Karimira v Macharia (Environment and Land Appeal E008 of 2022)
[2023] KEELC 17742 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17742 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E008 OF 2022

LN GACHERU, J

MAY 25, 2023

BETWEEN

FRANCIS KIMANI KARIMIRA ..... APPELLANT

AND

CHEGE MACHARIA ..... RESPONDENT

JUDGMENT

1. The Respondent herein had filed a suit against the Appellant at the defunct Land Disputes Tribunal *vide* Kigumo LDT No. 92 of 2005 over Loc. 2/Kangari/10. The tribunal gave an award in favour of the Respondent, and which award was adopted by the Court in Kigumo SPM LDT No. 20 of 2008, by its Ruling of 28th March, 2014. Prior to the adoption of the award, the Appellant had moved the Provincial Lands Appeals Tribunal in Nyeri. The Tribunal vide its letter dated 6th January 2009, requested parties to maintain status quo pending the hearing and determination of the Appeal. Before the Appeal could be heard, the Land Disputes Tribunal Act, was done away with, prompting the transfer of this Appeal to this Court.

2. The facts founding the filing of the suit at the defunct Land Disputes Tribunal were that, the Respondent was claiming ownership of 2.5 acres of land to be excised from Loc. 2/ Kangari/10. It was his case that the share belonged to his father Macharia Kaburu, but the Appellant had deceitfully caused the entire parcel of land to be registered in his name before sub-dividing it into seven portions. The matter was heard and the tribunal directed that the Appellant transfers 2.5 acres of Loc. 2/ Kangari/10, to the Respondent. The Appellant being dissatisfied with the award preferred an Appeal to the then Nyeri Provincial Land Disputes Appeal Tribunal raising three major grounds of Appeal.

    1. The Kigumo Land Disputes Tribunal had no jurisdiction to entertain a claim to title of a registered land

2. The Appellant has no relations to the claimant and has never held any land in trust or otherwise for him.

3. The land in question has never been family land as the Appellant acquired it through legal succession procedures and if the Respondent had any prior claim to any part of it he should have lodged his claim, now res judicata, in the Succession Court.

3. The Appeal was dispensed with by way of written submissions as directed by Court on 19th September, 2022.

4. The Appellant filed his written submissions on the 27th October 2022, through the Law Firm of Waweru Nyambura Co. Advocates and raised one issue for determination; being whether the Lands Dispute Tribunal had jurisdiction.

5. The Appellant submitted that the Tribunal made a determination on ownership of registered land, which was beyond their jurisdiction. Reliance was placed on the case of *Joseph Malakwen Lelei & Another v Rift Valley Land Disputes Appeals Committee & 2 Others* {2014}eKLR, where the Court of Appeal held that a decision by a Tribunal that lacked jurisdiction was a nullity. He also relied on the case of *The Republic v Chairman, Mauche Land Disputes Tribunal & Another Ex parte Elisha K Rotich: Christopher K. Koech (Interested Party)* {2021}eKLR, where the Court held that the claim being on ownership of land, the tribunal lacked jurisdiction.

6. He further submitted that this Court has the jurisdiction to determine this Appeal despite having been filed at the Tribunal. He relied on the case of *Munga Mbodi Mwenda v Muguza Jangwata v Jindwa & Another* {2014} eKLR, where the Court held that Appeals pending before the Provincial Appeals Committee could be transferred to the Environment and Land Court for determination. In the end he urged this Court to allow the Appeal and set aside the award.

7. The Respondent filed his written submissions on the 25th January 2023, through the Law Firm of T.M Njoroge & Co. Advocates and maintained that this Appeal is an abuse of the process of Court, having been filed 14 years after the award. He further submitted that the Appellant had not demonstrated his reasons for the delay of filing the Appeal considering the failure to prosecute the Appeal at the Appeals committee. It was his submissions that the Appellant is a litigious person by dint of the High Court case as well as the Court of Appeal case.

8. The Respondent also submitted that the Appellant did not seek leave before preferring the instant Appeal. He submitted that this Court lacked jurisdiction as the Appeal has already been determined by a competent Court. He urged this Court to dismiss the Appeal.

