

REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 35A of 2010

JOHN MBALASI MUGUMBA APPELLANT

V E R S U S

ENOCK ISIAHO MUKUMBA RESPONDENT

J U D G M E N T

This is an appeal from the Western Provincial Land Disputes Appeals Committee. The grounds of appeal are that the Tribunal was illegally constituted and the Tribunal erred in law by holding that there was no evidence to prove the appellant's case. Parties agreed to proceed with the appeal by way of written submissions.

Counsel for the appellant submitted that **Section 8(b)** of the now repealed Act number 18 of 1990 stipulated that the Appeals Committee was required to sit in a panel of three members. The requirement is mandatory. The appellant's appeal was heard by six members. Secondly, counsel submitted that the appellant proved his case to the required standard before the Tribunals. He proved that he had a right to work on land parcel number **ISUKHA/MUKHONJE/546**.

On the part of the respondent, counsel submitted that both tribunals lacked jurisdiction to deliberate on the dispute. The appellant's claim was based on trust and the Tribunals could not entertain it. Further, if the appeal succeeds, the decision of the Shinyalu Land Dispute Tribunal will stand and the Tribunal dismissed the appellant's case.

Section 8(a) of the now repealed Act number 18 of 1990 stated that an appeal to the High Court from the Appeals Committee shall be on issues of law only. Counsel for the appellant submitted that the panel was illegally constituted. **Section 8(5)** of the then Act allowed the Appeals Committee to sit in panels of three members. The main issue is whether the appellant was prejudiced by the fact the members were more than three. The Appeals Committee that decided the appeal had seven members including the Chairman. There was nothing wrong in the composition of the panel. It would have been illegal if the panel consisted of one or two members only. The fact that there were more than three members of the Tribunal does not render its decision unlawful. In fact such a unanimous decision holds more weight.

The next issue being raised is that the appellant proved his case as required. The appellant's claim was that plot number **ISUKHA/MUKHONJE/546** was ancestral land. The respondent was registered as the proprietor during land demarcation and adjudication in the 1970s to hold in trust for himself and other brothers. The claimant's evidence was that he wanted the land to be sub-divided amongst the brothers but the respondent had refused. The respondent testified that the four sons were each given their respective plots. Isutsa was given plot number 531, Mbalasi (appellant) got plot number 92, Lumiti had plot number 502 and he got plot number 546 which included some portions of land which he had bought himself.

It is evident that the appellant's claim was not one based on a right to work on land but it was based on Trust. The two Tribunals lacked jurisdiction to entertain the claim. The Tribunals dismissed the claim though not on lack of jurisdiction. The effect is the same. The claim was dismissed. Allowing the appeal would be tantamount to clothing the two tribunals with jurisdiction to determine the suit. That in effect would be illegal as the Tribunals could not have determined on issue based on trust. The contention that it was a right to work on the land is just a cover up. The next question would be, how does that right to work on someone else's land accrue and the answer would be that the owner was holding the land in trust.

In the end, I do find that the appeal lacks merit and t+he same is hereby dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 27th day of February, 2013

SAID J. CHITEMBWE
J U D G E