



**Kamau & another v Kamau & 3 others (Environment and Land Appeal  
21 of 2019) [2022] KEELC 14842 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14842 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 21 OF 2019**

**BM EBOSO, J  
NOVEMBER 9, 2022**

**BETWEEN**

**TITUS KINYANJUI KAMAU ..... 1<sup>ST</sup> APPELLANT**

**ESTHER WANJERI NG'ANG'A ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MUIRURI KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**PETER KAMAU MUIRURI ..... 2<sup>ND</sup> RESPONDENT**

**EVANS NGUGI MUIRURI ..... 3<sup>RD</sup> RESPONDENT**

**HARUN NJENGA MUIRURI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal against the Ruling and Order of Hon P. Gichohi (CM) delivered in  
Kiambu Chief Magistrate Court on 5/2/2019 in Kiambu MCEL Case No. 24 of 2003)*

**JUDGMENT**

1. This appeal arose from a ruling rendered on February 5, 2019 by Hon P Gichohi, Chief Magistrate, in Kiambu CMC Environment & Land Case No 24 of 2003. The subject of the ruling was an award by the Kiambaa land disputes tribunal [hereinafter referred to as “the tribunal”]. The impugned ruling was expressed as having been considered and rendered in relation to the appellants’ application dated May 4, 2011 through which the appellants had invited the magistrate court to read and adopt the award of the provincial land disputes appeals committee. At the time the impugned ruling was rendered, the provincial land disputes appeals committee [hereinafter referred to as “the appeals committee”] had heard and disposed the appeal relating to the award of the tribunal. Further, this court [Obaga J] had heard and disposed an appeal lodged against the award. Put differently, the appeal mechanism under the repealed *Land Disputes Tribunal Act* had been fully exhausted by the respondents and the appellants’ award had been upheld.



2. Upon hearing the application inviting the Magistrate Court to read and adopt the award, the learned magistrate declined to adopt the award, holding that the tribunal and the appeals committee overstepped their mandate and that they had no jurisdiction to arbitrate over a registered land. The learned magistrate rendered herself thus:

“This shows that the jurisdiction of the land disputes tribunal was very limited. They had knowledge that they were entertaining a complaint on a registered land and still went ahead to hear and determine the same in the manner they did. In the circumstances, the tribunal and provincial land disputes appeals committee overstepped their mandate. They did not have jurisdiction to arbitrate over a registered land.”

3. The court record of the Magistrate Court and the record of appeal in this appeal show that the application dated May 4, 2011 which Hon P Gichohi purported to hear and determine had, in fact, been dismissed by Hon C Oluoch on June 8, 2011 on the ground that there was a pending appeal in the High Court against the decision of the appeals committee [see page 24 of the record of appeal]. The Hon C Oluoch made the following disposal order:

“In the circumstances, I cannot read and adopt the decision of the appeals committee when there is an appeal pending therefrom. I therefore dismiss the application with no order as to costs.” [see page 21 of the record of appeal.

4. It does appear Hon P Gichohi did not notice that the application dated May 4, 2011 had been dismissed on June 8, 2011 by Hon C Oluoch. It does also appear that none of the advocates who appeared before the Magistrate Court between November 9, 2017 and February 5, 2019 realized that the application dated May 4, 2011 had been dismissed by Hon C. Oluoch on June 8, 2011. Before I delve into the issues that fall for determination in the appeal, I will outline a brief background to the appeal.

5. In brief, sometime in the year 2002, Titus Kinyanjui Kamau, Esther Wanjeri Ng’ang’a and Samuel Kamau Njeri [the appellant] presented a land claim to the Kiambaa Land Disputes Tribunal [hereinafter referred to as “the Tribunal”] relating to parcel number Kiambaa/Kihara/T479. The objectors/ respondents in the land claim were Muiruri Kamau, Peter Kamau Muiruri, Evans Ngugi Muiruri, David Kinyanjui Muiruri and Harun Njenga Muiruri. After hearing the claim, the Tribunal rendered an award in favour of the appellants on May 23, 2003 in the following terms:

“From the correctness given from the history of this plot we find that the objector was registered as a trustee of himself and that of claimants representing this mother’s “Githaku”. Therefore our ruling is that Kiambaa /Kihara T497 belongs to objector and claimants and it should be registered jointly in their names, ie 1. Muiruri Kamau; 2. Kinyanjui Kamau; 3. Esther Njeri Ng’ang’a; and 4. Samuel Kamu Njeri.”

6. The appellants subsequently filed an application dated July 9, 2003 in the senior principal magistrate court at Kiambu, inviting the court to read and adopt the award. On their part, the respondents lodged an appeal in the provincial land disputes appeals committee. The magistrate court read the award on August 20, 2003 but did not adopt it because the respondents’ appeal was pending disposal by the appeals committee. The appeals committee subsequently heard the appeal and in 2008, it rendered a decision upholding the award of the tribunal.

7. Aggrieved by the decision of the appeals committee, the respondents lodged an appeal in the High Court, to wit, Nairobi High Court Civil Appeal No 446 of 2008, challenging the award. The appeal



was subsequently heard and disposed by this Court [Obaga J] through a Judgment dated April 25, 2017. Obaga J dismissed the appeal.

