



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO.5 OF 2008

BETWEEN

ERASTUS NDEI alias MUSA AKUREAPPELLANT

AND

EPHRAIM DEMBETE KIROGOLIRESPONDENT

(Being an appeal from the ruling and order of M/s, F.K. Munyi, Resident Magistrate delivered on 08/02/2008 at Kakamega in Kakamega CMC misc. Application No.262 of 2001)

RULING

Background

1. The appeal herein emanates from the ruling of F.K. Munyi delivered on the 8/2/08 wherein he dismissed the appellant's application dated 04/09/2007 seeking review of the Court's orders made on 17/11/2005 adopting the award of the Lugari Land Disputes Tribunal by which award the Respondent herein was given 3.2 acres out of Land Parcel No.Kakamega/Lumakanda/1935.
2. Arguments in this appeal were made vide the written submissions that were filed and exchanged between the parties as per the directions given by Hon. Mr. Justice Chitebwe on 16/06/2014. The parties duly filed and exchanged their submissions dated 07/08/2014 and 10/08/2015 respectively. On 21/10/2015 after confirming that the written submissions were on the file, I reserved the judgment for 11/02/2016.
3. When I retired to write the judgment it became clear to me that this appeal emanates from a land dispute that was first canvassed before the Lugari Land Disputes Tribunal vide Tribunal case No.12 of 2001. The award by the Tribunal was confirmed as a judgment of the Court on the 17/11/2005 and an order issued therein on 20/02/2006. After an appeal to the Provincial Appeals Committee, the Respondent was dissatisfied with the outcome and thus filed High Court Civil Appeal No.100 of 2002. That appeal was allowed.
4. Although this matter is now before me for determination, this Court is prohibited from dealing with the same by dint of Section 30 of the E.LC Act which provides as follows:-

“30.(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or any local tribunal of competent jurisdiction shall continue to be heard and determined by the same Court until the Environment and land

Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part heard cases, where appropriate to the Court”

5. The ELC Act was to operationalize the provisions of Article 162 (2) (b) of the Constitution which gave Parliament powers to establish a Court to hear disputes relating to land and the environment. The contemplation in the Constitution is that the Environment and Land Court will be the Court to hear disputes related to the environment and land.

6. The Environment and Land Court became operational after the 5th November 2012 when the first batch of judges appointed to the ELC were sworn in. The position of Section 30 of the ELC Act was to have matters continue to be heard in the forum where the case was filed before the Environmental and Land Court came into operation or alternatively as may be directed by the Chief Justice or the Chief Registrar. It is to be noted that though Section 30 allowed continuity, there could be no continuity, where the forum ceased to exist. Thus a case could not be continued before the Land Dispute Tribunal after the repeal of the Land Disputes Tribunal Act on 30th August 2011. The case is different for other forums that continued in existence, such as Magistrates Courts. Matters pending before these sort of forums whose existence remained unaffected by the Environmental and Land Court Act could continue being heard in the said forums, because such forums continued to exist and the law allowed them to continue hearing matters pending before them.

7. After the ELC Act came into operation, 5 practice directions were issued relating to matters touching on disputes of Land and Environment. Direction No.2 squarely dealt with matters pending before the Land Disputes Tribunals as at the date of enactment of the Environmental and Land Court Act.

8. The issue now facing this court is whether with the clear provisions of the Constitution and statute it should proceed to determine this appeal. In the case of **Owners of Motor Vessels “Lillian S- Vrs – Caltex Oil Ltd (1989) KLR1, Nyarangi JA, said the following at page 14 of the judgment;-**

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step”

9. The above words of wisdom by Nyarangi JA were applied by the Supreme Court in Re **The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011**, the Supreme Court cited with approval the words of Mohammed A.J. in the **Namibian case of State _ vrs _ Acheson 1991(2) SA 805, 813 (NM)** at page 8132 B-C where the learned judge stated;-

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between government and the governed. It is a mirror reflecting the “national soul” the identification of ideals and.....aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.”

10. The spirit of Articles 162 and 165 of the constitution 2010 is that only judges appointed to the ELC have the jurisdiction to hear and determine land and environment cases while judges appointed to the ELRC have the jurisdiction to hear and determine employment and labour disputes. Judges of the High Court have the mandate to deal with all other matters that fall outside the purview of these specialized courts. This was the rationale for the Court of Appeal decision in the case of **Karisa Chengo and 2 others – vrs – Republic (2015) eKLR**.

11. I am of course aware of the provisions of Section 13 of the High Court (Organization and Administration) Act No.27 of 2015 which donates power to the Chief Justice to”(b) deploy a judge from

one division to another .” as envisaged under section 11 of the ACT. At the moment, this court has not been empowered to hear land and environment matters.

12. Having reached the above conclusion, and noting that what was placed before me were only written submissions, and in the interest of justice, I make the following orders;-

1. This court has no jurisdiction to hear and determine this appeal..
2. This appeal be and is hereby transferred to the Environment and land court for hearing and final determination.
3. Parties shall take dates at the registry on priority basis.

13. I make no order as to costs in respect of the proceedings to date.

14. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 11th day of February 2016.

RUTH N. SITATI

J U D G E

In the presence of:

M/s P.K Kamau (absent) for Appellant

Miss Khatashi for Shiriko (present) for Respondent

Mr. Lagat - Court Assistant