



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**Civil Appeal 87 of 2002**

**THOMAS KUNDU**

**JAMIN WANYMA**

**BARASA KHAEMBA.....APPELLANTS**

**VS**

**REBECCA W. W.**

**OMIDO.....RESPONDENT**

**JUDGMENT**

**This is an appeal arising from the Western Province Land Appeals Committee read and adopted as the judgment of Court by the Honourable Magistrate B. Ojoo (Miss) D.M.II vide Bungoma LDT case no.25 of 2002 on 12<sup>th</sup> November 2002.**

**Briefly, the facts are that the respondent purchased land parcel No.BOKOLI/BOKOLI/9 in an Auction in 1975. The parcels were thereafter transferred in the joint name of herself and her son Geoffrey Macleord Omukhango. A neighbour by the name Simon Khaemba (since deceased) allegedly interfered with the boundary. The Respondent called in surveyors to determine the boundary. At this stage Barasa Khaemba, the 3<sup>rd</sup> appellant built a home on the disputed section of the land. Against this backdrop, the respondent appealed to Land Disputes Tribunal in LDT case no.BOKOLI.**

**BOKOLI/LDT/2/95. The respondent was the claimant and the appellants the objectors.**

**The elders that sat and heard the case were: Jonathan, Belli Masinde, Henry Makokha Sirengo and Moses Wasike Amutala.**

**At the end of the hearing, the Land Disputes Tribunal reached the following decision.**

**1 The director of surveys to be requested to produce an Aerial map covering these two disputed parcels BOKOLI/bokoli/9 AND 8 SINCE R.I.M. (Registry Index Map) has currently been disputed by the claimant as not the correct one and then the District Land Registrar and the District Surveyor to be requested to re-visit the site to interpret the Aerial Map themselves without**

delegating powers to their Juniors so that boundary features separating parcel No.9 and 8 may be fixed possibly by the use of beacons to remain there permanently.

2 The claim touching on parcel no.8 where the claimant wants a portion of approximately 7 ½ acres stretching from river Kuywa upwards is purely of ownership and it is our opinion that, it is not the parcel originally affected by Public Auction, it should be left alone to its 3 occupants who are the objectors. If the claimant has any claim over it, it is our feeling that this panel has no jurisdiction over the same since it falls under the first registration of the register which can only be dealt with under "Limitation of Actions Act" an act which is above this panel of elders jurisdiction.

3 We finally stress that the Land Registrar and the District Surveyor in determining the boundaries between Parcel No.9 and 8 should not delegate powers to their Juniors in order to solve this problem once and for all.

The said decision was signed by 3 elders, to wit, Jonathan Seli Masinde, Henry Makokha Sirengo and Moses Wasike Amutala.

The respondent, Rebecca N. A. Omido, being aggrieved by the decision of the Land Disputes Tribunal appealed to the Provincial Land Disputes Appeals Tribunal case no.13/95. The panel of elders were as follows:

- 1 Hesbon Naibei-Chairman
- 2 Crispus Sasur-Member
- 3 B. Chagala- Member

Hearing commenced on 19<sup>th</sup> December 1996. The coram was as follows:

- 1 Hesbon Naibei - chairman
- 2 Mr Mudogo - member
- 3 Mr. Obukui - member

Appellant - present

Respondent - Present

The case proceeded and was thereafter adjourned severally.

On the 16<sup>th</sup> April 1998 viewing of the subject parcel was scheduled. By record of proceedings in attendance were:

- 1 CRISPUS
- 2 CHAGALA

It would appear that the same aborted. On 14<sup>th</sup> day of October 1997, the matter again came for hearing. By record of proceedings the following were in attendance:

- 1 HESBON NAIBEI - CHAIRMAN

**2 CRISPUS SASUR - MEMBER**

**3 B. CHAGALA - MEMBER**

**It was ordered, by consent, that land in dispute be visited on 16<sup>th</sup> October 1997. Each party to meet transport costs assessed at Ksh.500/=.**

**After the viewing, hearing was conducted and all parties were in attendance. It was adjourned to 2<sup>nd</sup> December 1998. Which day, it was adjourned to 7<sup>th</sup> December 1998. By record of proceedings, quorum is stated to be as before. It was adjourned to 12<sup>th</sup> March 2002. The quorum on that day, by record of proceedings was as follows:**