8. The respondents having exhausted all the appeal mechanisms, the appellants went back to the Magistrate Court on November 9, 2017 and invited the Magistrate Court to read and adopt the award. On that day, Mr Njuguna who appeared for the appellants informed the court that what was before the court for hearing was the appellants' application dated May 5, 2011. Subsequent court attendances and the impugned ruling indicate that what was canvassed and determined was the application dated May 4, 2011. Upon hearing the said application, the chief magistrate [Hon P Gichohi], rendered the impugned ruling in which she declined to read and adopt the award, holding that the Kiambaa land disputes tribunal and the provincial land disputes appeals committee overstepped their mandate.

## **Appeal**

9. Aggrieved by the ruling of the chief magistrate court, the appellants brought this appeal advancing the following verbatim grounds:
  1. The learned trial magistrate erred in law and in fact when she failed to appreciate the nature and import of the application before her and hence arrived at a wrong decision.
  2. The learned trial magistrate misdirected herself on point of law when she failed to properly appreciate the legal import of the judgement delivered in Civil Appeal number 446 of 2001 and hence arrived at a wrong decision.
  3. The learned trial magistrate erred in law and in fact in delivering a ruling whose effect would be to overturn the decision of the Land Disputes Tribunal, the Provincial Land Dispute Appeals Committee and the Superior Court which is outside the jurisdiction of a Chief Magistrate Court and hence arrived at a wrong decision.
  4. The learned trial magistrate erred in law and in fact in delivering a ruling that effectively overruled a higher court, namely the High Court of Kenya and hence arrived at a wrong decision.
  5. The learned trial magistrate misdirected herself in point of law and fact when she failed to appreciate the role of the magistrate's courts in an application as the one that was before her and arrived at a wrong decision.
  6. The learned trial magistrate erred in failing to address her mind to the issues raised by the parties before her and instead basing her ruling on matters not canvassed before her hence arrived at a wrong decision.
  7. The learned trial magistrate erred in raising matters not before her thus depriving the appellants a chance to respond to such matters before basing her decision on such matters.
  8. The learned trial magistrate failed to deliver justice to the parties before her.
  9. The learned trial magistrate erred in dismissing the application before her thereby leaving the parties and their respective rights to the subject matter in limbo.

## **Submissions**

10. The appeal was canvassed through written submissions dated January 13, 2022, filed by M/s Kiarie Njuguna & Co Advocates. Counsel condensed the nine grounds of appeal into the following three issues:



- i. That the learned magistrate erred in failing to appreciate the legal impact of the High Court Judgment in Civil Appeal No 446 of 2008 and thus delivered a ruling whose effect was to reverse the decision of not only the land disputes tribunal and the appeals committee but even worse the decision of the High Court, a superior court;
  - ii. The learned magistrate erred in misunderstanding the role of the magistrate court under section 7 of the [Land Disputes Tribunal Act](#), No 18 of 1990 hence arrived at a wrong decision; and
  - iii. The Learned Trial Magistrate erred in failing to deliver justice to the parties and thus left the dispute in limbo.
11. On the first issue, counsel made reference to the finding of this court [Obaga J] in the Judgment rendered in Civil Appeal No 446 of 2008 on the question of jurisdiction of the Tribunal and the Appeals Committee and submitted that the Learned Magistrate was totally out of order in purporting to reverse the findings of this Court. On the second issue, counsel submitted that although there were conflicting authorities on the jurisdiction of a magistrate court under Section 7 of the repealed [Land Disputes Tribunal Act](#), once this court rendered a finding on the issue, the Learned Magistrate had to abide by it. On the third issue, counsel faulted the Learned Magistrate for leaving the parties in limbo. Counsel observed that Samuel Kamau Njau died while the appeal in the High Court was pending. On the right of appeal, counsel cited Section 75 of the [Civil Procedure Act](#) and submitted that the appellants did not require leave to bring this appeal.
  12. The respondents filed written submissions dated March 2, 2022 through M/s Mbigi Njuguna & Co Advocates. Counsel identified the following as the issues that fell for determination in this appeal; (i) Whether the appellant was entitled to appeal as of right; (ii) That the application giving rise to the impugned ruling was erroneously before the Magistrate Court; and (iii) Merits of the appeal.
  13. Counsel cited Order 43 of the [Civil Procedure Rules](#) and submitted that an appeal against an order declining to enter judgment under the Land Disputes Tribunal Act was not among the orders appealable to this court as of right. Counsel added that the application dated May 4, 2011 was erroneously canvassed and determined because it had been dismissed by Hon Oluoch on June 8, 2011. Counsel contended that there was no application to be heard and the entire proceedings were an exercise in futility. Counsel faulted the appellants for filing an appeal against a refusal to grant an application that was not there in the first place. On the merits of the appeal, counsel submitted that there was no basis for faulting the Learned Magistrate. Counsel contended that this court did not hold that the Tribunal had jurisdiction to determine issues relating to title.

