



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

**Civil Appeal 144 of 2003**

**SAMMY LIKUYI ADIEMA .....APPELLANT**

**V E R S U S**

**CHARLES SHAMWATI SHISIKANI ..... RESPONDENT**

**J U D G E M E N T**

The appeal before me arises from the decision of the Western Provincial Land Disputes Appeals Committee, in Appeal No.19 of 2003.

The appellant cited the following three grounds of appeal;

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

***2A. The Western Provincial Land Disputes Appeals Committee erred in law by failing to inform the appellant the date, time and place of hearing of the appeal and proceeded to dismiss the appeal in his absence contrary to the mandatory provisions of section 8 (4) of the land Disputes Tribunal Act No.18 of 1990.***

***3A. The Western Provincial Land Disputes Appeals Committee erred in law by allowing an unlawful award of Kabras Division Land Disputes Tribunal to stand.”***

When canvassing the appeal, Mr. Ombaye, advocate for the appellant, submitted that the Appeals Committee ought to have been constituted of a panel of three members only.

As the panel in this case was constituted of four members and a chairman, the appellant submitted that they acted ultra vires the law.

The second issue canvassed by the appellant was as appertains to the failure by the Appeals Committee to notify him of the time, place and date when the appeal was scheduled for hearing.

As a consequence of that failure, the appellant says that he was denied the chance to be heard in the appeal.

It is the submission of the appellant that by failing to follow the law, the Appeals Committee allowed the unlawful decision of the Kabras Land Disputes Tribunal to stand.

The Tribunal had ordered that the respondent herein should not be evicted from the land that was the subject matter of the dispute between the parties. The appellant contends that that award by the Kabras Land Disputes Tribunal was unlawful because the Tribunal did not have powers to make such orders.

Indeed, as far as the appellant was concerned, the Tribunal had no powers to entertain the claim that was before it.

For those reasons, this court was asked to allow the appeal.

However, the respondent submitted that if the appellant was questioning the powers of the Appeals Committee to hear the appeal, then the appellant must be deemed to be saying that the said Committee lacked jurisdiction.

The respondent also submitted that if the Kabras Land Disputes Tribunal lacked jurisdiction then logically the appellant should not have appealed to a body which lacked jurisdiction.

Therefore, as far as the respondent was concerned, the appellant ought not to have moved this court by way of an ordinary appeal. The respondent's view was that the appellant could only have sought judicial review.

Whilst saying that he appreciates the High Court's unlimited jurisdiction, the respondent nonetheless, submitted that the court could only invoke its inherent jurisdiction in matters that were properly before it.

In that regard, the respondent submitted that had the matter been brought by way of judicial review, the High Court could have been able to exercise its supervisory role over the Appeals Committee.

Had the appellant only sought to challenge the manner in which the Appeals Committee reached its decision, the respondent might have been right. However, in my understanding, the appellant was not only challenging the manner in which the decision was arrived at.

The appellant expressly faulted the constitution of the Appeals Committee.

As the constitution of the Committee is expressly provided for by statute, it may well be that the improper constitution thereof may deny the Committee the legal capacity to act.

**Section 9 (2)** of the Land Disputes Tribunal Act stipulates as follows;

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

In this case, the Provincial Appeals Committee was made up of a chairman and four members. The decision of the committee was signed by the five persons who constituted the committee. To my mind, the five persons did so because they were party to the said decision. In other words., the decision was made by them.

**Section 8 (5)** of the Land Disputes Tribunal Act states that appeals are to be determined by;

***“The Appeals Committee, which shall consist of three members appointed under section 9.”***

Therefore, in so far as the decision by the Appeals Committee herein was made by five persons, it follows that there were two persons who had no authority to be involved in that decision-making exercise. To my mind, the involvement of those two extra persons must be deemed to have invalidated the decision, as the extra persons could only be construed as strangers.

Secondly, the appellant has submitted that the Kabras Divisional Land Disputes Tribunal gave an

unlawful award because it had no powers to give the orders for his eviction.