**1 E. J. WASIDA - CHAIRMAN**

**2 W. P. AMUTALLA - MEMBER**

**3 H.A. OMAR, (MBS)- MEMBER**

**Appellant Absent**

**Respondent Absent**

**ORDER: Case adjourned to 7<sup>th</sup> may 2002.**

**On 7<sup>th</sup> May 2002, by record of proceedings the coram was as follows:**

**E. J. MASINDE - CHAIRMAN**

**F. KONGO - MEMBER**

**W.P. AMUTALLAH - MEMBER**

**H.A. OMAR - MEMBER**

**APPELLANT - ABSENT**

**RESPONDENT - ABSENT**

**Record read and confirmed. The case has been heard by several panel of elders for along time since 18<sup>th</sup> April 1996.**

**FINDINGS: Appellant, Mrs Rebecca W. A. Omido proved her case by producing necessary documentary evidence to show that the land in dispute was bought through auction:**

**VERDICT: The land in dispute is given to the appellant Mrs Rebecca W. A. Omido. She bought it legally. – Costs to be borne by the parties themselves.**

**E. J. WASIDIA CHAIRMAN**

**W. P. AMUTALLA MEMBER**

**FRANCIS KANGU MEMBER**

**H. A. OMAR MEMBER**

**Dated 7<sup>th</sup> May 2002.**

**The above decision thus provoked this appeal. The appellants Thomas Kundu, Jamin Wanyama and Barasa Khaemba in their memorandum of Appeal dated 10<sup>th</sup> December 2002 raised several complaints through counsel.**

**At the hearing, Mr Makali for the appellant chose to argue the 4 grounds of appeal globally**

**The first complaint was that PLA Committee was not duly and validly constituted. That the award was made by 4 panel members instead of 3 contrary to the provisions of Section 8(5) of the Land Disputes Tribunal. Hence the award was a nullity in law.**

**The second complaint was that there was no valid hearing of the appeal as the composition of the panel kept on changing with each sitting. That this is borne out by proceedings at page 17 –21 of the record.**

- 1) On 28<sup>th</sup> November 1996 – 4 members**
- 2) On 19<sup>th</sup> December 1996 – 3 members that sat were different from the ones that sat on 28<sup>th</sup> November 1996.**
- 3) On 14<sup>th</sup> October 1997 different set of members.**
- 4) 12<sup>th</sup> March 2002 different set of members sat.**
- 5) On 17<sup>th</sup> May 2002 – a different set of panel of members sat which awarded the respondent the subject land. That consisted of members who never heard the appeal. The question posed by counsel is as follows: How could they award the land when they never heard the case?**

**The third complaint was that the award was in excess of jurisdiction in that it purported to vest title in the respondent when it did not have jurisdiction to do so by dint of the provision of section 3(1) of the LDT Act No.18/1990.**

**Mr Kraido, for the respondent, argued that the award of the appeals Committee is signed by 3 members and not 4. That the fourth member is an error in typing, a matter which can be corrected by review as opposed to appeal. The appeal committee was thus properly constituted.**

**That the appeal was heard on 19<sup>th</sup> December 1996. In attendance were 3 members. That in any event LDT Act No.18/96 does not contemplate the hearing of a case by same panel from beginning to the end. The procedure in LDT is not as rigid as the one of a Court of law that would require same coram from beginning to the end.**

**That, the issue for determination touched on trespass and boundary. The ultimate award that gave the appellant the entire land he had purchased at an auction was proper.**

**I have carefully analysed the evidence on record as I am bound to do on first appeal.**

**It is clear to me that the composition of the panel of elders kept on changing from time to time. In my view the change of composition vitiated the outcome. At the end of the day not all the members who heard the appeal gave the verdict.**

**The initial claim was for trespass and boundary dispute. Finally the panel awarded the whole land to the respondent. The award was at variance with the claim before the panel.**

**On the premises, I allow the appeal, set aside the entire award. I award costs to the appellants.**

**Dated and delivered at Bungoma this 23rd day of March 2006.**

**N.R.O. OMBIJA**

**JUDGE**

**Mr. Makali for the appellant**

**Mr. Mukhisa for Kraido for respondent.**