



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MAKUENI**  
**ELC APPEAL NO. 2 OF 2020**

**(Formerly Machakos High Court Civil Appeal No. 125 of 2011)**

STEPHEN KITHUKA NDUNGWA.....APPELLANT

-VERSUS-

NDAMBUKI VEKE KYAI

WILLIAM KYENGO SILA

TITUS KILOKWE NTHALE.....RESPONDENTS

*[Being an Appeal from the decision of the Appeals Committee*

*(Johnson Manzi, C. Muthoni & S Nyaga) in the Eastern Province*

***Land Dispute Appeal Tribunal, Appeal No.22 of 2008,***

*delivered on 6<sup>th</sup> July 2011]*

**JUDGMENT**

1. The Appellant herein commenced this litigation journey in the Makueni District Land Tribunal *vide* LDT claim No. 140 of 2006. He sought the sub division of family land and marking of a boundary that would be respected by all parties. The Tribunal agreed with him and ruled that an identical boundary would be marked by the panel members within the operational zones of each family once the reading and confirmation of award had been done by the Court.

2. In the award, the Tribunal made the following observations;

- a) The land in dispute belonged to the great grandfather of both parties called Ndavi.*
- b) Ndavi left his land to his two sons, Nthele and Mukala. The dispute was therefore between the descendants of Nthele and Mukala.*
- c) The Appellant belongs to the family of Nthele and the Respondents belong to the family of Mukala.*
- d) Mukala died and his brother Nthele cared for both families.*
- e) The family of Nthele was attacked by small pox and many of the family members died.*
- f) The members of Mukala family who were many in number took advantage of the family land by cultivating most of the shambas. Their grandfather Nthele was by then known as the only owner of the two families.*
- g) Before Nthele died, he had sub divided the land into two operational zones. Mukala had the upper part of Nthunguni hill and Nthele had the lower part of the hill.*

***h) The two families worked and developed their sides without interference from either side and the homesteads are built on each operational zone.***

***i) On cross examination, Kilokwe Nthale (3<sup>rd</sup> Respondent) agreed that the land should be share equally between the descendants of Nthele and Mukala.***

***j) During the hearing, the 1<sup>st</sup> witness of the Respondents (John Saiva Mwakavi) tried to drive the panel members astray by involving other people who he said were relatives of Nthele and Mukala from their fifth great grandfather but it turned out that those people were not known to Nthele's family members. They didn't live there or near there.***

***k) Upon visiting the site, the panel members found out that each family had its own operational zone as stated by the Appellant.***

***l) In Nthele's operational zone, there were 3 identical shambas of other people who didn't belong to the two families.***

***m) John Saiva Mwakavi tried very much to put 14 cradle shambas 'ngundu' into Nthele's part but the panel members did not see them when they went to the site.***

***n) At the site, the panel members found out that a Kamba traditional oath was administered by a Court of law in Civil Case L 277 of 1950 with regard to the land in dispute.***

***o) According to the panel's assessment, Mukala's family occupies the best, productive and biggest part of the entire land.***

***p) The panel concluded that it was quite unfair for Mukala's family to claim shamba on the side of Nthele.***

3. Aggrieved by the award, Kilokwe Nthale (3<sup>rd</sup> Respondent) filed an appeal at the Provincial Appeals Committee in Embu *vide* Appeal No. 125 of 2007. Meanwhile, execution of the award of the District Tribunal, which had been adopted as an order of Court *vide* Kilungu Misc. Application No. 45 of 2007, was stayed. The Appeal Committee confirmed the decision of the District Tribunal and advised it to revisit the disputed land and mark a boundary between the descendants of Mukala and Nthele. The award was adopted as a judgment of the Court on 12/08/2009 and consequently implemented by the District Tribunal as ordered.

4. Separately, a new claim was filed at the District Tribunal after conclusion of LDT 140 of 2006. The new claim was filed by Ndambuki Vyeke Kiai, William Kyengo Sila & Others (LDT No. 22 of 2007) against Stephen Kithuka Ndungwa and Titus Kilokwe Nthale. The grievance was that LDT 140 of 2006 was decided without setting aside 14 ancestral portions belonging to other people. The panel agreed with the claimants that indeed there were 14 portions of ancestral lands belonging to other people and condemned Stephen Kithuka Ndungwa to pay costs of kshs 80,000/=. According to the Tribunal, he caused the expenses to be incurred as he was aware that the ancestral lands existed.

