REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL CASE NO. 21 OF 2014

MWANGANGI KILANGO.....APPELANT

-VERSUS -

KIRURU MURIUKI.....RESPONDENT

(Being an appeal from the ruling delivered on 12/6/2014 by the Honourable M W Murage,

Ag Senior Resident Magistrate, in Mwingi SPMC Land Case No. 20 of 2001)

JUDGMENT

1. On 31/5/2001, through a plaint of even date, Mwangangi Kilango **(the appellant)** initiated proceedings in Mwingi SPMC Land Case Number 20 of 20001, seeking recovery of an unspecificed piece of land. He contended that the cause of action arose at Syanzendu Village in Nguni Location. Nothing happened in the said suit until 17/6/2002 when the matter came up for reading of the award of the land disputes tribunal. On the said date, the Senior Resident Magistrate, Hon Ondabu, confirmed receipt of the land disputes tribunal's award dated 15/12/2021 from Nguni/Ngomeni Division Establishment, and awarded the unspecified suit land to the present respondent in the following terms:

> **"We are in receipt of the Land Dispute Tribunal Award. The Tribunal awarded the suit land to the defendant Kiruru Muriuki with costs. Now pursuant to the provisions of Act No 18/90, I hereby decree the suit land to the defendant"**

2. Aggrieved by the award of the land disputes tribunal dated 15/12/2001, and notwithstanding the adoption of the award and issuance of a decree by the magistrate court, the appellant, on an unspecified date, appealed to the Eastern Provincial Appeals Committee against the award. The Eastern Provincial Appeals Committee is alleged to have subsequently rendered an undated award in favour of the appellant.

3. Nothing happened in the magistrate court file until 21/8/2009 when the appellant filed a chamber summons of even date inviting the magistrate court to adopt the award of the Eastern Provincial Appeals Committee which the appellant contended was made in his favour on 14/4/2009. In the same application, the appellant invited the court to set aside the earlier award which had been made by the district land disputes tribunal and which had been adopted on 17/6/2002.

4. By the year 2011 when the Environment and Land Court Act was enacted, repealing the Land Disputes Tribunals Act of 1990, the said application by the appellant had not been prosecuted. On 20/2/2014, while the appellant's application was still pending, the respondent, Kiruru Muriuki, filed a parallel application dated 18/2/2014 in the same court file, inviting the court to reject and/or arrest the "ruling of the provincial land dispute committee". He further sought an order confirming the earlier decree of the court.

5. The respondent's application was subsequently heard and fell for determination before Hon Murage, Ag Senior Resident Magistrate. In a ruling rendered on 12/6/2014, the Learned Magistrate held that her predecessor having already decreed the suit land to the defendant, she could not sit as an appellate court to review the judgment. She rendered herself thus:

> **"From the foregoing, it is clear that the court decreed the suit land to the defendant yet it was coming for award. I warn myself that I cannot sit on appeal. There is a decree on record as far as my interpretation is concerned. I agree with counsel for the applicant that the District Land Disputes Act has been repealed. However Gazette Notice No 16268 is very clear that;**
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> **"All proceedings which were pending before the Magistrates court having been transferred thereto from the now District Land Disputes Tribunals shall continue to be heard and determined by the same court."**

As such therefore the fact that the said Act was repealed does not mean that the court cannot all entertain a matter which was before it before the "Act" was repealed. If this court goes ahead and adopt the award by provincial Land Disputes Committee, it would suggest that there are two orders which are inconsistent.

I agree with the authority cited by the defendant/applicants that reading and adopting the aforesaid award would be siting against the award which had already been adopted as a court order."

6. Ultimately, the Learned Magistrate granted the respondent the following verbatim orders:

"1. That the purported ruling of the provincial land disputes committed and filed in court be and is hereby rejected or arrested.

