



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA  
Civil Appeal 63 of 2007 BARASA KIBUTU ..... APPELLANT**

**VERSUS**

**WASHINGTON KITUNGELELE ..... RESPONDENT**

**JUDGEMENT**

The appellant has raised seven grounds of appeal in his memorandum of appeal. The said grounds are as follows:

*“1. THAT the Provincial land dispute council erred*

*in law and without considering how the respondent herein had obtained fraudly the title deed being Kakamega Wandega 672 which he secretly sold to a school and later bought a land and registered in his name as Jadelele Scheme Plot No. 77 as sole propriety.*

*2. THAT the said land dispute council erred in law and did not consider the earlier ruling which had been granted to the Appellant ownerful of 1/3 of the said land in dispute being said land in Plot No. 77.*

*3. THAT the Provincial land dispute in fact erred and did not consider what the TIRIKI elders of Council had ruled and the same already adopted by the magistrate’s court at Vihiga.*

*4. THAT the Provincial dispute council did not consider how the respondent without the consent of the family members obtained land being Wandega 672 without applying letters of administration of which the original owner who is now deceased was Kibutu Mutabakwa.*

*5. THAT the provincial land dispute council did not call any witness either sub-chief of our area, the chief or even headman.*

*6. THAT the land dispute council did consider even calling any other family members to give evidence.*

*7. THAT the provincial land dispute did not even consider that we had buried in the disputed land our late father Keremendi Kindo.”*

On the basis of those grounds of appeal, the appellant asked this court to set aside the decision of the Western Provincial Appeals Tribunal delivered on 8<sup>th</sup> March 2007. It was his further request to this court that the matter be heard afresh or alternatively, that the decision of the Tiriki East Divisional Land Disputes Tribunal be upheld.

In a nutshell, the Tiriki East Divisional Land Disputes Tribunal had ordered the respondent herein to sub-divide into two portions, the subject matter of the dispute between the two parties. The said subject

matter was L.R. NO. TIRIKI EAST/SHAMAKKHOKHO/77.

From my understanding of the record of the proceedings before the Tribunal, the respondent purchased that parcel of land after he had, first sold off the original ancestral land L. R. NO. TIRIKI/SHIRU/672.

Notwithstanding my said understanding, the appellant told this court that the shamba belonged to his late father. He said that he wished to have this court order that the land be returned to him.

According to the appellant, the shamba was currently registered in the names of the respondent.

The appellant also contended that the respondent had forced him off the shamba. Therefore, he asks this court to enable him get his share of the shamba, in the same way that the children to his father's brothers, also got their respective shares from their fathers.

In answer to the appeal, the respondent first pointed out that the appellant was his brother. Both parties did tell me that their father was KULUNDU. But, later when replying to the respondent's submissions, the appellant said that he did not know the respondent.

That notwithstanding, the respondent submitted that their father had two wives. Their father is also said to have had three properties.

Before their father died, he is said to have sub-divided the properties amongst his children. The exercise of sub-division is said to have taken place in the year 1932, when the respondent was still very young.

Thereafter, during land adjudication, the respondent's portion was registered in his name. And although the respondent got the title deed for his portion and held it since the time of land adjudication, the appellant is alleged to have laid claim to a portion of the respondent's land, only in recent days.

As is clear from the submissions of both parties, they were both making factual assertions. I am afraid that as an appellate court, in matters emanating from the Provincial Appeals Committees, the High Court is only mandated to adjudicate on points of law. Section 8 (9) of the Land Disputes Tribunals Act provides as follows;

***“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.”***

To the extent that the submissions made before me are only on factual matters, the same are not helpful to this court in determining the appeal.

Reverting now to the grounds of appeal, I find and hold that it is not the function of the Provincial Appeals Committee to call any particular witness or witnesses. The obligation of choosing who to call as a witness rests with the parties. It is they that know best what their respective cases are about, and therefore it is they who should decide whether or not to call witnesses, or the nature of other evidence to adduce, with a view to persuading the decision-making body to rule in their favour.

In the event I find no merit at all in the criticism of the Provincial Appeals Committee, for its alleged failure to call, as witnesses, the headman, sub-chief, chief or the family members of the parties.

In any event and by virtue of the provisions of Section 8 (7) of the Land Disputes Tribunals Act, the only persons who the Provincial Appeals Committee are obliged to give a hearing, are the parties. That provision is understandable because the dispute would have reached an appellate stage. In other words, the real issue at that stage is why the appellant was finding fault with the decision made by the Tribunal.

In the event that the respondent obtained the title to parcel No. 672 without applying for letters of administration, if at the time he did so there was a legal requirement for letters of administration to be first obtained, the dispute ought not to have been taken before the Tribunal. The Land Disputes Tribunals

have a very limited jurisdiction, pursuant to section 3 (1) of the Land Disputes Tribunals Act. And such jurisdiction does not extend to issues of succession, arising from the demise of persons who are the registered owners of property.

In my understanding of the dispute, the appellant is laying claim to the ownership of a portion of the land currently registered in the name of the respondent. If my understanding is right, and even if it is assumed that the respondent had originally acquired the title deed fraudulently, the Land Disputes Tribunal would not have the jurisdiction to hear and determine the dispute.

Therefore, there can be no question of upholding the Tribunal's decision, even if I were to set aside the decision of the Appeals Committee. Similarly, this court cannot order the Appeals Committee to hear the appeal afresh, nor can I order the Tribunal to hear the original dispute again. I so find, because the appellant did not lay down any sound legal foundation for having the appeal heard afresh; and also because the Tribunal lacked jurisdiction in the first instance.

Notwithstanding the fact that the appeal, as canvassed, did not yield any issues of law, I nonetheless cannot close my eyes to the fact that the Appeals Committee was constituted of six members, at the time when their decision was signed.

The number six is double the number of members who are legally empowered to determine appeals before the Provincial Appeals Committees. Section 8 (5) of the Land Disputes Act stipulates that;

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

And, pursuant to Section 9 (2) of the statute;

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

In the matter before me, the record of the proceedings before the Provincial Appeals Committee commenced before a panel of five persons. But by the time the proceedings were concluded, the verdict was signed by a panel of six persons.

Regrettably, the composition of the Committee constituted a violation of the law, and I therefore cannot allow the decision to stand. The decision is thus set aside, on the grounds that it was made by an improperly constituted Committee.

Furthermore, the decision of the Tribunal is also set aside, as the Tribunal lacked the requisite jurisdiction to hear and determine the issues which were canvassed before it.

Finally, each party will bear his own costs of this appeal.

Before concluding, I wish to emphasize that there is need, if the dispute is revived, to ensure that the size of land in issue is specifically determined. I say so because it only confuses matters, to order, as the Tribunal did, that Washington Kitungelele should get 2.0 Hectares, whilst Barasa Kibutu and his brothers should get 1.5 Hectares; yet the same said Tribunal had established that there was only between 3 and 4 acres of land available.

***Dated, Signed and Delivered at Kakamega, this 30<sup>th</sup> day of April, 2009.***

**FRED A. OCHIENG**

**J U D G E**