



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISC.APPLICATION NO. 58 OF 2019

SOLOMON MBURU NJAU.....1ST APPLICANT

ELIZABETH WAMBUI.....2ND APPLICANT

VERSUS

EUNICE WANJIRU MBURU.....RESPONDENT

RULING

The matter for determination is the *Notice of Motion* Application dated **4th November 2019**, by the Applicants seeking for orders that;

- 1. This Honourable Court be pleased to transfer and dispose the Central Provincial Appeals Committee Appeal No. 4 of 2010, Solomon Mburu & Elizabeth Wambui Mburu versus Eunice Wanjiru Mburu which is still pending.***
- 2. Pending the hearing and determination of the Applicant's Appeal, an order do issue staying proceedings in Githunguri Tribunal Case No. 4 of 2010, Eunice Wanjiru Mburu Versus Elizabeth Wambui Mburu.***
- 3. The costs of this Application be provided for.***

The Application is premised on the grounds that an award was made by the **Githunguri Land Disputes Tribunal Case No. 16/20/9/2010**, on **22nd October 2010**. That the award purported to cancel the 1st and 2nd Applicants title document **Githunguri/ Githunguri/2214**, and **Sipili/Ndonyoloip Block 2/4408**. That being aggrieved with the award of the tribunal, the Applicants filed an Appeal before the Central Provincial Appeals Committee, at Nyeri and that the appeal raises a cardinal issue of law regarding the jurisdiction of the tribunal to make the award it did. That notwithstanding that the said award was never adopted, the Respondent has moved the Subordinate Court in **Githunguri Land Disputes Tribunal Case No. 4 of 2010**, seeking to restrain the Applicants from use and occupation of **Githunguri/ Githunguri /2214**. Further that the **Land Disputes Act No. 18 of 1990**, was repealed before the Applicants appeal was heard and determined and it is therefore necessary that the Appeal be transferred before this Court.

In her supporting Affidavit, **Elizabeth Wambui Mburu**, the 2nd Applicant herein averred that she is the registered owner of **L.R Githunguri/ Githunguri/2214**, while the 1st Applicant is the registered owner of **L.R Title No. Sipili/Ndonyoloip Block 2/4408**. That by virtue of an award made by the **Githunguri Land Disputes Tribunal**, the tribunal directed that their title deeds be cancelled and distributed the two parcels to various people. That being aggrieved, they appealed to the Central Provincial Appeals Committee sitting in Nyeri and the decision was stayed. She averred that the Respondent has filed an Application before the subordinate Court seeking an order restraining her from using the land. She averred that she has been informed by her Advocate that the reason the appeal is still pending is because the Land Disputes Tribunals including the Appeals Committee were done away with after the enactment of the **Environment and Land Court Act, 2011**. That pursuant to the Chief Justice's directions, the **appeals** pending before the Appeals Committee were to be transferred to the Environment and Land Court. It was her contention that when she followed up on the appeal sometimes in **2015**, she was advised that her file would be forwarded to the **Environment and Land Court, Nyeri** for hearing and disposal and subsequently they would receive the notice. She contended that the delay in filing the Application was not intentional or deliberate as it was occasioned by the advice they got that the same would be forwarded to the Environment and Land Court in Nyeri and that when she instructed her advocates on record, that is when it was confirmed that the attempts to confirm the appeal were futile. She contended that the Respondent would not be prejudiced if the appeal is transferred.

The Application is opposed and the Respondent **Eunice Wanjiru Mburu**, filed her Replying Affidavit on **15th November 2019**, and averred that together with the 2nd Applicant, they are wives of the 1st Applicant. She averred that the two families together with their Children lived on **L.R Githunguri/Githunguri/2214**, being their family land for 27 years until 1997, when the 1st Applicant chased her away. She further averred that the 1st Applicant was the initial owner of **L.R Githunguri/ Githunguri/ 2214**, and in the year 2010, the 2nd Applicant with her aforesaid husband fraudulently transferred it to be registered in the name of the 2nd Applicant who is her Co-wife without her consent. That the title deed in the 2nd Applicant's name was issued on **20th April 2010**. She averred that the said acts denied her rights to inherit their

matrimonial home that prompted her to lodge a complaint at the Land Disputes Tribunal **Case No.16/20/9/2010**, seeking a share of the land. That the dispute was determined and an award issued in her favour and forwarded by the District Commissioner's office on **22nd June, 2010** to the Magistrates Court at **Githunguri** for the award to be adopted as a Judgment of the Court. She averred that the Applicants appealed against the award at **Nyeri in 2010**, and have since failed to prosecute it and as a result, she filed an application at **Githunguri Law Courts**, which application was withdrawn after her Advocate advised her that she had filed the Application prematurely and that the Advocate then proceeded to argue the adoption of the tribunal award dated **22nd June 2010** as a Judgment of Court. That the Court sitting in Githunguri then ordered that the same being an old matter in which the parties had delayed in prosecuting the intended appeal, that on **13th February 2020**, the Court would proceed to adopt the tribunal award dated **22nd June 2010**.

She averred that the Applicants had time to follow up on their appeal as the **Environment and Land Court Act of 2011**, came into effect immediately the **Land Disputes Tribunal and Appeals Committees** were rendered defunct and any undue delay and upto date they have not demonstrated to this Court that the appeal is before the Court. It was her contention that the failure by the Applicants to prosecute their appeal is intentional and the same continues to deprive her of her proprietary rights over her share of the land. That the Application is defective and an abuse of the Court process and should be dismissed.

