REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 93 of 2003

JAMIN ODERA KITALI ---------- APPELLANT

V E R S U S

HEZRON ANZUNU ---------- RESPONDENT

JUDGEMENT

This appeal emanates from the decision of the Western Provincial Appeals Committee dated 26th March 2002, in respect to parcels of land numbered **TIRIKI/GISAMBAI/1525, TIRIKI/GISAMBAI/1524** and **TIRIKI/GISAMBI/1145.**

By its decision, the Committee set aside the award that had been made by the "**Tiriki Elders Tribunal**" on 23rd February 2001. The Committee also ordered each of the parties to bear his own costs.

Being dissatisfied with the Committee's decision, the appellant lodged an appeal to this court. In his appeal, he cited seven grounds of appeal, as follows;

"***1. The Provincial Appeals Committee erred in law in failing to***

recognize that the sub-division of 1254 and 1525 was based on houses and that HEZRON ANZAU and JAMIN KITALI were from the 1st wife while James Mbaiza and 3 others were in the second house.

2. The Provincial Appeals Committee erred in law in failing to recognize that land NO. TIRIKI/GISAMBAI/1145 was not family land of Kitali as it was given to the Appellant as a gift by his maternal grandfather.

3. The Provincial Appeals Committee erred in law as the elders never visited the scene as the District Land Disputes Tribunal did.

4. The Provincial Appeals Committee erred in law in failing to make a finding of forgery as alleged by the Appellant as Land REG. NO. TIRIKI/GISAMBAI/1524 was to be registered in Kitali's name and not Hezron's as per the directive of the Land Control Board.

5. The Provincial Appeals Committee erred in law by failing to take cognizance of the fact that there was forgery and use of criminal law to criminilise the victims of the Appellant taking over the father's share upon the death of the fathers.

6. The Provincial Appeals Committee erred in law in concluding that the Deceased had two shambas but the allegation that he had Land NO. TIRIKI/GISAMBAI/1145 is wrong. It is only Land

registration NO. TIRIKI/GISAMBAI/1102 that was sub-divided into two for the two wives.

7. The Provincial Appeals Committee erred in law in failing to appreciate that the Appellant had instituted a case before the Area Chief to have sub-divided into two shambas for the two houses in order to enable him get a shamba being his rightful share of family land."

When canvassing the appeal, Mr. Nyanga, learned advocate for the appellant, faulted the Appeals Committee for not recognizing that the parcels numbered 1524 and 1525 were created after the original title, (parcel No. 1102), was divided between the two households of Kitiali Indiavo.

As far as the appellant was concerned, his case all along, has been that he was entitled to a share of the family land. And as he was the first born son of Kitiali Indiavo, he petitioned his father to divide his land into two, between his two wives.

It is the Appellant's case that his father responded to the petition, by sub-dividing the land into two parts. However, the appellant complains that the boundary between the two parts, was placed in such a manner as to result in the 1st house getting a smaller portion of land compared to the portion of the 2nd house.

The Appellant took his complaint before the Tiriki West Divisional Land Disputes Tribunal, who ordered that the land be shared equally between the two houses. In order to give effect to its findings, the Tribunal ordered that the registration of parcel No. 1524 be cancelled first. Thereafter, there would follow a sub-division which would result in each of the two houses getting an equal share of land.

When the Appeals Committee set aside the award of the Tribunal, the appellant faults it for leaving him without any share of land from his father.

He emphasized that parcel No. 1145, which the Committee held to be his, was not originally the property of Kitali Indiavo, his father. That parcel of land had been given to him by his maternal grandfather. It was thus not a part of the estate of his late father.

Thirdly, the Committee was faulted for failing to visit the land which was the subject matter of the appeal before it. Therefore, the Committee was said to have made its decision in darkness, if compared to the Tribunal, which visited the land.

In supporting his contention that the land belonging to his late father was family land, the appellant cited the authority of ***MUKANGU VS MBUI KLR [E & L] 1 622.***

As far as the Appellant was concerned, the term "family land" was used to describe property which is held in trust for the family, by the person in whose name it is registered. A cardinal plank of the definition of that which constitutes "family land" was the fact that it had been inherited from generation to generation, as opposed to land which had been purchased by an individual.

In answer to the appeal, Miss Wanda, the learned advocate for the Respondent, submitted that the appeal was incompetent. Her contention was that the appeal violated the provisions of sections 3 (1) (a) and 8 (a) of the Land Disputes Tribunals Act.

In that regard, it was the respondent's contention that the appeal ought to have been filed within 60 days of the date of the decision complained of.

It is common ground that the Appeal Committee's decision is dated 26th March 2002. That implies that the appeal ought to have been filed on or about 25th May 2002. However, it was not filed until 28th July 2003.

Pursuant to the provisions of **section 8 (a)** of the Land Disputes Tribunals Act;

"***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."

As the Appeal Committee's decision in issue herein, is dated 26th March 2002, it is apparent on the face of the record that an appeal arising therefrom, which was filed on 28th July 2003, is inordinately late.

But then the Appellant points out that although the decision of the Appeals Committee was dated 26th March 2002, neither of the parties before the Committee, became aware of the said decision until 19th June 2003.

The respondent does not dispute the fact that the decision of the Appeals Committee was read out to the parties, by the court, on 19th June 2003.

