



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF MACHAKOS

ELC APPEAL NO 115 OF 2007

BENJAMIN KAVOO NZINGU.....APPELLANT

VERSUS

RAEL NDULE DOMINIC

PETER MUEMA NZINGU

PATRICK MASYO NZINGU

ALEXANDER MANG'AU NZING'U

(Being joined as legal representatives of the

Estate of Dominic Kilonzo Nzing'u).....RESPONDENTS

(Being an Appeal from the Decision/Judgement of the Eastern Provincial Appeals Committee dated/read to the parties on the 11th of April 2007; in the said Appeals Committees Land Appeals Case No 12 of 2006)

JUDGMENT

1. The Appellant being dissatisfied with the decision made and issued by the Eastern Provincial Appeals Committee on 11th of April 2007 appeals to this court on the following grounds that:

i. The said Appeals Committee erred in law in accepting, entertaining, and proceeding to "hear" a purported appeal which had clearly been filed out of time-well after thirty (30) days from 1st of August 2005 when Makueni District and Disputes Tribunal read its award to the parties in its Tribunal Case No.34 of 2004.

ii. The said Eastern Provincial Appeals Committee erred in law in accepting, entertaining, hearing and purporting to determine a purported Appeal against an award which had already become a Judgement/Decree of Kilungu Magistrates court-vide the said court's civil suit No.46 of 2005.

iii. The said Appeals Committee erred in law in purporting to sit on an appeal against a Judgement/Decree of Kilungu Resident Magistrate's court when it had no jurisdiction to purport to hear such an appeal.

iv. The said Appeals Committee erred in law in failing to take down the presentations made by the Appellant at the hearing of the said purported appeal, either in full or at all; and failing to swear the parties/witnesses as by law required.

v. The said Appeals Committee erred in law in failing to take into account the evidence given by the parties before the Makueni District Land Disputes Tribunal, and purporting to proceed with the matter before it as though it was a fresh hearing.

vi. The said Appeals Committee erred in law in making a finding which is not in any way supported by anything in its proceedings.

A. Background

2. The Appellant filed a claim against the Respondent at the Makueni District Disputes Tribunal (The Tribunal) pursuant to the **Land Disputes Tribunal Act No.18 of 1990(The Act)(now repealed)** with regard to a dispute over land known as Makueni/ULU/505 (the suit property).

3. The Tribunal heard the dispute and determined it in favour of the Appellant declaring that the suit property belonged to him and ordering the eviction of the Respondent from the property. On 13th December 2005, the Chairman of the Tribunal caused its decision to be filed at the Kilungu Magistrates Court where it was registered on the 13th of December 2005 as civil suit No. 46 of 2005.

4. The Tribunal's Award was adopted as an order of the Court on 20th January 2006 and a Decree was subsequently issued on 1st of February 2006. Pursuant to the Decree, the Respondent was consequently evicted from the suit property. The Record of Appeal shows that on 9th February 2006, the Respondent filed an appeal at the Eastern Provincial Appeals Committee (Appeals Committee) which heard the matter. On 11th April 2007, the Appeals Committee made the following determination:

“We have come to the conclusion that the shamba at Maigani continues to be for 3 people; Nzioki Nzing’u, Dominic Mutungi & Kavoo Nzingu and the Shamba at Ngaamba goes to the two brothers who are; Dominic Mutungi & Kavoo Nzingu.”

5. The Appellant filed a Memorandum of Appeal challenging the afore stated decision on the 8th of June 2007. The Appeal proceeded by way of written submissions.

B. Submissions by the Parties

6. The Appellant through their counsel filed submissions on the 4th of March 2020. Counsel submitted that sometime in 2004, the Appellant filed a claim in Makeni District Disputes Tribunal with regards to a dispute over land known as Makeni/ULU/505 (hereinafter the suit property) and that the Tribunal heard the dispute and made a finding that the suit property belonged to the Appellant and ordered that it be transferred to him. Counsel cited the provision of **section 7(1) of the Land Disputes Tribunal Act (No.18 of 1990)** (now repealed) which provided as follows:

“The chairman of the Tribunal shall cause the decision and any depositions and/or documents produced before the Tribunal to be filed in the Magistrates Court together with any depositions or documents which have been taken or proved before the Tribunal.”

7. Counsel also cited **Section 8(1)** of the same which provided;

“ any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within 30 days of the decision appeal to the Appeals committee constituted for the province where the suit property is situate.”

8. Counsel submitted that the Respondent did not appeal to the Eastern Provincial Appeals Committee within 30 days as required; that time for purposes of any such appeal started running from the date of the decision of the Land Disputes Tribunal being the 1st of August 2005; that the 30 days lapsed on the 30th of August 2005 and that there being no appeal, the Chairman of the Land Disputes Tribunal pursuant to **Section 7(1) of the Land Disputes Tribunals Act** caused the Tribunal's decision to be filed at the Magistrates court at Kilungu as Civil suit No.46 of 2005.