9. It is imperative to point out that the matter was first filed before the Kigumo Land Disputes Tribunal in 2005, and an award was issued in 2008. Subsequently there have been causes filed between the parties herein as enumerated hereunder

   i. Nyeri Land Disputes Appeals Tribunal No. 6 of 2009: An Appeal against the award which is the substance of the current suit.

   ii. Kigumo SPM LDT No. 20 of 2008: The Respondent herein filed an application for adoption of the Tribunal's award. A Ruling was delivered on the 28th March 2014, adopting the award.

   iii. Nyeri ELCA No. 17 of 2014: The Appellant herein filed an Appeal against the order of Court in Kigumo SPM LDT No. 20 of 2008, that adopted the ward. A Judgment herein was delivered on 22nd April, 2015 allowing the Appeal thus setting aside the order of adoption.

iv. Nyeri Civil Appeal No. 20 of 2015: The Respondent herein filed an Appeal against the Judgment of the Court in Nyeri ELCA No. 17 of 2014. The Court of Appeal gave orders that "We are satisfied that the learned Judge ought not to have interfered with the Judgment entered by the learned Magistrate. She erred in so doing and is accordingly reversed. The Judgment dated 22nd April 2015, is set aside. We substitute it with an Order that the Respondent's Appeal No. ELCA 17 of 2014 be and is hereby dismissed."

v. Murang'a ELC Misc' No. E011 of 2021: The Appellant filed an Application seeking an order for transfer of Nyeri Land Disputes Appeal Tribunal No. 6 of 2009 to this Court. The Application was allowed giving rise to the instant Appeal, ELC Appeal No. E008 of 2022.

10. This Court takes note of the number of cases that have been filed and concluded between the parties.

11. Before delving into the merits of the Appeal, it is imperative for this Court to first determine whether this Court can entertain the instant Appeal. The Respondent contends that the Appeal is an abuse of the process of Court for the reason that the Appellant is guilty of delay and is a vexatious person. Further that the Appeal is res judicata the Court of Appeal Judgment in Nyeri Civil Appeal No. 20 of 2015.

12. On the issue of res judicata, *Black's law Dictionary* 10th Edition defines "res judicata" as

> An issue that has been definitely settled by judicial decision...the three essentials are
>
> (1) an earlier decision on the issue,
>
> (2) a final Judgment on the merits and
>
> (3) the involvement of same parties, or parties in privity with the original parties..."

13. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a Court to try any suit or issue which had been finally determined by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. A close reading of Section 7 of the *Act* reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements, which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

i. The suit or issue raised was directly and substantially in issue in the former suit.

ii. That the former suit was between the same party or parties under whom they or any of them claim.

iii. That those parties were litigating under the same title.

iv. That the issue in question was heard and finally determined in the former suit.

v. That the Court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

14. In the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the Court of Appeal set out the ingredients of res judicata as follows:

> From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should

be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the Court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83."

15. Further in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) the Court of Appeal held that:

> Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

16. The Nyeri Court of Appeal in Civil Appeal No. 20 of 2015 was on whether the trial Court erred by setting aside the order of the trial Magistrate of adopting the award. A reading of the Judgment of the Court informs this Court that the issues raised in the Appeal were dealt with. The Court of Appeal rightly stated in its Judgment:

> The final observation we would make in this Appeal is that neither before the learned Judge nor before us did the respondent contend that on the merits the determination of the Tribunal was unfair or prejudicial. He was content to attempt to raise procedural niceties which cannot avail him much in the face of an eminently just and well considered award."

17. It is thus right to conclude that even though parties are the same the issues in the instant Appeal as well as the issues in the Court of Appeal case are not the same. This Court finds and holds that the instant Appeal is not res judicata.

18. The Appeal was first filed before the defunct Nyeri Provincial Land Appeals Tribunal sometime in 2009. Section 8 of the *Land Disputes Tribunal Act*, No. 18 of 1990, gave the Appeals Committee the jurisdiction to hear Appeals emanating from Tribunals exercising their jurisdiction donated by Section 3 (1) of the same *Act*. This Act was however repealed by Section 31 of the *Environment and Land Court Act*, No. 19 of 2011 which commenced on 30th August, 2011. This did not mean that matters filed before the Appeals Committee were done away with. As a matter of fact, Section 23 (3) of the *interpretation and the General Provisions Act* which was applicable as at the time the Statute was repealed, provides that where a Law is repealed in part or as a whole, it did not inter alia affect its previous operations or anything done under it nor affect a right, privilege, obligation or liability acquired, accrued or incurred under it unless a contrary intention appears.

19. Further, Section 30 (1) of the *Environment and Land Court Act* provides for transitional provisions. It states:

> All proceedings relating to the environment or to the use and occupation of, and title to land pending in any Court or land tribunal of competent jurisdiction shall continue to be heard and determined by the same Court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar."

20. By Legal Notice No. 5178 published on 28th July, 2014 the Chief Justice issued "Practice Directions" on proceedings in the Environment and Land Courts under various provisions of the law including Section 30 (1) of the *Environment and Land Court Act*, Practice Directions No. 7 provided;

> All proceedings which were pending before the Magistrate's Court having been transferred thereto from now defunct District Land Disputes Tribunal shall continue to be heard and determined by the same Court."