In my considered view, the difficulty arising in this appeal is attributable to a lacuna in the Land Disputes Tribunals Act. I say so because the Act stipulates that an appeal shall be filed within 60 days from the date of the decision of the Appeals Committee. However, the Act does not specify how the parties shall get to know when the decision has been so dated.

In comparison, and by virtue of the provisions of Order 20 rule 3 of the Civil Procedure Rules, in civil suits;

"***A judgement pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it."***

As the dating and signing of judgements in civil cases are to be done in open court, at the time of pronouncing the said judgement, it follows that the time for lodging an appeal, starts to run from a specific time.

In contrast, the Appeals Committee may date its decision as soon as they have concluded writing it, or as soon as it is typed. There is no legal requirement that the decision be read out to the parties, or that the parties be made aware that it was ready. In the result, and as was the position in this matter, the parties first became aware of the Committee's decision, more that a year after the Committee had dated the said decision. In those circumstances, there is simply no way at all that the Appellant could have filed his appeal within the time prescribed, because the said period had lapsed long before the appellant had become aware of the existence of the decision in question.

In order to resolve the difficulties arising from such situations, I recommend that the Land Disputes Tribunals Act be amended expeditiously, with a view to incorporating thereinto, a requirement that the Appeals Committee should date its decision on the day when the said decision is read out to the parties. There should therefore be a requirement in the statute, that the Committee should read and deliver its decision to the parties.

As things stand currently, I have no option but to hold, as I hereby do, that the appeal was filed long after the lapse of the period prescribed. And, as it was filed without leave of the court, it is hereby struck out on the grounds that it is incompetent.

But, in the event that the appeal was competent, I do accept as accurate, the respondent's contention that the issues raised in grounds 1, 2, 3, 6 and 7 of the memorandum of appeal are issues of fact. Therefore, pursuant to the provisions of **section 8 (9)** of the Land Disputes Tribunals Act, those issues cannot be raised on an appeal before the High Court.

In any event, the failure to visit the property in issue, cannot by itself, constitute an error of law, upon which the decision of the Appeals Committee could be overturned. There is no legal requirement that the Appeals Committees should visit the property which was the subject matter of the dispute over which they or any of them is expected to make a decision.

If any party before the Appeals Committee feels that a visit to the property would be helpful, it is for that party to make an appropriate application. Thereafter, the decision made on the application may inform a subsequent appeal, arising from the Committee's decision.

From my understanding of the case before me, the father to the parties herein, did sub-divide his property between his two wives. Their father is Jonathan Kitali Indiavo, and he sub-divided the land into two portions, at the instance of the Appellant.

But even after he had taken the said action, the Appellant was dissatisfied because the two portions were unequal. He decided to file a case before the Tiriki East Land Disputes Tribunal. He did so in the year 2001.

By the time the Appellant filed the case before the Tribunal, their father was deceased. Apparently, he had died in January 2000.

By the time of his death, Jonathan Kitali Indiavo had lived for about four years after he had already sub-divided the land.

In the circumstances, I believe that had the appellant got genuine concerns about the sizes of the portions which his father had given to each of the two houses, he should have raised the concerns with his father. He did not.

By laying claim to more of the land than that which that was given to the 2nd house, after the death of his father, the appellant was challenging a deceased person indirectly. It is little wonder that when he was asked about the circumstances under which he got land from his maternal grandfather, he was elusive, in his answers.

To my mind, although I am not required to make a finding thereon, the sizes of land to go to each of Kitali Indiavo's two wives was influenced by the fact that the Appellant already had parcel No. 1145.

Secondly, as Mzee Kitali Indiavo divided parcel No.1102 between his wives; there is nothing at all to say that he did not provide for the appellant. The responsibility of sub-dividing the two portions amongst the children rested with the head of each house.

Thirdly, I am not aware of any law which requires a parent to sub-divide his property, equally, amongst his children. Provided that a parent does not disinherit any of his children, the law does not purport to direct him on how he is to distribute his property.

The Tribunal ordered that parcel No. 1524 be cancelled and be re-sub-divided into two equal portions of 0.55 Hectares each. Before that, the Tribunal directed that the boundaries between parcels Nos.1524 and 1525 be re-adjusted, so that the two would give rise to two equal portions of 1.1 Hectares each.

By making those orders, the Tribunal was interfering with the decision by Jonathan Kitali Indiavo, to divide his land in unequal shares. They were not adjudicating on a boundary dispute per se.

In my considered view, the Tribunal acted in excess of its jurisdiction. Therefore, I hold the view that to reinstate the decision of the Tribunal would be an error. That therefore is another reason why I cannot grant the prayers in the memorandum of appeal.

The claim for a bigger share of land is certainly not within the realm of "**a claim to occupy or work land**" as envisaged by **section 3 (1) (b)** of the Land Disputes Tribunal Act.

In the final analysis, I reiterate that this appeal was filed late, but without leave of the court to do so. It is therefore struck out as being an incompetent appeal.

But in the event that I am wrong in that respect, I nonetheless dismiss the appeal as being without merit.

The appellant shall pay costs of the appeal to the respondent.

Dated, Signed and Delivered at Kakamega, this 28th day of April, 2009.

FRED A. OCHIENG

J U D G E