5. Aggrieved by the award, Stephen Kithuka Ndungwa (Appellant) filed an appeal at the Provincial Appeals Committee in Embu *vide* Appeal No. 22 of 2008 but the Appeal was dismissed. The dismissal prompted Stephen Kithuka Ndungwa to move to the High Court and the matter was subsequently transferred to the Environment and Land Court.

6. Through a Memorandum of Appeal dated 23/08/2011, the Appellant raised 7 grounds as follows;

***a) The Appeals Committee erred in law in opening appeal No. 125 of 2008 which was consolidated with appeal No. 22 of 2008 and decided and implemented by the Kilungu Resident Magistrate.***

***b) The record of appeal was tainted with forgery/fraud by introducing proceedings and findings which did not exist on 26<sup>th</sup> March 2009 and which were not signed by the chairman.***

***c) The proceedings and Ruling are irregular and have errors of law on the record which includes parties who did not exist and others who were not parties to the appeal and were dead.***

***d) The committee erred in law in failing to consider the grounds of appeal or at all dated 28<sup>th</sup> March 2008 and basing the ruling on irrelevant facts.***

***e) The Appeal Committee failed to evaluate the evidence and particularly when it made findings which were irrelevant to the proceedings and Award of the Tribunals.***

***f) The Committee proceedings and Ruling was res judicata vide case No. 125 of 2008.***

***g) The Appeal Committee erred in law in deciding an appeal where in the parties were not in attendance.***

7. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

8. The Appellant submitted that after appeal No. 22 of 2008 was heard, 14 new parties were introduced into the appellant's land which he was awarded after a boundary was marked by the Tribunal and confirmed as a judgment of the Court. He contends that none of the 14

portions were found to be in the land awarded to the Respondent.

9. He submitted that the memorandum of appeal to the Appeals Committee contained more than 10 grounds but none was considered.
10. He submitted that it was a major breach of the law for the Appeals Committee to consolidate a decided appeal with an undecided one.
11. He submitted that the Appeal Committee wrote a letter saying that the consolidated appeals were finalized on 25/03/2008 yet the same committee consolidated the appeal on 06/07/2011.
12. The Respondents submitted that from the proceedings and Ruling of the Appeals committee, it is clear that the Appellant had thrown the Appeals Committee into confusion by lodging an appeal against persons who were not parties to the proceedings at the District level. They submit that the decisions of the Appeals Committees had already been implemented and as such, the appeal was rightly dismissed.
13. They submitted that after making the preliminary observations, the Appeals Committee did not take evidence/dispositions from the wrong parties to the appeal before it.
14. Relying on section 8(1) of the Land Disputes Tribunal (*LDT*) Act (*now repealed*), they submitted that an appeal to the Appeals Committee against a decision of the Land Disputes Tribunal can only be made by a person who is a party to the Dispute's Tribunal proceedings giving rise to the decision appealed against. Further, they submitted that the appeal must be against persons who are parties to such proceedings.
15. They submitted that ground (a) of the appeal is an admission that appeals 125 of 2008 and 22 of 2008 were consolidated, heard, decided and the resultant decision implemented by Kilungu Resident Magistrate's Court.
16. Relying on section 8(8) & (9) of the LDT Act, they submitted that the appellant has not established the existence of a point of law that is capable of being determined by this honorable Court.
17. They submitted that the land, the subject matter herein, is not surveyed/ adjudicated and is therefore held by the parties under customary law.
18. It was also their submission that the customary law rights over the suit property have already been determined by Makueni Land Disputes Tribunal whose decision was adopted as an order of the Court.
19. They submitted that this Court has already dealt with a similar matter in Misc. Civil Application No. 229 of 2011. A copy of the Ruling was attached to the submissions.
20. As correctly submitted by the respondents, the mandate of this Court is limited to dealing with matters of law only. **Section 8(8)** of the LDT Act provided that;

*“The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie there from to any Court.”*

21. Further, **Section 8(8)** provided that;

*“Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of”*

*“Provided no appeal shall be admitted to hearing by the Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.”*

22. Having looked at the grounds of appeal, the rival submissions and the entire record, the following issues arise for determination;

**a) Was there a consolidation of appeals 125 of 2007 and 22 of 2008 and if yes, was the consolidation proper?**

**b) Was appeal No. 22 of 2008 against persons who were not parties to the proceedings at the District level?**

**c) Was appeal No. 22 of 2008 properly dismissed?**

**d) Which orders should this Court issue?**

23. As indicated in the introductory part of this judgment, the Provincial Appeal 125/2007 was against LDT 140/2006 whereas the Provincial Appeal 22/2008 was against LDT 22/2007; judgment in the former was delivered on 25/03/2009 and in the latter; the judgment was delivered on 06/07/2011.

