



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC CIVIL APPEAL NO. 31 OF 2014**

**WAITHAKA WAIREGI ..... APPELLANT**

**-VERSUS-**

**HANNAH WANJIRU WAIREGI ..... RESPONDENT**

**JUDGMENT**

1. Aggrieved by the decision of **Hon. B. Khaemba** (R.M.) in Kigumo SPMC LDT Case No. 44 of 2011 made on 16<sup>th</sup> August, 2012 the appellant brought this appeal praying that the decision be reviewed, vacated and/or set aside.
2. The decision of the lower court which aggrieved the appellant was to the effect that the court had jurisdiction to enter judgment in favour of the respondent in accordance with the award of the defunct Land Dispute Tribunal.
3. Through the notice of motion dated 12<sup>th</sup> January, 2012 in which the impugned decision was made, the court had been asked to review and set aside the judgment it had entered in favour of the respondent in accordance with the award made by the Kigumo Land Disputes Tribunal, on 5<sup>th</sup> October, 2011.
4. Concerning the issue of the court's jurisdiction to enter judgment in accordance with the award of the Land Dispute Tribunal when the Land Dispute Tribunals Act had been repealed, the Magistrate had observed:-

**“Vide the Practice Directions issued by the Hon. Chief Justice through the Kenya Gazette Notice No.1617 dated 9/2/2011, all proceedings relating to the environment and use and occupation of and title to land pending before the Court of Appeal, High Court, Subordinate Courts or local Tribunal other than LTD, shall continue to be heard and determined by the same Court or Tribunal pending the establishment of the Environment and Land Court. In the present case, the award of the Kigumo District Land Disputes Tribunal was filed in court on 19<sup>th</sup> October, 2011. Since then the matter became proceedings of the court and ceased to be an LDT matter anymore. I therefore find that it was properly within the jurisdiction of the court as per the practice directions by the Hon. Chief Justice in the said gazette notice that the court adopted the award of the tribunal as judgment of the court on 22<sup>nd</sup> March, 2012 as the proceedings had been pending before court and the Environment and Land Court was yet to be established.”**

5. The appeal is premised on seven (7) grounds which can be summarised as follows:-

1). That the learned trial magistrate erred by finding that the application dated 12<sup>th</sup> January, 2012 and filed on the same day did not contravene the provisions of the Environment and Land Court Act, 2011.

2). That the learned trial magistrate erred by not finding that the application dated 12<sup>th</sup> January, 2012 was improperly in court.

3). That the learned trial magistrate erred by not finding that award before it, was illegal as it touched on title to land an aspect which was outside the ambit of the enabling Act.

6. The appeal was disposed of by way of written submissions.

7. In her submissions, the appellant has referred to the decision of this court in the case of **Francis Kimani Kirimira vs. Chege Macharia Nyeri ELCA No. 17 of 2014** in support of her contention that the application dated 12<sup>th</sup> January, 2012 was erroneous and the orders obtained therefrom unlawful. Maintaining that the application was irregular, the appellant urges the court to quash, set aside and vacate the orders issued in that application.

8. By the time of writing this judgment the respondent had not filed any submissions.

9. In the case relied on by the appellant, **Francis Kimani Kirimira vs. Chege Macharia**, this court had observed:-

**“Section 30 of the Environment and Land Court Act as read with Practice direction 6 (supra), gives the magistrates courts jurisdiction to hear and determine the cases transferred thereto by the Tribunal but not adopted as the judgment of the court, to be entered as judgment of the court in a case which has been transferred to that court whether pending or concluded. The obligation imposed on the court to which the cases are transferred is to hear and determine the cases, a completely different regime to that obtained under Section (7)(2) of the repealed Land Dispute Tribunals Act.”**

#### **Analysis and determination**

10. From the grounds of appeal and the submissions by the appellant, the sole issue for determination is whether the lower court had jurisdiction to enter judgment in favour of the respondent in accordance with the award of the Tribunal?