9. It was submitted by counsel for the Appellant that pursuant to **Section 7(2) of the Land Disputes Tribunal Act**, the Magistrates court on 30th January 2006 entered Judgement in accordance with the Tribunal's decision; that on 1st February 2006, the Magistrates court issued a decree from the Judgement aforesaid which was subsequently enforced and that the suit property was registered in the name of the Appellant and the Respondent was subsequently evicted from the suit property.

10. Counsel submitted that the appeal having been lodged five months after the date of the decision contravened **Section 8(1) of the Land Disputes Tribunals Act**; that the aforementioned notwithstanding, the Appeals Committee proceeded to hear and determine the appeal and made a decision with regards to “shamba at Maigani & “shamba at Ngaamba” and that the decision of the Appeals Committee is not in respect to the suit property as the same is not mentioned in the Appeal Committees decision.

11. The Respondents through their counsel filed submissions on 9th July 2020. Counsel submitted that as at the time of the issuance of the award on 13th December 2005, the only persons present were the Chairman, Secretary and an elder of the Tribunal and that the Respondent only became aware of the award on 30th of January 2006 when the award was adopted by the Magistrates Court in the presence of both parties. Counsel relied on the case of **Adriano M. Anduku Vs Charles A. Ingabo [2018] eKLR** where the court stated;

“It is trite law that before the award would go for adoption the same has to be read to the parties. This cannot be communicated by way of a letter. Far from this, it has to be part of the proceedings.

...Reading of the finding/award of the Tribunal is critical in so far as it gives the parties a chance to explore other avenues in the event that a party is dissatisfied. This could be by way of judicial review to the high court or an appeal to the Provincials Appeals Committee. To the extent that the award was not read to the parties, and it is very clear that it was not read, the appellant lost his chances of challenging the decision of the Tribunal. This is breach of the appellant's constitutional right and it is in this regard that this appeal ought to be allowed so that the appellant is not denied this fundamental constitutional.”

12. Counsel submitted that the failure by the Tribunal to read the award was contrary to **Section 20 of the Land District Tribunal Rules** which states that at the conclusion of every dispute, the tribunal shall make a determination to be served on the person affected; that after becoming aware of the award on 30th January 2006, the Respondent filed the Appeal and made payments to the Appeals Tribunal on 9th

February 2006 while the application to appeal was received was received by the Committee on 22nd February 2006 hence there was no delay on their part.

13. Counsel submitted that there is no provision in law barring the Respondent from appealing an award that has become judgement and decree; that the Appellant is appealing against the decision of the Appeals Committee and cannot purport to undermine its decision; that the Appellant ought to have filed a judicial review to challenge the jurisdiction of the Appeals Committee and that the issue of the competency and jurisdiction of the Appeals Committee was in any event never raised at the Appeals Committee.

14. It was submitted for the Respondents that the Appeals Committee has jurisdiction to sit on an appeal against the judgement and decree of the Magistrates court pursuant to **Sections 7 and 8** of the **Land Disputes Tribunal Act** and that the Appeals Committee duly took down the presentations made by the Appellant as evidenced by the copy of proceedings filed by the Appellant.

15. On the issue of whether the Appeals Committee failed to take into account evidence given by the parties at the Tribunal, counsel cited Section 8 which reiterates that there is no laid down provision for how an appeal should be conducted; that the Appeals Committee made a finding on the basis of issues which were before the Tribunal, being the dispute over the suit property by the parties and that in any event, this issue is one of fact and not law and cannot lie as a ground of appeal. Counsel urged the court to dismiss the appeal.

C. Analysis & Determination

16. Having read and considered the entire record, pleadings and submissions, the following issues fall for determination in this appeal:

i. Whether the Appeal that was filed with the Eastern Provincial Appeals Committee-Land Appeals Case No 12 of 2006 was statute barred?

ii. Whether the Respondent could file an appeal at the Eastern Provincial Appeals Committee after the Magistrate's court adopted the award of the Makueni District Land Disputes Tribunal and issued a decree therefrom?

iii. Whether the Eastern Province Appeals Committee properly conducted the Appeal case No 12 of 2006?

iv. Whether the Appellant is entitled to any of the reliefs sought in the Memorandum of Appeal?

17. Section 8(8) of the Land Disputes Tribunals Act (no 18 of 1990) (now repealed) provided as follows:

“The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.”

18. Further, Section 8(9) of the Act provided;

“Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within 60 days of the decision complained of:

Provided that no appeal shall be admitted to hearing by the Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.”

19. From the foregoing provisions, it is clear that first, an appeal from the Provincial Land Disputes Appeals Committee used to be lodged in the High Court and since its establishment, this court is now the right forum to determine such appeals. Secondly the mandate of this Court in this regard is limited to issues of law and not issues of fact. Issues of customary law are deemed to be issues of fact.

