



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Appeal 91 of 2002

AYUB ENDONDO ALIODO -----APPELLANT

VERSUS

HERBERT MWERESA -----RESPONDENT

J U D G E M E N T

The Provincial Appeals Committee, Western Province delivered its verdict on 30th April, 2002. By their said verdict the Committee awarded the suit land, **L.R. NO. MARAGOLI/MADZUU/272**, to the Respondent, Herbert Mweresa.

The Committee set aside the ruling that had been made by the Vihiga Land Disputes Tribunal. The Tribunal had earlier given one-third (1/3) of the suit land to Ayub Endondo Aliodo and Priscilla Musimbi.

Following the reversal of the Tribunal's decision, the appellant was left with no land, out of the suit land. He felt aggrieved, and lodged an appeal to the High Court. This judgement is in relation to that appeal.

The first ground of appeal that was argued by the appellant, was that the Provincial Appeals Committee had no jurisdiction to entertain the appeal that was before it, as that appeal had been filed late.

The appeal was filed on 12th March 2001, whereas the Vihiga Land Disputes Tribunal had delivered its judgement on 4th November 1999.

Although the appeal was filed on 12th March 2001, there was a very curious occurrence in the case. The appeal was first given the number 81 of 1999.

I say that that occurrence is curious because an appeal that was filed on 12th March 2001 cannot have been numbered 81 of 1999.

When the appellant herein wrote to the Appeals Committee to protest about the anomaly, the Committee removed from its hearing list, the appeal No. 81 of 1999.

The records made available to the Appeals Committee and also to this court, show that the parties in Appeal No. 81 of 1999 were;

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In the light of those facts, it does appear obvious that someone at the Provincial Appeals Committee deliberately or otherwise set about misrepresenting that the respondent herein had filed his appeal in 1999, whereas the appeal had been filed in 2001. In an endeavour to achieve the intended goal, the said person or persons cited the number of an appeal which had already been heard and determined.

In my considered opinion, what was done herein cannot be termed as anything other than a forgery, which was perpetrated by a person or persons who wanted to show that the appeal to the Appeals Committee was filed some 2 years before it was actually filed.

The appellant herein was not present before the Appeals Committee on 9th April 2002, as well as on 30th April 2002. The appellant says that that was because he was not served with a hearing notice to attend the sessions.

But the respondent drew the court’s attention to the fact that the appellant knew about the appeal which was before the Appeals Committee. His reason for so saying was that the appellant herein did exchange correspondence with the Committee, regarding the appeal.

A perusal of the documents in the record of appeal shows that there was an appeal;

“1. **HERBERT MWERESA**

2. **FLORENCE MUHONJA APPELLANTS**

3. **TAFROZA KASAYA**

VERSUS

AYUB ENDONDO ----- RESPONDENT

Those were the parties in Appeal No. 81 of 1999.

The appellant herein had apparently ascertained that the appeal by the respondent herein had been lodged with the Provincial Appeals Committee on 12th March 2001. Therefore, the appellant was persuaded, in his mind, that there was a forgery involved.

In that regard, the appellant did instruct his advocates to take up the matter with the Provincial C.I.D., Western Province, with a view to having those involved in the forgery, brought to book.

In effect, the appellant herein did appreciate that the forgery was a criminal offence. However, in my view, the appellant had no obligation to prove that there was a person who had been convicted for the offence of forgery, before he could, in this civil case, assert that there was a forgery.

Regardless of the steps, if any, which the police and the C.I.D. may have taken, with a view to bringing to book those who were criminally liable for the matters complained about, the appellant was entitled to raise the issue within the Civil Proceedings.

And, as I have already held herein, there is no other explanation, other than forgery, for an appeal filed on 12th March 2001 to be cited as if it had been filed two years earlier.

Meanwhile, it is one thing to know that there is an appeal on record, and quite another thing to be made aware of the hearing date of the said appeal.

In this case, the appellant has said that he was not served with the memorandum of appeal in Appeal No. 179 of 2001. He was also not served with any hearing notice.

Those assertions have not been disproved at all. I therefore find that the Appeals Committee erred by proceeding to hear the appeal when the respondent thereto had not been served. By so doing, the Appeals Committee condemned the appellant herein unheard.

By virtue of the provisions of **Section 8 (1)** of the Land Disputes Tribunals Act;

“Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.”

As is clear in this case, the Tribunal’s decision is dated 20th April 1998. That date is cited in the memorandum of appeal which is numbered “Civil Appeal No. 81 of 1999.”

Therefore, the appeal to the Appeals Committee should have been filed before the end of May 1998. However, it was only filed on 12th March 2001. It was thus filed hopelessly out of time.

In the circumstances, the appeal was incompetent, and the Provincial Appeals Committee ought not to have entertained it.

Furthermore, the Appeals Committee had been notified that the respondent herein had filed an appeal before the High Court. The said appeal was Kakamega High Court Civil Appeal No. 75 of 1999, and the same arose from the decision of the Vihiga Land Disputes Tribunal, which was adopted as a judgement of the court. That appeal was dismissed by the High Court on 16th February 2001.

According to the Appeals Committee, the respondent only filed his appeal before the said Committee, after the High Court had dismissed Appeal No. 75 of 1999.

In the light of that knowledge, which the Appeals Committee expressed in its letter dated 8th March 2002, the Committee erred by registering Appeal No. 179/2001, and later, by proceeding to hear it. Once the High Court had dismissed the appeal that the respondent herein had lodged before it, the Appeals Committee ought not to have entertained a new appeal arising from the said decision as that which the appeal before the High Court had adjudicated on.

For all those reasons, I find the appeal herein well merited. It is therefore allowed. The decision by the Provincial Appeals Committee is set aside.

The costs of this appeal and of the appeal before the Appeals Committee are awarded to the Appellant herein.

Dated, Signed and Delivered at Kakamega, this 27th day of April, 2009.

FRED A. OCHIENG

J U D G E