

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Appeal 95 of 2001

1. MOSES ETAKWA

2. ELISHA WAKHANU
.....APPELLANTS

VERSUS

ENOCKER
WECHULLI
..RESPONDENT

JUDGEMENT

Enocker Wechuli (the Respondent in this appeal) on the one hand and Messrs Elisha Etakwa Wakhanu and Moses Etakwa (the Appellants in this appeal) on the other hand were the complainant and Respondents respectively before Navakholo Land Disputes Tribunal. Their dispute related to boundary to their contiguous farms. The Respondent's farm was land title No. Bunyala/Sirigoi/225 while land title numbers Bunyala/Sirigoi/721 and 722 belonged to the first and second Appellants, respectively.

Navakholo Divisional Land Control Board adjudicated on the dispute between the parties and held that the old boundary that had existed for over 50 years would be maintained.

Aggrieved by this decision, the Respondent appealed to the provincial Appeals Committee which by its decision dated 29-5-2001 reversed the decision of the Navakholo Divisional Land Disputes Tribunal.

In their Memorandum of Appeal dated 3-12-01, the Appellants put forward three grounds of Appeal in which they contended firstly that the decision of the Appeals Committee was a nullity because it was based on irrelevant matters and secondly that the Appeals Committee was biased and thirdly that the panel of the said Committee was irregularly constituted and that its decision therefore was null and void.

There was no evidence to buttress the allegation of bias and clearly that ground of appeal must fail.

Mr. Mukavale, learned counsel for the Appellants, submitted that the Navakholo Divisional Tribunal had jurisdiction and that it arrived at a correct decision which, he said, was reversed by the Appeals Committee without any justification as there was no material before it, he argued, on the basis of which they could disturb the decision. He urged the court to allow the appeal.

On his part, Mr. Getanda, learned counsel for the Respondent, contended that the Appeal had no merit. He sought its dismissal. His contention was that the composition of the tribunal was proper and in accordance with Section 9 of Act 18 of 1990 as three members of the tribunal sat and signed the decision. He further contended that the Appeals Committee relied on evidence both before it and in the Divisional Land Disputes Tribunal and did not rely on extraneous matters.

I have perused the record of appeal and in particular both the proceedings of the Navakholo Land Disputes Tribunal and the Kakamega Provincial Appeals Committee. I have also perused the Memorandum of Appeal and given due consideration to the submissions of both counsel.

The issue for determination is whether the Appeals Committee was justified in reversing the decision

of Navakholo Land Disputes Tribunal. The latter tribunal had found that the boundaries had been interfered with by a surveyor who was a quack, but no qualified surveyor re-established the boundaries. The Tribunal got no co-operation from the Lands Office in this regard, and therefore decided to reconfirm the old boundaries. The Appeals Committee *suo moto* called for a report of a Surveyor whose costs the parties agreed to pay. No report however was furnished as, ostensibly, no survey work was carried out. The Appeals Committee confirmed the existing boundaries on the basis that on 6th July, 1999, the District Land Registrar, Kakamega, had marked the boundaries by growing plants. There was no evidence to this effect. In any case, the Land Registrar is not charged with the responsibility of marking boundaries. This was the responsibility of the Survey office. It was a misdirection on the part of the Appeals Committee to reverse the decision of the Navakholo Land Dispute Tribunal on that basis. I agree with Mr. Mukavale that there was no basis for the reversal of the decision of Navakholo Land Disputes Tribunal by the Appeals Committee. Moreover, while J. S. N. Adagala was not a member of the panel of the Appeals Committee of three, W. P. Amutallah who was a member did not sign the decision.

As Section 8(5) of Act 18 of 1990 required the Appeals Committee to consist of three members and as only two of the three members signed the award, it was not valid as it could not be assumed that the member who did not sign assented and was privy to the decision. For these reasons, the appeal must succeed. It is allowed. The Appellants shall have costs.

Dated, signed and delivered at Kakamega this 24th day of February, 2006.

G. B. M. KARIUKI

J U D G E