21. The Appellant's right of Appeal had accrued and the Repeal of the Land Disputes Tribunal Act did not take away his right of Appeal. This Court was established pursuant to Article 162 (2) (b) of the *Constitution of Kenya*, 2010 to hear and determine disputes relating to environment and the use, and occupation of, and title to land. It draws its powers from the *Environment and Land Court Act*. Section 13 (1) of the *Environment and Land Court Act* has given Environment and Land Court original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) and the provisions of the *Environment and Land Court Act*, and any other written law relating to environment and land. With that in mind, this Court find the Court herein has the jurisdiction to hear and determine this Appeal.

22. The Appellant filed the instant Appeal before the Appeals committee in 2009. He then sat on the Appeal without prosecuting it and was only jolted to action once the Respondent moved the Court to adopt the award. It is not clear why the Appellant had to wait for close to 12 years before moving this Court. Interestingly, the Appellant filed the Appeal about 120 days from the date of the decision. Section 8(1) of the *Land Disputes Tribunal Act* (repealed) is instructive of the timelines for the filing of Appeals. It provides:

8.

(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, Appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated"

23. The Appeal was undoubtedly filed out of time. This Court in its Ruling of 2nd February 2022, while allowing the transfer of the Appeal, the Appeal stated that:

> "Any issues that may arise on the merit or otherwise of the said Appeal will be considered by the Court when the Appeal is before it and the said issues can be raised"

24. Throughout the submissions, the Appellant has not submitted on the reason for late filing of the Appeal, this is despite the Respondent raising the issue. Importantly, the Appellant had the instant Appeal moved to this Court after pursuing an Appeal before the Court of Appeal in Nyeri. It is not clear why the Appellant did not pursue the instant Appeal before Nyeri ELCA No. 17 of 2014. While the cause might have been an Appeal, he had adequate time to make an application for transfer of the Appeal before the said Court even if it meant by way of a different cause. The Court of Appeal in Civil

Appeal No. 20 of 2015, pronounced itself in in favour of the Respondent herein. There was no activity by the Appellant up until 2021 when he made an application seeking to have the Appeal transferred to this Court. It is questionable that the Appellant has not been keen to prosecute his Appeal. It is a maxim of equity that, equity aids the vigilant and not the indolent. The Appellant is seeking equity and it is only prudent that he does what equity expects of him.

25. The Respondent has termed the Appellant's action as an abuse of the process of Court. To determine whether it is an abuse of the process of Court or not, this Court will consider what constitutes "abuse of Court process" as was adequately discussed by the Court of Appeal in *Muchanga Investments Ltd v Safaris Unlimited (africa) Ltd & 2 others* [2009] eKLR. The Court considered its applicability in other jurisdiction and held:

> Again the Court of Appeal in Abuja, Nigeria in the case of *Attahiro v Bagudo* 1998 3 NWLL pt 545 page 656, stated that the term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

26. In the Nigerian Case of Karibu-whytie J Sc in *Sarak v Kotoye* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined: -

> "The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It's one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ..."

27. The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:

    (a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

    (b) Instituting different actions between the same parties simultaneously in different Courts even though on different grounds.

    (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross Appeal and a respondent's notice.

    (d) (sic) meaning not clear))

    (e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness."

28. Undoubtedly, the Appellant has a right of Appeal, but his enjoyment of the right must not be at the detriment of the Respondent, in whose head the sword of Damocles' has hanged on for some time now. The Appellant found it prudent not to accord this Court any reason for failing to move this Court at the soonest. It is discernible from pleadings that the Appellant was reminded of his Appeal in 2013 after the Respondent moved the Magistrate's Court, and this was four years after filing of Appeal. Even so, the Ruling of the Magistrate's Court was subject of Appeal at the Court of Appeal in Civil Appeal No. 20 of 2015 and which Court pronounced itself on 14th October 2015, yet again the Appellant had

to wait for six years before considering the next available remedy. The Appellant cannot be allowed to benefit from his unexplained indolence.

29. Additionally, the equitable principle of laches has significant forbearance herein. Laches in defined under the *Black's Law Dictionary*, 11th edition, as

> unreasonable delay in pursuing a right or claim- almost always an equitable one- in a way that prejudices the party against whom the relied is sought
>
> The equitable doctrine by which a Court denies relief to a claimant who has unreasonably delayed in asserting the claim...."

30. There is no doubt that there has been continuous delay in prosecuting the Appeal. The Appellant ought to have been sufficiently advised on the proper way to enforce his right noting that he has as Advocate on record. To this end this Court finds and holds that the Appeal is ripe for dismissal and proceeds to dismiss it.

31. Consequently, the Court finds this Appeal not merited and for the said reasons, the instant Appeal is dismissed entirely with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED IN MURANG'A THIS 25TH DAY OF MAY 2023.

L. GACHERU

JUDGE

25/5/2023

Delivered online in the present of:

Mr Waweru Nyambura Appellant

N/A Respondent

Joel Njonjo Court Assistant

L. GACHERU

JUDGE

25/5/2023