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

It is the Court's considered view that the issues for determination are as framed by both parties in their submissions;

1. Whether the Court should transfer the Appeal from the Central Provincials Appeals tribunal to this Court.

2. Whether the Court should order stay proceedings in Githunguri Tribunal case No. 4 of 2010.

1. Whether the Court should transfer the Appeal from the Central Provincials Appeals tribunal to this Court.

In order for his Court to make a determination on whether or not the proceedings before the Githunguri Chief Magistrate's Court should be stayed, it is the Court considered view that it must first determine whether or not the appeal should be transferred before this court for hearing and determination. It is not in doubt that the Respondent lodged **Case No. 16/20/9/20**, at the **Githunguri Land Disputes Tribunal**, seeking for a share of **L.R 2214**. It is further not in doubt that an award was thereafter issued in favour of the Respondent and that the same was forwarded to the Chief Magistrates Court Githunguri on **22nd June 2010**, by the District Commissioner's office for adoption. However it is also not in doubt that being dissatisfied with the said award, the applicants lodged an appeal against the said award to the Central Provincial Appeals Committee, However before the said appeal was heard and determined, the Appeals Committee issued **status quo order** until the appeal was heard and determined.

Before the appeal could be heard and determined, the **Land Disputes Act No. 18 of 1990**, was repealed by **Section 31(b)** of the **Environment and Land Court Act 2011**, that commenced on **30th August 2011** and the Judges of the Environment and land Court were then appointed on **1st October 2012**. It would therefore mean that the earliest opportune time that the Appeal could be transferred to this Court was in the year 2012. Though there are conflicting decisions on how the Courts should deal with the Appeals from the Land Disputes Tribunal Act of 1990, it is not in doubt that the tribunal established under the Act were to forward all the proceedings to the respective Courts. On whether it is the subordinate Court or this Court it might be a question of either law or facts .See the case of **Thomas Muthee & another ...Vs... Nyaguthii Kaguthu [2015]** where the Court held that;

What recourse does the applicant have in such circumstances? The decision of the Court of Appeal in the cases of Chege Macharia v. Francis Kimani Kirimira (2015)eKLR supra suggests that the only option available is for the applicant to move the lower court for adoption of the award, and thereafter file an appeal to this Court against the judgment of the lower court, if need be. The foregoing notwithstanding, given the special circumstances of this case, where it is the appellants who has moved this court and noting that the repealed law does not require that there be a judgment of the lower court before a matter can lie to this court, on a matter of law; and bearing in mind that the appeal lodged at the defunct Land Disputes Appeals Tribunal raises a pure question of law to wit, whether the repealed Land Disputes Tribunal had jurisdiction to entertain claims concerning registered land, I hold the view that for expeditious, fair and cost effective determination of the issues raised in the appeal pending at the Defunct Appeals Tribunal, the appeal should be transferred to this Court for hearing and determination."

In this instant, it would seem that the same was never done with regards to the instant Appeal. The Applicants have averred that they tried to follow up with the matter, but their effort were futile. Though the Court Concurs with the Respondent that the handwritten note produced as annexure EWM-10 has no evidence of where it originated, the Court also has not seen any evidence to show that the appeal had been forwarded to the Court for further directions. The Applicant has sought to have the Appeal filed at the Provincial Appeals Committee at Nyeri transferred to this Court. However, the Respondent is of the opinion that the Application seeking for transfer of the appeal is barred by the doctrine of laches, That there was an inordinate delay and therefore the Court should not transfer the said appeal.

Having carefully perused the submissions by the Respondent, the Court notes that the Respondent has largely relied on case law that involve the enlargement of time within which to file an appeal. However, in this case, the Appeal has already been filed and the issue at hand is with regards to whether it ought to be transferred to this Court for determination.

Though the Respondent has contested the transfer of the appeal to this Court, the Court notes that the appeal is still pending and that the court gave status quo orders until the appeal is heard and determined. There is no suggestion that the appeal has been dismissed and though the Applicants may have taken over 7 years to seek to prosecute it, the appeal has never been dismissed either *suo moto* or by the Application of either party and therefore, it is this Court's considered view that it cannot die a natural death. It is evident that as long as the appeal still subsist and without vacating of the **status quo orders**, the case could still remain in limbo and unresolved. Therefore, it is the Court's considered view that for the Appeal to be heard and determined, it must first be transferred before this Court so that all the issues that are pending can be canvassed. The Court therefore finds and holds that the prayer of transfer of the said appeal is merited and it is allowed.

2. Whether the Court should order stay proceedings in Githunguri Tribunal case No. 4 of 2010.

The Applicants have sought for a stay of proceedings of the case filed in Githunguri Court being **Land Disputes Tribunal case No.4 of 2010**.

While the Respondent has also sought for the Court to decline this prayer, the Court further notes that there is a status quo order that is in place that had sought for the halting of the proceedings in the Magistrate's Court. Further this Court notes that the award being appealed against is with regards to the jurisdiction of the **Land Disputes Tribunal** to grant the said award sought to be adopted. It is not in doubt that **jurisdiction** is everything and if a Court does not have it then it must automatically down its tools. In this instance, the appeal questions the jurisdiction of the Land Disputes Tribunal and if the proceedings are to continue and the award adopted and this Court finds that the said **Land Disputes Tribunal** had no jurisdiction, then all the Court would have done would amount to an academic exercise.

Consequently, the court finds that the stay of proceedings sought herein is merited and should be allowed.

The Upshot of the foregoing is that the Applicant's Application dated **4th November, 2019**, is found merited and the same is allowed with costs being in cause.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of June 2020.

L. GACHERU

JUDGE

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of:

None for the 1st Applicant

None for the 2nd Applicant

None for the Respondent

L. GACHERU

JUDGE