



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC APPEAL NO. 19 OF 2018**

**ONESMUS MUNGUTI KIOKO.....APPELLANT**

**VERSUS**

**GIDEON MUTILU MUTUNGE**

**JOHN NGULU MUTEVU.....DEFENDANTS**

**JUDGMENT**

1. The Appellant filed an appeal in this Court in respect of the decision made by the Eastern Province Land Disputes Appeal Committee sitting at Embu in Appeal No. 164 of 2002 on 26<sup>th</sup> May, 2006.

2. The appeal is premised on the following grounds:-

**(1) The Appeals Committee erred in law in determining the appeal without giving the parties an opportunity to be heard and thus breaching the Cardinal Rule of National Justice.**

**(2) The Appeal Committee erred in failing to appreciate that the alleged conceding of the appeal by one responded could not in law affect the rights of a Co-respondent to the appeal.**

**(3) The Committee erred in law in that it failed to comply with Section 8(6) of Act 18/90 by failing to give the appellants the opportunity to state their appeal case first.**

**(4) The Committee erred in law in that the appellant was not given an opportunity to state his case contrary to Section 8(7) of Act 18/90.**

**(5) The Committee erred in law in that it did not give its reasons for its decision as required by the law.**

3. Only the Respondent's Counsel A. M. Mbindyo filed written submissions in compliance with the Court's direction that the appeal be disposed off by way of written submissions. As observed hereinabove, by the time of writing this judgment, the Appellant had not filed his submissions.

4. Mr. Mbindyo responded to each of the five grounds of appeal separately.

5. Regarding the first ground, Mr. Mbindyo submitted that the proceedings and the award of the Provincial Appeals Committee dated 26<sup>th</sup> May, 2006 as per the certified copy appearing in page 59 of the Appellant's bundle of documents, the Appellant herein who was the Respondent before the Committee elected to say nothing and hence the award by the Appeals Committee. He went on to submit that the 1<sup>st</sup> Respondent was absent on the material day but had sent a letter conceding to the appeal by the Appellants in the said appeal. The Counsel further submitted that the Appellant has not come to Court with clean hands for claiming on one hand that he was not present at the hearing and on the other hand that he was not granted an opportunity to be heard.

6. On ground two of the appeal, the Respondents' Counsel submitted that it is acknowledged that conceding the appeal by the 1<sup>st</sup> Respondent in the appeal could not affect the rights of the 2<sup>nd</sup> Respondent who is now the Appellant herein but if he was not present at the hearing as he alleges when he had been served with a hearing notice, the Committee would have been at liberty to proceed and make a decision his non-appearance notwithstanding. The Counsel pointed out that if the Appellant opted not to address the Committee on the appeal, nothing in law would have precluded the Committee from pronouncing its decision.

7. On ground three of the Appeal, the Respondents' Counsel submitted that although Section 8(6) of Act No.18/90 provided that the party bringing the appeal would begin, where a Respondent concedes to an appeal, the Appellant need not address the court or tribunal on the appeal which is then deemed as not opposed and as such the Tribunal or Court would be at liberty to make a decision which it may deem appropriate in the circumstances including the appeal which is not opposed without necessarily calling upon the Appellant to argue the appeal.

8. Regarding ground four of the appeal, the Respondents' Counsel submitted that it would be wrong to hold that the Appellant was not given an opportunity to state his case as provided for under Section 8(7) of Act No.8/90. The Counsel pointed out that it is clear from the record that the Appellant was notified of the date, time and place of the hearing of the appeal in line with Section 8(4) of Act No.18/90 which fact the Appellant admits.

9. The Counsel further submitted that if the Appellant did not attend the hearing of the appeal after having been notified as he alleged before the Court, then he cannot claim to have been denied an opportunity to state his case.

10. The Counsel added that if the Appellant attended the hearing on 26<sup>th</sup> May, 2006 and opted not to address the committee, he cannot claim to have been denied an opportunity to state his case.

11. Regarding ground five the Respondents Counsel submitted that the committee complied with Section 8(7) by giving its reason for the decision in the proceedings by stating in paragraph 4 that,

*"It is therefore the opinion of this committee in regard to the letter written by the 1<sup>st</sup> Respondent that:-"*

12. The Counsel concluded by submitting that that this appeal has no merit and prayed that it be dismissed with costs.

13. Having read the memorandum of appeal and the submissions that were filed by the Respondents, I will address the five grounds raised in the appeal together. Firstly, the award of the Eastern Provincial Land Disputes Appeal Committee which is in page 60 and not page 59 of the record of appeal as was indicated by the Respondents' Counsel shows that although the Appellant was present before the Committee on the 26<sup>th</sup> May, 2006, he was not given a chance to present his side of the story before the Committee made its determination. The Committee dealt with the letter conceding the appeal by one of the Respondents in arriving at its decision. The Committee ought to have allowed the appeal as it did only in respect of the Respondent who had conceded upon which it ought to have given the Appellant herein the chance to prosecute his appeal as provided for under Section 8(6) of the repealed Land Disputes Tribunal Act Cap 303 A [Rev 2010].

14. The aforementioned Section provides as follows:-

*"At the hearing of the appeal, the party bringing the appeal shall begin."*

15. Further Section 8(7) of the aforementioned Act provides as follows:-

*"After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its determination."*

16. From the record herein and more so the Committee's award, it is clear that the Appellant herein was not given a chance to present his case. The Committee appears to have concentrated its attention to the conceding of the appeal by the 1<sup>st</sup> Respondent whose letter made adverse comments against the Appellant herein. It was important that the Appellant ought to be given a chance to either rebut those allegations against him by his co-respondent in addition to presenting his case. It is also clear that the award does not contain reasons behind the decision arrived at by the Committee. To that extent, the Appeals Committee erred in law in determining the appeal without giving the parties an opportunity to be heard and thus breaching the cardinal rule of national justice. The Committee also erred in failing to appreciate that the alleged conceding of the appeal by one Respondent could not in law affect the rights of a co-respondent to the appeal. The Committee also erred in law in that it failed to comply with Section 8(6) of Act 18/90 by failing to give the Appellants the opportunity to state their appeal case first. The Committee also erred in law in that the Appellant was not given an opportunity to state his case contrary to Section 8(7) of Act 18/90. The Committee also erred in law in that it did not give its reasons for its decision as required by the law. In my view, the appeal by the Appellant herein has merit. I will therefore set aside the award of the Eastern Province Land Disputes Appeal Committee dated 26<sup>th</sup> May, 2006 and substitute it with the award Makueni District Land Dispute Tribunal dated 07<sup>th</sup> December, 2001 in case No.32 of 2001. It is so ordered.

**Signed, dated and delivered at Makueni this 21<sup>st</sup> day of May, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. R. M. Mutune for Mr. Makundi for the Appellant

No appearance for the Respondent who has notice of today's date vide the notice dated 03/05/19

Mr. Kwemboi – Court Assistant

**MBOGO C.G, JUDGE,**

**21/05/2019.**