



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC MISC NO.E011 OF 2021

FRANCIS KIMANI KARIMIRA.....APPLICANT

VERSUS

CHEGE MACHARIA.....RESPONDENT

RULING

The Applicant filed a Notice of Motion Application dated **16th August 2021**, brought **under** the provisions of **Order 9 Rule 9 & 10** of the **Civil Procedure Rules**, Sections **1A,1B & 3A** of the **Civil Procedure Act**, **Rule 3** of the High Court Practice & Procedure Rules and all other enabling provisions of law seeking for orders that;

a) That this Honourable Court be pleased to transfer for hearing and determination of the Provincial Land Appeals tribunal (at Nyeri) Land Appeal case Number (Murang'a south) 06 of 2009 Francis Kimani KarimiraVs.... Chege Macharia which is still pending.

b) The Costs of this Application be provided for.

Francis Kimani Karimira, the Applicant herein swore an Affidavit in support of the Application and averred that the matter was first heard by the **Land Disputes Tribunal** (Kigumo) in **No. 20 of 2008**, and a decision rendered. That he was dissatisfied with the same and hence filed an Appeal before the Provincial Land Appeals Tribunal (at Nyeri) Land Appeal **No. 06 of 2009**. Further that the Respondent had also filed a Reply in opposition to his appeal and before the Appeal was heard, the tribunals were declared defunct. That the matter needs to be heard to its finality as he believes the same has merit and it is only fair that it is transferred and be heard on merit.

The Application is opposed and the Respondent **Chege Macharia** swore a Replying Affidavit filed in Court on **18th October 2021**, and averred that the Application is incompetent and bad in law as the alleged Appeal before the **Provincial Appeals Tribunal** cannot be argued in this Court . That the **Provincial Appeals Tribunal**, is now a defunct entity and the Applicant is seeking to revive an Appeal when the mortician has already left the table as there is no Appeal as the relevant quasi judicial body is defunct. Further that **Environment & Land Court Act** expressly bars this Court from entertaining the said Appeal.

It was further contended that the Appeal has been overtaken by events as the matter has been litigated upon in **Nyeri Civil Appeal No. 19 of 2015**, and litigation has to come to an end . Further that the arguments being advanced in this Application were also in contention in the High Court making this matter **Res Judicata** . That Court has no jurisdiction to hear a matter that was filed before the **Provincials Land Appeals Tribunal**. That no sufficient reason has been offered by the Applicant as to why he waited for **12 years** to bring the present Application and therefore cannot get any relief from equity.

The Application was canvassed by way of written submissions which the Court has carefully read and considered.

The Applicant seeks to have his Appeals filed at the **Provincial Land Appeals Tribunal** transferred to this Court. It is the Respondent's contention that this Court does not have jurisdiction to hear and determine the said Appeal as the **Provincial Appeals Tribunal** is defunct. Further, the Respondent has submitted that the Appeal has been overtaken by events as the matter has been litigated all the way to the Court of Appeal and hence **Res Judicata**.

The instant Application is one for transfer of an Appeal that was pending before the **Provincial Land Disputes Appeals Tribunal**, which became defunct upon the repeal of **Land Disputes Tribunal Act No. 18 of 1990**. Whether or not the Appeal is merited or Res Judicata, goes to the merits of the Appeal. The Court is not seized with the said Appeal to enable it determine the merit of the same. The Respondent has annexed to his Replying Affidavit a Memorandum of Appeal being **Civil Appeal 19 of 2014**, which he contends has already been heard and determined. The Court is not seized of the Appeal from the **Provincial Land Appeals Tribunal**. Further, the Application before Court is for transfer and there would be no need to determine the Appeal on merit at this juncture. Therefore, the Court finds and holds that it is only mandated to determine at this juncture whether it has jurisdiction to hear and determine an Appeal from the said **tribunal**, and hence the powers to transfer the pending Appeal before the **Provincial Appeals Tribunal**, as no evidence has been produced to prove that it has ever

been heard and determined.

Section 30 of the Environment & Land Court Act provides for the transitional clause and it provides that all proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under the Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

Pursuant to **Section 30** of the said Environment and Land Court Act and upon the establishment of the Environment and Land Court, the then Chief Justice **Hon. CJ Dr. Willy Mutunga** vide Gazette Notice **No. 16268** issued Practice directions in particular Practice Direction **No. 6** and stated that;

“all proceedings which were pending before the Magistrates Courts, having been transferred thereto from the now defunct District Land Disputes Tribunal shall continue to be heard and determined by the same Courts”.

The provisions of **Section 13(1)** of the **Environment and Land Court** give this Court original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2) (b)** of the Constitution and with the provisions of this Act or any other written law relating to the Environment and Land. Further **Section 13(4)** states that in addition to the matters referred to in subsection (1) and (2), the Court shall exercise Appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of the matters within the jurisdiction of the Court.

Section 23(3) of the Interpretation and General Provisions Act provides that the repeal of the **Land Dispute Tribunal Act**, did not affect any rights, privileges or obligations acquired, accrued or incurred under it, unless a contrary opinion was indicated. The Court has not seen anything to the contrary. The Applicant’s rights of Appeal had already accrued and he is therefore entitled to have the Appeal heard and determined.

The Environment & Land Court Act grants the Environment and Land Court both original and appellate jurisdiction. As proceedings which were pending before the defunct District Land Disputes Tribunal were transferred to the Magistrates Court and as any appeal from the defunct District Land Disputes Tribunal lied in the Provincial Land Appeals Tribunal, it is only natural that all the Appeals that were pending before the **Provincial Land Disputes Appeals Tribunal** are deemed to be assumed by the **Environment & Land Court**, under its Appellate jurisdiction. Flowing from the above, the Court finds and holds that it has jurisdiction to hear and determine a **pending appeal**, that was before the defunct **Provincial Land Dispute Appeals Tribunal**. Therefore, it follows that the transfer of the said Appeal pending before the said tribunal is necessary for its final determination and conclusion. See the case of **Christopher Wafula Mutoro ...Vs... Richard Lordia Lokere [2017] eKLR** where the Court held that;

Parliament duly enacted the Environment and Land Court Act which in Section 13 (1) gives the Court original and appellate jurisdiction to hear and determine all land disputes. The ELC Act repealed the Land Disputes Tribunal Act which had created administrative tribunals to hear and determine certain types of land disputes. It follows that in the absence of the Land Disputes Appeal Committee before which the appellant’s appeal was pending, the ELC has jurisdiction to hear and determine the appeal.

[12] Fourthly, as section 23 (3) of the Interpretation and the General Provisions Act provides, the repeal of the Land Disputes Tribunal Act did not 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. The ELC Act does not convey a contrary intention. That means, amongst other things, that the appellant was entitled to pursue his right to appeal which had accrued under the repealed Act before a competent Court.

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. The Upshot of the foregoing therefore is that the Application herein dated **16th August 2021**, is found merited and the same is allowed entirely with costs being the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 2ND DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

Delivered virtually:

In the presence of

M/s Wiyemi H/B Mr. Waweru for the Applicant

Mr. T M Njoroge for the Respondent

Kuiyaki – Court Assistant

L. GACHERU

JUDGE