

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 435 OF 2001

JACOB MBUTHIA GITHAIGA

MUSA CHEGE GITHAIGA

MURURIA WAIYA APPELLANTS

ELIZABETH WANGARI NGUKU

VERSUS

JEREMIAH KABUKU GITHAIGA RESPONDENT

JUDGMENT

This is an appeal against the decision of Kangema Senior Principal Magistrate, Mr Abdul El-Kindly, made on July 20, 2001 in Land Disputes Case No 9 of 2001.

In a short seven line ruling the Hon Senior Principal Magistrate set aside the previous orders of the court which had adopted the award of the Land Disputes Tribunal of Mathiyoa District in Cause No 9 of 2001 as a Judgment of the Court. The order to set aside followed an application by the Defendant by way of a Notice of Motion dated June 4, 2001 in which, among other things, the Defendant/Applicant averred that the Judgment and decree had been entered by the lower court without knowledge of a material fact that the Nyeri Provincial Land Disputes Tribunal had overturned the decision of the aforesaid Mathiyoa District Tribunal on appeal.

The Appellant, in a Memorandum of Appeal listing six grounds, argued before this Court that having entered Judgment, the Trial Magistrate had no jurisdiction to reverse the decision. He further argued that the application to set aside was not properly before the Lower Court as the advocates who filed the application were not properly on record. Having perused the record of proceedings, I find that neither of these two arguments have any merit or substance. One of the prayers in the application before the Court dated June 4, 2001 asked for leave to the defendant to change his advocates, and for advocates filing the application to be appointed his advocates. That leave was indeed granted and an order extracted. That order is exhibited on page 41 A of the Record.

The Magistrate was equally correct in his decision to set aside the previous order which had been made without knowledge of a material fact, that the District Tribunal's decision had been overturned on appeal by the Provincial Tribunal. Had that fact been brought to the attention of the Magistrate he would not have entered the District Tribunal's award as a Judgment of the Court.

Accordingly, I dismiss this appeal with costs.

Dated and delivered at Nairobi this 18th day of May, 2004.

ALNASHIR VISRAM

JUDGE