24. In a ruling dated 14/04/2008, the Appeals Committee in Appeal 22/2008 indicated that it had *“decided to bring together the two cases.”* Appeal 125/2007 was conducted on 25/03/2009 and it proceeded as if appeal 22/2008 was not in existence. The consolidation issue was never mentioned. Further, the different judgment dates indicated therein in the two appeals is a clear show that the two appeals were never

procedurally consolidated.

25. LDT No. 22 of 2007 was filed by Ndambuki Vyeke Kiai, William Kyengo Sila & Others against Stephen Kithuka Ndungwa and Titus Kilokwe Nthale.

26. In the judgment of the Appeals Committee delivered on 06/07/2011, the Appellant is indicated as ‘Stephen Kithukwa Ndungwa’ and the Respondents are indicated as ‘Ndambuku Veke Kyai and William Kyengo Sila’. It is therefore evident that the appeal was proper and was against persons who were parties to the proceedings at the district level.

27. It is clear from the record that this appeal was never heard. In the submissions, the respondents agree that “...the Appeals Committee did not proceed to take evidence and/or depositions from the wrong parties to the appeal before it.”

28. Paragraph 7 of the award of the Appeals Committee states as follows;

*“The appellant in 22/2008 has appealed against Ndambuki Veke and another who was not in the case number 125/2007 and which brings up the confusion in the two files.”*

29. If the Appellate Committee had been diligent enough, they would have realized that the parties were proper and there was absolutely no confusion in the two files. **Section 8(7)** of the LDT Act provided that;

*“After giving each party an opportunity to state his case, the Appeals Committee shall determine the appeal giving reasons for its decision.”*

30. It was, therefore, an abdication of statutory duty by the Appeals Committee to dismiss the appeal without considering the grounds of appeal and without giving each party an opportunity to present its case. To that extent, I agree with the appellant that that was an error of law. Consequently, it is my considered view that appeal No. 22 of 2008 was not properly dismissed.

31. According to **section 8** of the **LDT Act (supra)**, the decision of the Appeals Committee on any issue of fact was final and no appeal could lie therefrom to any Court. As indicated above, appeal 22/2008 was never heard and it cannot therefore be said that there was a final decision on the factual issues raised in the appeal.

32. **Section 13** of the **Environment and Land Court (ELC) Act** provides as follows with regard to Jurisdiction of this Court;

*1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

*2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes;*

*a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rent, valuations, mining, minerals and other natural resources.*

*b) relating to land administration and management.*

*c) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and*

*d) any other dispute relating to environment and land*

*3) .....*

*4) In addition to the matters referred to in sub sections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

33. From the above provisions, this Court has jurisdiction to exercise its appellate jurisdiction over decisions of local tribunals and to entertain any dispute relating to land.

34. The grounds of appeal in appeal 22/2008 were basically attacking the award of 14 ancestral lands (*ng'undus*) by the District Tribunal. According to the appellant, his co-defendant did not file a defence as he was the author of the case in order to recover the land which he had lost in claim 140/2006.

35. Having looked at the decisions of the District Tribunal, the panel in claim 140/2006 did not find any ancestral lands in the suit land even after visiting the scene and the appeal filed against the award did not deal with the issue. In the award, the District Tribunal expressed itself as follows;

*“In his statement, Kilokwe Nthale agrees that the land is for both parties and he doesn't mention about these 14 shambas that he*

*now wants to create to Nthele's portion."*

36. On the other hand, the panel in claim 22/2007 found that there were 14 ancestral portions belonging to other people and the appeal did not determine the issue as well.

37. It is therefore evident that we have two conflicting decisions issued by Tribunals of the same status. It is however not in dispute that the appellant and 3<sup>rd</sup> respondent were representatives of Nthele and Mukala respectively hence entitled to the suit land in equal portions.

38. In the circumstances therefore, the 14 ancestral lands should be shared equally by both parties in the sense that, their acreage should be determined, carved out of the suit land and the balance of the suit land divided equally between the appellant and 3<sup>rd</sup> respondent.

39. Arising from the above it is my finding that the appeal has merit. Consequently, the judgment/ruling/Award in the Appeals Committee proceedings in case No.125 of 2008 as consolidated with appeal No.22 of 2008 is hereby set aside. Same is substituted with the award of Makueni District Land Disputes Tribunal in claim No.140 of 2007 as implemented on 11<sup>th</sup> April, 2011.

**Signed, dated and delivered at Makueni via email this 28<sup>th</sup> day of May, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi