



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC APPEAL NO 22 OF 2017**

**ANTONY NYONGESA.....1<sup>ST</sup> APPELLANT**

**MELANIA NYONGESA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PETER WANDENJE OMACHI.....RESPONDENT**

**JUDGEMENT**

This is an appeal from the judgement or verdict of the Western Provincial Appeals Committee sitting in Appeal No. 97 of 2002, Peter Wandaje Omachi, appellant versus Antony Nyongesa and Melania Nyongesa – Respondents. The appellants dissatisfied with the ruling and judgment delivered by the Provincial Appeals Committee prefer an appeal on the following grounds;

- 1) That the said appeals committee was improperly constituted when 5 members instead of 3 purportedly sat and determined the said appeal.
- 2) That the said Appeals committee went past its legal mandate and determined the matter in relationship to ownership of L .R. S. /WANGA /BUCHIFI 590.
- 3) That the said appeals committee failed to appreciate the fact that the appellants herein who the respondents then were in occupation of the suit land.
- 4) That the appeals committee failed to go by the evidence adduced at the and on the records of the Mumias Land Disputes Tribunal case No. 21 of 2001.
- 5) That the appeals committee erred on facts and law when they made a finding that the respondent herein had proved hid case when there were material contradictions in his evidence at the Mumias Land Disputes Tribunal and the appeals committee.
- 6) That the appeals committee was biased in favour of the Respondent.

The appellants submitted that, whilst the case before the tribunal that gave rise to this appeal i.e. the initial case at the Mumias Land Disputes Tribunal wit case No. 21 of 2001. The parties therein were only one initial defendant and or respondent at the tribunal.It is surprising that at the Western Provincial Appeals committee sitting in appeal No . 97 of 2002 there were two alleged respondents that are ANTONY NYONGESA and MELANIA NYONGESA. They submit that was a serious case of injustice as a party (MELANIA NYONGESA ) who was not a party in the said Mumias Land Disputes Tribunal case No . 21 of 2001 was wrongly and irregularly enjoined.

This clearly shows that members of panel of elders sitting to determine the appeal at the Western Province Appeals Committee did not understand the nature of case before it and did not first establish if the parties before it were the right parties.The inability of the members of the Western Provincial Appeals Committee to first establish the parties before it for appeal means that they arrived at the decision they arrived at without analyzing and or basing their findings on the proceedings of the Mumias Land Disputes Tribunal sitting in case No . 21 of 2001.

To further prove that the members of the Western Provincial Appeals Committee did not follow and or base their findings on the proceedings of the Mumias Land Disputes Tribunal you note that the Appellant at the Provincial Land Disputes Tribunal i.e . PETER WANDANJE OMACHI come with a totally different story or version of evidence from what he gave at the Mumias Land dispute Tribunal. To point out the inconsistency of the appellant ( PETER WANDAJE OMACHI'S) evidence at the Mumias Land Disputes Tribunal and the Western Province Appeals Committee are captured in the proceedings at both Mumias Land Disputes Tribunal and the Western Province Appeals Committee captured at pages 6 line 7 and pages 2 line 25 of the record of Appeals.

It was the evidence of the (PETER WANDANJE OMACHI ) At the Mumias Land Disputes Tribunal that he bought the suit property from one WAMBETSA WESA measuring 4.0 hectares. At the Western Province Appeals Committee the said PETER WANANJE OMACHI said he bought the suit land measuring 10. 5 acres from one NASICHE WAMBATSA in the year 1974 at Ksh. 50,000/= .This is a glaring material contradiction which any diligent member of the tribunal ought to have captured and known to be cheating or misleading.

While the said PETER WAMANJE OMACHI alleged to have bought the subject land from either WAMBESA WESA or NASICHE WAMBATSA, the green card in respect of the subject land clearly showed and indicated that he got the subject land by succession by alleging he was a close relative of deceased WAMBATSA WESA. The said PETER WANDANJE OMACHI when cross examined at both at the Mumias Land Disputes Tribunal and the Provincial Appeals Committee clearly said he is no way related to the Appellants now WAMBATSA WESA and that proves that the said PETER WANDANJE OMACHI illegally and fraudulently had himself registered as proprietor of land parcel S . WANGA /BUCHIFI/ 590, by holding out to be a close relative of the Appellants herein.The fact that from the testimony of the said PETER WANDANJE OMACHI it is difficult to know much land he allegedly bought i .e. whether it is 4.0 hectares or 10.5 acres shows that the said PETER WANDANJE OMACHI was a true liar.

They submit that from the testimony of the said PETER WANDAJE OMACHI it is difficult to know the nature of this claim at both the Mumias Land Disputes Tribunal and the Provincial Appeals Committee, at one point he says he purchased the suit land and at the other time he alleges it is boundary dispute and the Appellants herein have only encroached onto his land. This clearly shows the Western Appeals Committee did not analyse the evidence adduced at the Mumias Land Dispute Tribunal and the said PETER WANDANJE OMACHI SAID at the Provincial Appeals Committee. For the above reasons they urge the Honourable court to find in favour of the Appellants herein and allow the Appeal herein with costs.

Further it is their prayer that to lay this matter to rest and avoid any further litigation over Land parcel L.R S. WANGA/BUCHIFI/590 that the court orders that the land reverts back to the Appellants who are entitled to the same by virtue of being the relatives to the deceased and the administrator of the estate of the original owner WAMBATSI WESA. The court should make an order directed at the Land Registrar Kakamega directing that the suit Land be removed from the name of PETER WANDANJE OMACHI and registered in the names of ANTONY NYONGESA.By so doing the court shall save the Appellants the time, money and headache of applying for revocation of the grant issued to the said PETER WANDANJE OMACHI.

The respondent submitted that it is alleged that which the appeals tribunal was to be constituted by 3 members.It is alleged that while the appeals tribunals was to be constituted by 3 members, the tribunal herein was constituted by 5 members. This was a matter of the procedure which did not in anyway affect the substance of the appeal. Procedural technicalities cannot be used to set aside to judge without fault in substance. They pray that this limb be totally disregarded by the court. 5 was an odd number as 3 hence no prejudice was occasioned to the appellants.

It is alleged the tribunal presided over ownership of Land Parcel No. S/WANGA/BUCHIFI/ 590.Going through the record it is very clear that the Respondent was consistent in his compliant of encroachment to his land parcel No. S/WANGA/BUCHIFI/590. It was the appellant who kept on referring to how he got the land but the respondent's claim was trespass on to his land.He told the court how the encroachment had started with the 1<sup>st</sup> appellant's father and how various lands personnel visited the site and all confirmed that the appellant had encroached on the respondent's land.Indeed, it was the Mumias Disputes Tribunal that had veered off the case beforethem. They wanted to decide how the respondent got the land and not if indeed the appellant was encroaching on the suit land.The Respondent is the registered owner of the suit land and anyone encroaching thereto without his express consent is a trespasser. The Appellant's occupation of land led the respondent herein to seek redress. This is on admission of the encroachment of the appellants on the respondent's land.

The appeals Tribunal went through the evidence on record and exercised its discretion to admit, "further evidence" if at all any was adduced. It was a first appeal. The Rules of procedure did not apply hard and fast to these institutions.

No bias was displayed. The respondent has title to the question. The appellants admit occupying the suit land which prima facie belongs to the respondent. If at all they are displaying his ownership they ought to have come to court the right way. This appeal is an abuse of the court process.

This court has carefully considered both the appellant's and the respondent's submissions. This appeal is premised upon the memorandum of appeal dated 29<sup>th</sup> June, 2009 which raises six grounds, the preliminary issue in my view which is for determination is the jurisdiction of these tribunals. On ground 1 and 2 of the appeal, the operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows-

*"3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-*

- (a) The division of or the determination of boundaries to, land including land held in common;*
- (b) A claim to occupy or work land, or,*
- (c) Trespass to land, shall be heard and determined by a Tribunal established under section 4."*

In this case, the tribunal meandered beyond its boundaries. In **M'Marete v Republic & 3 others, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR** the court held-

*"In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the*

*appellant. In our view, the Tribunal acted in excess of its jurisdiction.”*

The tribunals in the present case dealt with title ownership to property. It found that the respondent herein was the owner of the suit land. The dispute between the parties before the Mumias Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee was essentially a claim to ownership over the land. The the Western Provincial Land Disputes Appeals (the Committee’s ruling at page 5 of the Record of Appeal) in reversing the decision of the the Mumias Land Disputes Tribunal held that;

*“In view of the above observation;*

*This appeal tribunal court do rule and order that;*

- 1. The Mumias Land Disputes Tribunal ruling is revoked*
- 2. The plaintiff Peter Wandanje appeal is allowed and the land parcel No 590 belongs to him.No costs award”.*

For those reasons, I find that the proceedings and decision fell well outside the jurisdiction of the Mumias Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee. The proceedings prima facie violated the Land Disputes Tribunal Act (now repealed). In the case of **Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & another, Nairobi, High Court, JR 370 of 2013 [2014] eKLR**. In that case, Odunga J held as follows-

*“In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.*

The provisions of section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 are very clear on what matters these tribunals had jurisdiction over claims of title to registered land is not one of the matters that can or could be laid in these tribunals and the Mumias Tribunal was wrong to register and hear pass judgment and make orders on the appellants claim for him for the title to the suit land. Again, the Provincial Land Disputes Appeals Committee was wrong in revoking the tribunal’s verdict as the tribunal had no jurisdiction to hear or pass judgment on a claim of title to land.Having found this there will be no need to go into the merits or demerits of the composition or proceedings in the tribunals as they never had jurisdiction in the first place. I find that this appeal has merit and I allow the same. I quash the decision/verdict of theMumias Land Disputes Tribunal and the Western Provincial Land Disputes Appeals Committee with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**