 2010

ISAAC LENAOLA

J U D G E