2. That the decree issued by this court is hereby confirmed

3. That the costs of the said application be provided for (sic)"

7. Aggrieved by the ruling and orders of the Acting Senior Resident Magistrate, the appellant brought the present appeal, advancing the following grounds:

1. That the honourable Learned Magistrate erred and misdirected herself in law when she failed to adopt the decision and award of Embu Provincial Land Disputes Appeals Tribunal case number 131 of 2002 and filed in her court on 22/6/2009.

2. That the honourable Learned Magistrate erred and misdirected herself in law when she held that adopting Embu Provincial Land Disputes Appeal Tribunal award would amount to her sitting on appeal against a decree in the same matter.

3. That the honourable Learned Magistrate erred and misdirected herself in law when she failed to appreciate that the award of the Mwingi District Land Dispute Tribunal in its case number 20 of 2001 having been set aside by the Embu Provincial Land Disputes Appeal Tribunal was non-existed.

4. That the honourable Learned Magistrate erred and misdirected herself in law when she abdicated her duty and jurisdiction conferred upon her by Section 30 of the Environment and Land Court Act Number 2011.

5. That the honourable Learned Magistrate erred and misdirected herself in law when she allowed the Respondent's application dated 18/2/2014.

8. The appellant urged the court to grant him the following orders in this appeal:

a. The Ruling and orders in Senior Resident Magistrate Court at Mwingi Land Case Number 20 of 2001 dated 12/6/2014 be set aside.

b. An order directing Senior Resident Magistrate at Mwingi to adopt the Embu Provincial Land Disputes Appeals Tribunal Case Number 131 of 2002 and filed in her Court on 22/2/2009 in her Land Case Number 20 of 2001.

c. In the alternative to prayer (b) above an order do issue adopting as a judgment of the court the award in Embu Provincial Land Disputes Appeals Tribunal case number 131 of 2002.

d. The respondent to pay the costs of this appeal and in the lower court.

9. The appeal was canvassed through written submissions dated 16/3/2020, filed through the firm of B M Musyoki & Co Advocates. Counsel for the appellant submitted that he had condensed all the grounds of appeal into one. Counsel submitted that the learned magistrate misinterpreted her role as conferred by the law. He added that the magistrate's role was simply to read the award as pronounced by the tribunal. He argued that when the court read the award in the first instance, it correctly pronounced that the parties had the right of appeal to the provincial appeals committee within 30 days and that was what the appellant did. Counsel added that once an appeal is preferred, the decision of the appellate body affects the original decision and the court is obliged to execute the decision given on appeal. Counsel argued that, in effect, a provincial appeals committee's award interfered with what he called "the original decision" and consequently, the magistrate court had no choice but to adopt and execute the award of the provincial appeals committee. Reliance was placed on the decision in **Benson Kaboi Mwai v James Kariuki Mwai [2009] eKLR** in which the High Court held that the mandate of the magistrate court was restricted to adopting the tribunal's award and enforcing it in accordance with the laid down procedure as provided under the Civil Procedure Act. Counsel urged the court to allow the appeal.

10. The respondent filed written submissions dated 4/3/2021 through the firm of Kinyua Mwaniki Wainaina Advocates. Counsel identified the following as the four issues falling for determination in this appeal: (i) Whether the magistrate had jurisdiction and obligation under any known law to read and/or adopt the award of the provincial appeals committee; (ii) Whether the Magistrate was bound to carry out proceedings in accordance with a repealed law; (ii) Whether the repealed Land Disputes Tribunals Act ever provided for reading of the provincial appeals committee's awards; and how authentic were the documents purported to be the provincial appeals committee's award?

11. Counsel submitted that the repealed Land Disputes Tribunals Act did not confer on magistrate courts jurisdiction to read and adopt the

provincial appeal's Committee's awards. Reliance was placed on the decision of Makhandia J (as he then was) in **Joshua Musee Meru v Mukiri Njeru, Machakos HCCA No 174 of 2009.** Counsel added that because the Land Disputes Act had been repealed, the magistrate court did not have jurisdiction to entertain provincial appeals committees' awards. Counsel questioned the documentation relating to the provincial appeals committees' award.

12. I have read and considered the entire record of **Mwingi SPMC Land Case No 20 of 2001**. I have also read and considered the grounds of appeal; the parties' respective submissions; the relevant legal frameworks; and the applicable jurisprudence. The following issues fall for determination in this appeals: (i) Did the magistrate court error in declining to entertain the award of the provincial appeals committee procured after the award of the district land disputes tribunal had been adopted as a judgment of the court and a decree thereon issued? (ii) Did the appellant still have the redress mechanism of an appeal to the provincial appeals committee after the magistrate court adopted the award of the district land disputes tribunal and issued a decree in favour of the respondent on 17/6/2002? and (iii) Is the defendant entitled to any of the reliefs sought in the memorandum of appeal? I will deal with the first two issues simultaneously.

13. Our courts have umpteen times spelt out the procedure that magistrate courts were required to follow when adopting the award of the Land Disputes Tribunals created under the repealed **Land Disputes Tribunals Act.** Pronouncements by the courts became necessary because **Sections 7** and **8** which set out the procedure and gave the aggrieved party the right of appeal was not clear on how that right of appeal was to be actualized without giving the provincial appeals committees unconstitutional appellate jurisdiction over judgments/decrees of the magistrate courts. Makhandia J (as he then was) summarized the proper procedure in **Machakos HCCA No 174 of 2009 Joshua Musee Meru v Mukiri Njeru** in the following words:

> **" As correctly submitted by counsel for the appellant, the tribunal was required to file its award in the subordinate court for reading under Section 7 of the Act. An aggrieved party had a right of appeal within 30 days of the decision of the award being made. The 30 days would commence from the date of reading of the award and before it is adopted as a judgment and decree of the court."**

14. The tenor and import of the above procedure was two-fold. Firstly, once the aggrieved party exercised the right of appeal by initiating an appeal within the stipulated time, the magistrate court was required to allow him the opportunity to exhaust the appeal mechanism in the manner and within the time-frame prescribed under the law. Secondly, once the award of the tribunal was adopted as a judgment/decree of the court, the door of appeal to the provincial appeals committee was shut on the aggrieved party because the provincial appeals committee would have no jurisdiction to overturn the judgement/decree of the court. It is for this reason that aggrieved parties who wished to seek redress after adoption of the award opted for judicial review proceedings.

15. In the appeal under consideration, the award of the tribunal was read and adopted as a judgment/decree of the court on 17/6/2002. Whether that procedure was the correct one is for determination in a different forum because that procedure has not been challenged in this appeal. What is clear is that there was adoption and issuance of a decree on 17/6//2002. The legal effect of the adoption of the award and issuance of the decree on 17/6/2002 is that no valid appeal hearing could thereafter ensue in the provincial appeals committee, and no valid or enforceable award could be issued by the provincial appeals committee while the judgment/decree of the court was in place. Secondly, the provincial appeals committee had no powers to issue an award overturning the judgment/decree of the court.

16. That regrettably is the fate which befell the award obtained by the appellant from the provincial appeals committee. Given these circumstances, the learned magistrate was right in taking the view that she could not admit the award of the provincial appeals committees. In my view, for the above reasons, the magistrate did not err by rejecting the subsequent award which was procured by the appellant from the provincial appeals committee long after the award of the district land disputes tribunal had been adopted as a judgment of the court and a decree issued. I have said what I consider to be enough to dispose the first two issues in this appeal.

17. In light of the above findings, none of the substantive reliefs sought by the appellant in this appeal is available. With regard to costs, it is apparent from the record of appeal that the situation in which the appellant finds himself in was largely contributed to by the magistrate through the procedure he employed in adopting the award of the district land disputes tribunal which effectively shut the appellant out of the appellate forum. For that reason, I will not award costs in this appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Mwania for the Appellant

Mr Kabwere holding brief for Mr Kinyua for the Respondent

Court Assistant: June Nafula