REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL APPEAL NO 8 OF 2012.

CHRISPINUS NYONGESA OUNA ……………………….APPLICANT.

VERSUS

WABWIRE OKONYOLO)

BARASA OKONYOLO)………………RESPONDENTS.

CHRISTOPHER WANDERA WANJALA)

J U D G M E N T.

CHRISPINUS NYONGESA OUNA the appellant, filed this appeal against **WABWIRE OKONYOLO, BARASA OKONYOLO and CHRISTOPHER WANDERA WANJALA** hereinafter referred to as 1st, 2nd, and 3rd Respondents through the memorandum of appeal dated 1st February, 2012 citing the following five grounds:

1. That the Trial Magistrate erred in law and facts in adopting the Provincial Land Disputes Tribunal report when the Appellant was not given the opportunity to respond to the allegations raised by the Respondents/Defendants.
2. That the trial Magistrate erred in law and fact in adopting wholly the Provincial Land Disputes Tribunal report which was a replica of Matayos Land Disputes Tribunal which had already been adopted earlier on 11th September, 2009.
3. That the trial Magistrate erred in law and facts in adopting the Provincial Land Disputes Tribunal report that had deviated from the material facts and or the contentious issues raised by the plaintiff/appellant.
4. That the trial learned Magistrate further erred in law and facts in adopting the Provincial Land Disputes Tribunal report that had equally adopted the Matayos Land Disputes Tribunal where the Appellant/Plaintiff had raised issue of bias from the Committee in which some members had interest in the matter.
5. That the Respondents in their persons have equally erred in law and facts on filing for a bill of costs and taking out a notice to show cause against the Appellant/Plaintiff in contravention of the Provincial Land Disputes Tribunal verdict item 3 which read ‘’Costs to costs.’’

The Appellant prays for the appeal to be allowed with costs in prayers (a) and (c). Prayer (b) was for stay of Busia SRM court Land Dispute case No. 72 of 2009 pending hearing and determination of this appeal. The Appellant did not pursue this prayer possibly for reasons he hadobtained stay orders from the lower court on 21st March, 2012 as confirmed by the copy of Busia C.M.C Land case No. 72 of 2008 annexed herein as part of the record of Appeal.

The parties appeared before the court on 28th May, 2013 for hearing of the appeal. The Appellant did not submit on grounds 1, 2, 3, and 4. He only submitted on grounds 5 on costs saying the Provincial Land Disputes Tribunal had directed costs to costs and not costs to the Respondents.He also appeared to be asking the court to make orders for a re-surveying for Land parcels Bukhayo/Nasewa/886, 358, 356 and 357 with a view of confirming their sizes on the ground and their respective boundaries.

The 1st Respondent opposed the appeal saying the Appellant had called a surveyor who confirmed the boundaries of the parcels as they exist as correct. John Wandera Barasa, informed the court that he was the son of the 2nd Respondent who died in 198, and indicated he has been answering for his father in the proceedings. He opposed the appeal saying a surveyor brought by Appellant had confirmed that the Appellant land boundaries were where they should. That Appellant took the matter to the Tribunal and the Appeals Committee and lost. The third Respondent said his land is separated from that of the Appellant by a river and there is no way he could have encroached into the Appellants land. He said the Appellant had brought a government surveyor to measure his land and the surveyor confirmed it was intact. He asked for the appeal to be dismissed with costs.

After considering the record of appeal and submissions by all parties, l find as follows:

1. That the Appellant herein was the plaintiff before the Matayos Land Disputes Tribunal case No. 14 of 2005 and the Respondents herein were the Defendants.
2. That the Appellant herein was also the appellant in Kakamega Provincial Land Disputes Appeals Tribunal case No. 95 of 2009 and the Respondents herein were still the respondents before the Appeals Tribunal.
3. That the copy of the proceedings before the Matayos Land Disputes Tribunal clearly indicates the 2nd Defendant/Respondent was deceased. Even though one John Wandera Barasa, a son of the deceased appeared throughout the proceedings for the deceased, he had not been appointed a legal representative of his father's estate. The court wonders how service of the processes were being effected on the 2ndRespondent who had died long before the Land Disputes Tribunal case was commenced. He had reportedly died in 1987 from what John Wandera Barasa submitted before this court. In the case of **Republic –vs- Chairman Matungu Land Disputes Tribunal Exparte Electina Wang'ona (2012) eKLR** the court was addressing the issue of capacity and Gikonyo J, held as follows:

    ''………..**The parties before the Tribunal were not representatives of the estate of the deceased persons in the service of the Law of Succession Act. There is no evidence of grant of Probate or letters of administration that was produced before the Tribunal to prove their capacity to sue or be sued. The presence of proper parties before the Tribunal is a matter of jurisdictional significance. The absence of proper parties, does not make the case feeble, rather, it goes to the jurisdiction of the Tribunal with the result that the Tribunal had no jurisdiction .''** The Honurable Judge referred to the case of **NKR HC.MISC. APPLICATION NO. 64 OF 2011 Apex Finance & Another –vs- Kenya Anti-Corruption Commission in which Emukule J,** quoted the case of the Supreme Court of Nigeria of **Goodwill and Trust investment and Another –vs- Witt and Bush Ltd** where it was held:…''**The question of proper parties is a very important issue which affect the jurisdiction of the case in limine. When proper parties are not before court, the court lacks jurisdiction to hear the suit…''**. Even though the issue of the deceased being enjoined as a party, and John Wandera Barasa's capacity in appearing for the deceased was not conversed before the Tribunal, Appeals Tribunal, Learned Magistrate's court or this court, it is important that it be flagged as an issue.

