

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 107B of 2003

ZACKAYO KWENDO AGOI APPELLANT

V E R S U S

CHRISTOPHER OCHUNYI ONG'ONG'O RESPONDENT

J U D G M E N T

This is a judgment from the appeal from the Appeals Committee, Western Province. The appeal was brought to this court under *Section 8 (9) of the LAND DISPUTES TRIBUNALS ACT NO.18 OF 1990*. The Appeals Committee dismissed the appeal to it by Zackayo Kwendo Agoi because he had failed to prosecute it. In effect therefore, the decision of the lower tribunal, LUANDA DIVISIONAL LAND DISPUTES TRIBUNAL remained in place. That decision required CHRISTOPHER NDEGE ONG'ONG'O, ZACKAYO KWENDO AGOI, the Appellant, to pay to the Respondent, the Appellant herein, Shs.30,000/= which he had failed to pay for over 8 years, and to put up structures he had wrongly demolished failing which Christopher Ndege Ong'ong'o should refund to Zackayo Kwendo Agoi the deposit of Shs.40,000/= and retain the land parcel No. West Bunyore/Emali/1533.

In his Memorandum of Appeal, Zackayo Kwendo Agoi, the Appellant, set out seven grounds of appeal as follows:-

1. *The Provincial Appeals Committee erred in law by allowing a fourth person A. K. LUKOSE to sit in the deliberation.*
2. *The Provincial Appeals Committee erred in Law in failing to annex any evidence of service to the Appellant and thereafter proceeding ex-parte to the detriment of the Appellant.*
3. *The Provincial Appeals Committee erred in Law in failing to inform the Appellant of the hearing date.*
4. *The Provincial Appeals Committee erred in Law in dismissing the Appellant's appeal without going to the merits of the case on record.*
5. *The Provincial Appeals Committee erred in law in failing to appreciate that the verdict of the Luanda Division was void ab-initio and could not be adopted as six elders sat instead of 5 as required by law.*
6. *The Provincial Appeals Committee erred in Law in failing to appreciate that the whole of purchase price of KShs.70,000/= had been paid in full on 11/8/95.*
7. *The Provincial Appeals Committee erred in failing to appreciate that the demolition had been ordered vide a valid court order in Civil Suit No.6808 of 1998.*

What is salient in the record of appeal is that the Appeals Committee dismissed the appeal due to non attendance of the appellant. The appeal was on 27.3.2003 fixed by Appeals Committee for hearing on 10.4.2003. The Appeals Committee required the Appellant to be served.

Under section 8 (5) of Act 18 of 1990, the Appeals Committee was required to consist of three members appointed as stipulated in section 9 (1) of the said Act. The record shows that 4 members sat. The Appeals Committee was therefore not properly constituted.

Under Rule 11 of the Land Disputes Tribunals (Forms and Procedure) Rules 1993, the Appellant should have been served in the manner provided for in the Rules made under the Civil Procedure Act. The record of appeal does not reflect compliance with Rule 11. In the premises, I find merit in grounds 1, 2 and 3 of the appeal. The Appeals Committee not having been properly constituted, and the Appellant not having been served as required under Rule 11 (supra), I find it unnecessary to consider the other grounds. I set aside the decision of the Appeals Committee on these grounds. Not being properly constituted, the Appeals Committee's purported decision was a nullity. In effect, the appeal succeeds. It is not open to me to examine the decision of the Luanda Divisional Land Disputes Tribunal which, it appears, was beyond the powers of that tribunal to make and was therefore ultra vires its powers. The Appellant shall have the costs of this appeal.

Dated at Kakamega this 24th day of May, 2007

G. B. M. KARIUKI

J U D G E