11. In answering this question, I will rely on the decision in the case of **Chege Macharia v Francis Kimani Kirimira [2015] eKLR** where the Court of appeal revised the decision of this court cited by the appellant. In that case the Court of Appeal said as follows concerning the jurisdiction of Resident Magistrates to enter judgments in accordance with the award of the defunct Land Dispute Tribunals:-

**“...With respect, the learned judge misdirected herself on the question. The latter part of Clause 6 of the practice direction is a repetition of Clause 7 and relates to matters transferred from the Tribunals and which were to be heard and determined by Magistrates’ Courts.**

**It seems clear to us that the direction had in mind those cases that were pending before the Tribunals but which, by reason of the demise of the Tribunals, had to continue before a different forum, in this case the Magistrates’ courts. It is noteworthy that the pecuniary jurisdiction, which applies to other cases pending or record filed before the Magistrates’ courts, did not apply to the matters transferred from the defunct tribunals. They were all, without exception, to be heard and determined by the Magistrates’ Courts.**

**There appears to us to be no indication express or implied, that cases already determined**

before the Tribunal and awards issued, but yet to be adopted by the Magistrates' Courts, were to be re-heard by those courts. Once the tribunal heard a dispute and made a determination; that was the end of the matter on the merits and all that remained was adoption by the Magistrates' Court. That much is clear from a plain reading of Section 7(2) of the repealed Act. It has also been the subject of many judicial pronouncements to the effect that a magistrate is under a statutory compulsion to enter judgment in terms of the award once he receives it from the chairman of the tribunal. It not being open to him to alter, amend, question or set it aside, See, MUTEMI MWASYA -VS- MUTUA KASUVA MACHAKOS HC.C.A. 140 of 2001; CHRISPUS MICHI GAKU -VS- KARANJA WAINAINA [2006] e KLR and PETER OUMA MITAI – VS- JOHN NYARARA KISII HCCCA 297 of 2005. So long as the court was satisfied that an award was on the face of it issued by a proper Tribunal and not a nullity, it was under duty to adopt it.

We are of the considered view that where, as in this case an award had been properly forwarded by the Chairman of the Tribunal but was not yet read when the Act was repealed, the proper course would have been for the magistrate to adopt the award and read it as a judgment of the court to be followed by the usual process of decree and execution and appeal where parties so desire. Such appeals would be to the High Court by dint of clause 13 of the practice direction, the Provincial Appeals Committee also having met their quietus with the repeal of the Act.

Such a course of action is inescapable from a proper reading of the Practice Direction as framed and also accords with the doing of justice in a timely, efficient and cost effective manner as commanded by Article 159 of the Constitution and the Practice Direction itself. Moreover, the effect of the repealing of a written law on proceedings, is provided for under the Interpretation and General Provisions Act, Cap 2, at Section 23 as follows;

“(3) where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, penalty, forfeiture, or punishment aforesaid, and any such investigation, legal proceeding or remedy may be instituted, construed or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

With that general provision in mind, we come to the conclusion that the learned Magistrate acted correctly in entering judgment in accordance with the award. The award had been filed by the Chairman of the Tribunal properly under Section 7 of the repealed Act. There was no procedural error in the appellant's predicating the application for judgment on the general Order 51 which simply, provides that applications to the court would be by way of Motion on Notice. It amounts to sophistic hair-splitting for the respondent to have argued that the procedure was wrong. This is a case where the substance must override the procedure which was not flouted in any event.” (Emphasis supplied).

12. From the above cited decision of the Court of Appeal, it is clear that the trial Magistrate did not err by entertaining the application dated 12<sup>th</sup> January, 2012 (notice of motion through which the award of the tribunal was adopted by the magistrate court) and entering judgment in favour of the respondent in accordance with the award of the Tribunal.

13. As pointed out above, the duty imposed on the Magistrate's court was to adopt the award so long as it was satisfied that the award was on the face of it issued by a proper Tribunal and not a nullity. The court had no power to alter, amend, question or set aside the award.

14. For the foregoing reasons I find the appeal to be lacking in merit and I hereby dismiss it.

15. As the appeal was not defended, I make no order for costs.

**Dated, signed and delivered at Nyeri this 7th day of March, 2016.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Njoroge for the appellant

N/A for the respondent

Court assistant - Lydia