20. The repealed law further provided that before an Appeal against the decision of the Appeals Committee is filed, this court ought to be satisfied that indeed a point of law to be determined by this court has arisen (see section 8 (9) of the Act).

21. With regards to appeals from the Land District Tribunal to the Appeals Committee, Section 8(1) of the Land Disputes Tribunal Act provides as follows:

“Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty (30) 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.”

22. Further, Rule 20 of the Land Disputes Tribunal Rules provides as follows;

“At the conclusion of every dispute the Tribunal shall make a determination to be served on the person affected by the decision and such determination shall be filed in the Magistrates court, and the court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and be enforceable in the manner provided for under the Civil Procedure Act.”

23. According to the Appellant's counsel, time for purposes of any such appeal started running from the date of the decision by the Land Disputes Tribunal being the 1st of August 2005 and lapsed on the 30th of August 2005. The Respondent's counsel contends that whereas the

award was made on the 13th of December 2005, the only persons present then were the Chairman, Secretary and an Elder of the Tribunal; that the Respondent became aware of the award on the same day the award was adopted by the court on 30th January 2006 when it was read in the presence of both parties and that the Respondent swiftly made payments to the Eastern Provincial Appeals Committee on the 9th of February 2006.

24. A perusal of the court record indicates that the award of the Tribunal was signed by the Chairman, Secretary and an Elder on 1st August, 2005. It is not clear from the award when the same was delivered, if at all. Rule 20 of the Tribunal Rules provides that at the conclusion of every dispute, the Tribunal shall make a determination to be served on the person affected by the decision.

25. There is no requirement under the Rule that the Tribunal's decision should be read in front of the parties. The Rule only requires the said decision to be served upon the parties, and especially a party to be affected by the decision. There is no evidence to show that the Respondent was served with the said decision, or was present when the same was being delivered by the Tribunal

26. Whereas the award was made on the 1st of August 2005, the same was confirmed by the Magistrates Court approximately 5 months later on 30th January 2006. That being the case, this court agrees with the Respondent's averment that he only learnt about the decision of the Tribunal for the first time when the same was adopted by the court on 30th January, 2006.

27. That being the case, the Respondent cannot be accused of having filed the appeal with the Appeals Committee out of the requisite time of 30 days. Although for the purposes of **section 8 (1)** of the Act time only starts running from the date that the Tribunal makes its decision, unless the Tribunal complies with Rule 20, time would only start running from the time the aggrieved party learns of the impugned award.

28. With regard to adoption of an award of the Land Disputes Tribunal by a Magistrate Court, **Section 7(2)** of the **Land Disputes Tribunal Act** provided thus:-

“(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

29. The adoption of an award by the court under **section 7 (2)** of the Act was a procedural requirement to give the award the force of law. Indeed, the adoption of the award had nothing to do with the appeal that would have been lodged subsequently by an aggrieved party. What this means is that an Appeal to the Appeals Committee will always be as against the decision of the Tribunal and not the order by the Magistrate as argued by the Appellant herein. That being the case, it follows that an aggrieved party had the right to file an appeal before the Appeals Committee, whether the award had been adopted by the magistrate or not.

30. The Appellant has argued that the Appeals Committee failed to take down the presentations made by the Appellant at the hearing, and that the Appeals Committee failed to take into account the evidence given by the parties before the Tribunal.

31. **Section 8** of the **Land Disputes Tribunal Act** (repealed) provides as follows:

“(6) At the hearing of the appeal, the party bringing the appeal shall begin.

(7) After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision: Provided that the Committee may in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal.

(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

32. The proceedings of the Appeals Committee show that when the appeal came up for hearing, “the two parties were sworn in” and testified. The parties were then cross examined by the members of the Committee who went ahead to deliver their decision. To the extent that the parties who were before the Appeals Committee were given an opportunity to be heard, and they were actually heard, it is the finding of this court that the Appeals Committee took into consideration, not only the evidence of the parties that was adduced before them, but also the evidence that was adduced in the Tribunal.

33. The only three issues of law raised in the current Appeal is whether the Respondent filed the Appeal before the Appeals Committee within the requisite time; whether the said Appeal could be filed after the award had been adopted by the Magistrates court and whether the Appeals Committee took into consideration the evidence of the Appellant herein.

34. Having made a finding that indeed the appeal to the Appeals Committee was filed within the requisite time; that the appeal to the Appeals Committee could still be filed even after the adoption of the award by the Magistrate and that the Appellant herein was heard by the Appeals Committee, I find that the Appeal is not meritorious.

35. For those reasons, I dismiss the Appeal with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 29TH DAY OF OCTOBER, 2021.

O. A. ANGOTE

JUDGE

IN THE PRESENCE OF;

MS WANJIKU FOR THE APPLICANT

MR. MUIA FOR THE RESPONDENTS

COURT ASSISTANT – JOHN OKUMU