### **Analysis and determination**

14. I have read the original record of the trial court together with the record of appeal. I have considered the grounds of appeal alongside the parties' respective submissions. Further, I have considered the relevant legal frameworks and the prevailing jurisprudence on the key issues in this appeal. The following are the three issues that fall for determination in this appeal: (i) Whether the appellant was entitled to an appeal to this court as of right; (ii) What is the legal status of the proceedings and ruling relating to the application dated May 4, 2011 which had long been dismissed at the time the Chief Magistrate Court purported to hear and determine it? and (iii) Whether the Magistrate Court erred in her decision on the said application. Before I dispose the above three issues, I will outline the principle that guides this court when exercising jurisdiction as an appellate court.



15. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013)eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

16. The above principle was similarly outlined in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

17. The first issue is whether the appellant was entitled to an appeal to this court as of right. Counsel for the respondents objected to this appeal contending that under Order 43 of the Civil Procedure Rules, the appellants were required to seek and obtain prior leave of the court before bringing the appeal. On his part, counsel for the appellants submitted that the appellants had a right of appeal under Section 75 of the *Civil Procedure Act*.

18. I have considered the rival submissions on the question as to whether the appellants had an automatic right of appeal. Section 75 of the *Civil Procedure Act* contains the following framework on the right of appeal:

- “(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
  - (b) an order on an award stated in the form of a special case;
  - (c) an order modifying or correcting an award;
  - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
  - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
  - (f) an order under section 64;
  - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
  - (h) any order made under rules from which an appeal is expressly allowed by rules.



- (2) No appeal shall lie from any order passed in appeal under this section.”
19. The impugned decision was made on an application presented to the Magistrate Court inviting the Magistrate Court to read and adopt an award made in favour of the appellants under the framework of the repealed Land Disputes Tribunals Act. The Magistrate Court was invited to adopt the award as an order or judgment of the court. Given the above circumstances, this was an award in form of a special case as contemplated under Section 75 (1) (b) of the *Civil Procedure Act*. Consequently, the right of appeal to this court lay as of right by dint of the provisions of Section 75(1)(b). I am therefore in agreement with counsel for the appellants that the appellants did not require prior leave to appeal to this court. That is my finding on the first issue.
  20. The second issue relates to the legal status of the proceedings and ruling relating to the application dated May 4, 2011 which had long been dismissed at the time the Magistrate Court purported to hear and determine it. Counsel for the respondents correctly pointed out in their written submissions that the application dated May 4, 2011 had been dismissed by Hon Oluoch on June 8, 2011. Perusals of both the original record of the Magistrate Court and the record of appeal confirm this fact. Hon Oluoch properly disallowed the application on June 8, 2011 because there was an appeal pending in the High Court. What the appellants were required to do subsequent to disposal of the Appeal by Obaga J was to file a fresh miscellaneous application for adoption of the award that had been upheld by the Provincial Land Disputes Appeals Committee and the Environment and Land Court. They instead pursued an application that had been dismissed on June 8, 2011. The respondents concede that all the advocates on record at that point were new and did not realize that the application they were dealing with had been dismissed on June 8, 2011. The Learned Chief Magistrate too did not realize this fact.
  21. In my view, the application dated May 4, 2011 having been dismissed on June 8, 2011, there was nothing to prosecute before Hon Gichohi. Similarly, there was nothing to be determined by Hon Gichohi. The result is that the proceedings conducted between November 9, 2017 and February 15, 2019 and the ruling rendered on February 5, 2019 were all nullities. Consequently, my finding on the legal status of the proceedings and the impugned ruling of the Magistrate Court in relation to the application dated May 4, 2011 is that, the said application having been dismissed on June 8, 2011, in the absence of a prior order reinstating the application, the proceedings relating to the hearing of the non-existent application, together with the impugned ruling relating to the non-existent application, are all nullities in law.
  22. On the last issue, the court is cognizant of the fact that the appellants hold an award which they seek to enforce. It is the view of this court that making a pronouncement on the merits of the findings that have been declared as nullities may prejudice the parties to this appeal when appropriate adoption proceedings are initiated in the Magistrate Court.
  23. On costs, the major error leading to the present scenario is attributable to the Magistrate Court. In the circumstances, parties will bear their respective costs of the appeal and costs of the relevant proceedings in the Magistrate Court.
  24. In light of the foregoing, this appeal is disposed in the following terms:
    - a. The hearing proceedings leading to the ruling rendered by Hon P Gichohi, Chief Magistrate, on February 5, 2019 in Kiambu CMC MCEL No 24 of 2003 together with the said ruling are declared null and void on the ground that they were conducted and made in relation to the application dated May 4, 2011 which was non-existent, the application having been dismissed on June 8, 2011 by Hon C Oluoch.



- b. The appellants shall be at liberty to initiate appropriate adoption proceedings in relation to the award subject matter of this appeal.
- c. Parties shall bear their respective costs of this appeal and costs relating to the nullified proceedings.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF NOVEMBER 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of:-**

Mr Njuguna Kiarie for the Appellants

Ms Maina holding brief for Mr Mbigi for the Respondents

**Court Assistant: Ms Osodo**