4.That the case filed before the Tribunal was one of boundary between parcels Bukhayo/Nasewa/356, 357, 358 and 886. The Appellant contention is that the other parcels have encroached into his Land Bukhayo/Nasewa/357.The matter was therefore filed before the appropriate forum for under section 3(1) (a) of the then Land Disputes Tribunal Act, the Tribunal had jurisdiction on disputes relating to the

‘’determination of boundaries to land.’’. The Appellant was not satisfied with the decision of the Matayos Land Disputes Tribunal and as provided under section 8 (1) of the then Land Disputes Tribunal Act appealed to the Kakamega Provincial Land Disputes Appeals Tribunal. The Appeals Tribunal delivered its decision on 16th June, 2011 dismissing the appeal and the Appellant filed the memorandum of appeal in this matterbefore this court on 1st February, 2012 as provided under 8 (1) of the then Land Disputes Tribunal Act which states:

‘’ Either party to the appeal may appeal from the decision of the Appeals Committee decision to the High Court on a point of Law within sixty days from the date of the decision complained of.’’

It would appear a period of over 150 days (over five months) had passed from the date of reading the Appeals Committee ruling on 16th June, 2011 to the date the memorandum of appeal was filed on 1st February, 2012.The record does not show whether the Appellant obtained extension of time to file the appeal out of time in accordance with the provisions of the Civil Procedure Rules. However, as my brother Justice Kimaru had on 11th September, 2012 admitted the appeal and the matter has not been conversed before me, l will leave the matter at that.

5.That section 8 (8) of the then Land Disputes Tribunal Act declared the Appeals Committee decision on the issues of fact to be final and therefore the Appellant could only come to this court on issues of Law only. All the grounds set out in the memorandum indicates they are raising both issues of Law and facts and this being a second appeal, the court will concentrate exclusively on issues of law. Ideally the decision being challenged is that of the Kakamega Provincial Land Disputes Appeals Tribunal which dismissed the appeal and confirmed, in effect, the Matayos Land Disputes Tribunal decision. Grounds 1 to 4 do not however mention the Appeal Committee/Tribunal but refers to the trial Magistrate decision. This is as it should be as confirmed by the then Khamoni J in the case of **R-V- Chairman Land Disputes Tribunal, Kirinyaga District & Another Exparte Kariuki (2005) 2 KLR**10. The Honourable judge held:

‘’…….When a decision of the Land Disputes Tribunal has been adopted by a Magistrate’s court in accordance with the provisions of the Land Disputes Act, that adoption makes the decision of the tribunal or decision of the Appeals Committee, be a decision of the Magistrate’s court. Consequently, the decision of the Tribunal orAppeal Committee in Law, ceases to , exist as all independent decision challengeable in an appeal or juridical review.’’

The provision of section 7 (2) of the Lands Disputes Tribunal Act (Now repealed) states:

‘’ The court shall enter judgment in accordance with the decision of the tribunal and upon judgment being a decree shall issue and shall be enforceable in the matter provided under the Civil Procedure Act.’’

This provision of the law does not allow the court to add or subtract anything from the documents received from the Tribunal and therefore the learned Magistrate cannot be faulted for not giving the Appellant any hearing before adopting the awards from both the Tribunal and the Appeals Tribunal. The duty of the court was limited to entering the decision as received and adopting it as the judgment of the court. The record from the Tribunal and the Appeals Tribunal clearly shows the Appellant participated in the hearing before those forums and cannot claim he was not given an opportunity to respond to the allegations raised by the Respondents as he does on ground 1.The record also do not show that the appellant at any one time raised any issue relating to the membership of the tribunal. The trial Magistrate as shown above had no alternative but to adopt the award or decision received from the Appeals Tribunal as Appellant seem to suggest on ground 2. The Appeals Committee found no merit in the Appellant appeal and dismissed it. It’s decision did not offend any provisions of the law and ground 3 is therefore without merit. As for ground 4, the Appeals Tribunal decision to adopt the decision of the Matayos Land Disputes Tribunal was an automatic and expected result after dismissing the appeal. I therefore find grounds 1 to 4 unsustainable. The fifth ground faults the actions of the Respondents to move the

Lower court on the bills of costs and execution. I find nothing wrong with their action as section 7 (2) of the then Land Disputes Tribunal Act allowed execution proceedings as provided for under the Civil Procedure Act after adoption by the court of the Tribunal award. The Appellant had lost the case before the Matayos Land Disputes Tribunal and the Appeals Tribunal. The Matayos Land Disputes Tribunal had in Order 4 directed plaintiff, who is the Appellant herein, to pay costs of the case. The Appeals Tribunal in Order 3 stated ''Costs to Costs''. The Appellant seems to interprete this to mean he was not to pay costs. While it is not clear what the Appeals Tribunal intended to mean when they said ''Costs to Costs,'' the obvious and reasonable implication when one reads their Order 1 and 2 is that they confirmed the orders appealed against which had awarded costs to the Respondents. The Appellant should therefore also pay the costs before the Appeal Tribunal.

From the foregoing, l find no merit in the appeal filed by the Appellant herein and the same is dismissed with costs.

S.M. KIBUNJA,

JUDGE.

Delivered on 4th day of July, 2013.