He did not say that the said Tribunal lacked jurisdiction to entertain the dispute. A tribunal may have jurisdiction to hear and determine issues, but it may give orders which were in excess of its powers.

In effect, if a tribunal made orders beyond its powers that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute, in the first place.

And when a party is convinced that the orders made were without lawful authority, I find nothing to bar such a party from challenging the said orders through the duly established appeal process.

When the appellant lodged his appeal to the Provincial Land Disputes Appeals Committee, he could not have known that the committee would constitute itself in such manner as to take away its capacity to adjudicate over the appeal.

Had the committee constituted itself in accordance with the provisions of **section 9 (2)** and **section 8 (5)** of the Land Disputes Tribunals Act, it would have had jurisdiction to hear and determine the appeal.

As regards the appellant's absence before the Appeals' Committee, the same is conceded by the respondent. However, the respondent submits that the responsibility of telling the parties to the appeal, about the hearing dates, the time and place for hearing, rested upon the Committee.

The appellant has not suggested that the responsibility rested on the respondent.

It is the respondent's contention that the chairman of the Appeals Committee should have been given an opportunity of explaining whether or not the appellant had been given notice of the date, time and place when the appeal was to be heard. That could have been done if the Appeals Committee had been made a party to these proceedings, if the proceedings had been commenced by way of Judicial Review: those were the submissions of the respondent.

The record of the proceedings before the Appeals Committee contains the following statement;

#### ***"FINDINGS***

***Since the appellant had failed to appear before elders whenever summoned to present his claim, we cannot keep on adjourning the case."***

In my understanding, that note indicates that the Appeals Committee had been summoning the appellant before themselves.

Although neither of the parties took up that point before me, I cannot overlook something which is apparent on the face of the record.

And given the said piece of information, it follows that the only way through which this court could have ascertained whether or not the appellant was given notification of the hearing date, time and place for the hearing of the appeal before the Appeals' Committee would be if the Committee was accorded an opportunity to tell its side of the story.

To that end, there is merit in the respondent's contention that Judicial Review would have been more appropriate in challenging the alleged failure by the Committee to give notice to the appellant.

However, that does not render the appeal process fatally defective. It simply means that this court is unable to determine, as a matter of fact, whether or not the Committee did give notice to the appellant before they handled the matter.

In my considered opinion this appeal either succeeds or fails on the basis of section 3 of the Land

Disputes Tribunal Act. I say so because the original dispute did not relate to either

**“(a) the division of, or determination of boundaries to land, including land held in common;**

**(b) a claim to occupy or work land; or**

**(c) trespass to land”**

as envisaged under **section 3(1)** of the Act.

From the evidence tendered before the Tribunal, the dispute was about whether or not the appellant had fulfilled the terms of the Agreement of Sale, as between himself and the father to the respondent herein.

On the one hand, the appellant insisted that he did pay the full purchase price, whilst on the other hand, the respondent insisted that the appellant only paid one-half of the purchase price. He therefore offered to refund to the appellant the money which the appellant had paid to his father in 1984. However, the appellant would have none of that, because he believes that he had paid the full purchase price.

The bottom-line appears to be a contractual dispute, over which the Tribunal had no jurisdiction. Therefore, by upholding a decision which was made without jurisdiction, the Appeals Committee erred in law.

In the result, the appeal is allowed. The decision by the Appeals Committee is set aside. Similarly, the decision by the Kabras Divisional Land Disputes Tribunal is set aside, for want of jurisdiction.

As regards costs, it is noteworthy that it was the appellant who instituted proceedings before the Tribunal. This court has held that the Tribunal lacked jurisdiction.

Had the appellant not moved the body which he now says had no jurisdiction, the appeals to the Appeals Committee and to the High Court may not have become necessary.

Therefore, although the appeal is successful, I order each party to pay his own costs.

***Dated, signed and Delivered at Kakamega, this 26<sup>th</sup> day of June, 2008***

**FRED A. OCHIENG**

**J U D G E**