



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC APPEAL CASE NO.25 OF 2010**

1. NZIOKA MWANIKI MALIU  
2. SABINA MUTINDI NZIOKA  
3. BONIFACE M. NZIOKA ..... APPELLANTS/APPLICANTS

**VERSUS**

1. PETER KITILI MALIU  
2. ALEX N. KITILI .....PLAINTIFFS/RESPONDENTS

**J U D G E M E N T**

1. The dispute in the instant matter arises from the act of the subordinate court adoption of one of the 2 awards purportedly emanating from the provincial appeals committee. This provoked the appellants to file an application seeking to review and/or set aside the order adopting the award as a decree of the court and or same be corrected to adopt the award dated 23.7.09 as the decree of the court.
2. The application was dismissed on the P.O. stage as the court held that it has no jurisdiction and it was *functus officio* after adopting the award into a decree of the court. The applicants thus lodged the appeal setting 5 grounds of appeal which might be summarized as follows:
  - That the trial magistrate misdirected himself in law and fact when he agreed that there were 2 awards and proceeded to hold that he did not have jurisdiction.
  - That he did not follow Section 7(2) of LDT Act No.8/1990 in that before reading the award and confirming it as judgment of the court he had agreed that there were 2 distinct awards.
  - That he relied on **HCC No.25/1998 at Kitale, MWALE –VS- BEKEKE & ANOTHER** yet same was dealing with totally different issues from the ones at hand.
  - That he erred in law and fact when he dismissed the application dated 25.11.09 and upheld the objection. And finally,
  - That he held that he did not have jurisdiction to hear the application dated 29.11.2009 yet he agreed that an anomaly was committed in the reading of the award.
3. The parties agreed and have filed written submissions to canvass the appeal. The appellant submits on ground 1 and 2 to the effect that

Section 7(2) of LDT Cap.303A (now repealed)

***“that the court shall enter judgment in accordance with the decision of the tribunal and a decree shall thereof issue enforceable under provisions of Civil Procedure Act Cap.21.”***

The Appellant submit that of the 2 awards (dated 18.6.09 and 23.7.09) the appeals committee confirmed the one dated 23.7.09 as the genuine one and thus the magistrate contravened the provisions of Section 7(2) *supra* in reading a repudiated award and converting it into a decree of the court. Thus the decision adopted as a judgment of court was not appeals committee award.

4. The appellants contend that there is no issue as to review of an award and setting aside the decree as there is nothing to set aside or review. The Appellants are seeking for the adoption of the correct award. The appellant therefore contend that the cited authority of **HCC No.25/1998 MWALE VS. BEKEKE *supra***, is not applicable in the instant circumstances of the case.
5. On ground No.4 and 5 the appellants contend that the court having noted the forwarded 2 awards, containing conflicting results, it should have waited for the appeals committee to clarify the genuine award. The appellants thus seek the court to allow the appeal. On the Respondents' side, the Respondents submit that the trial court was correct in its ruling. They contend that under LDT Act repealed, the subordinate court lacks jurisdiction to alter, review set aside and amend an award. The Respondent submitted that the authority of **HCCA 25/98 *supra*** was applicable and binding.
6. The Respondent contend that the only avenue to impugn the award was via an appeal or Judicial Review. The Respondents conclude by submitting that the appeal was filed without leave as the ruling challenged arose from the upholding of a preliminary objection. Thus the appeal is incompetent. The Respondents seek the appeal to be dismissed with costs. After going through the above submissions and the materials placed before the court, I find the following issues emerging?
  1. Did the court have jurisdiction to entertain the application for setting aside and or review?
  2. Is appeal incompetent for want of leave file an appeal?
  3. If yes, what was the appropriate orders to make?

It is not denied that 2 awards were filed in court all purporting to have been appeals committee awards dated 18.6.09 and another 23.7.09 respectively. It is also not denied that, the court noted the presence of the 2 awards in the court file and before clarification from the appeals committee adopted the one dated 18.6.09 as judgment on the 29.10.09.

7. Further it is not denied that by a letter dated 16.11.09 the appeals committee confirmed on 18.11.09 the correct award to be the one dated 23.7.09. By a motion dated 25.11.09, the Appellants sought inter alia an order to review or set aside the order adopting award as a judgment of court dated 29.10.09 or correcting to the extent that court adopts award dated 23.7.09 as the judgment in lieu of award dated 18.6.09.
8. The court on preliminary objection rejected the application and stated that:

***“The court having adopted appeals committee judgment cannot go back and review the same orders as doing so is going outside the jurisdiction of the court”.***

On the issue of whether the appeal is incompetent for want of leave, the court observes that the application struck out sought to review and or set aside and was anchored under order XIV 45 (1) (a) and (b) Civil Procedure Rule inter alia. Ruling/orders arising from applications for review or setting aside are appellable as a matter of right vide provisions of order XLIII (43) 1(x) of Civil Procedure Rules. In the premises the appeal is competent.

9. On the issue of whether the court ought to have allowed the motion, one has to look at the requirement of the order 45 (a) and (b) of Civil Procedure Rules. The court was aware there were 2 conflicting awards and needed clarification as to the correct one from the appeals committee. The court went ahead without waiting for clarification to select one award and adopt it as a judgment of the court.
10. Upon being notified of the correct award, the court ought to have realized that the judgment and/or decree based on the award was a nullity and on being moved ought to have noted that error on the face of the record and review its orders of 29.10.09 and either investigate the circumstances

leading to the making of 2 awards or adopt the so called the correct award. It is this court's finding that the court had jurisdiction to review the order it had made under the provisions of order 44. There is nothing in the LDT Act No.8 of 1990 which prohibited review of adopting order if the parameters set for review were demonstrated.

11. This court therefore finds that the magistrate went to error in rejecting the application. The court notes that the issue of 2 awards remains unresolved as the source of the same indicates to be the appeals committee. Neither the court nor the appeals committee investigated the circumstances leading to the production of the 2 awards. In the first award dated 18.6.09 the Respondent is the victim. In the second award dated 23.7.09 the appellant is the victim.

12. The court is vested with jurisdiction to question such shenanigans of the actors in such matters which smacks under hand dealings at the appeals committee offices. The court would have ordered the appeal to be reheard by another team of appeals committee if it were not that the same were disbanded on repeal of LDT Act. The practice direction directed that at the time of appeal of LDT ANY matter pending thereof was to go to the High Court. The High Court has been replaced by ELC court on land matters.

13. In interest of justice this court finds under Section 13(7) ELC Act appropriate to make the following orders:

1. The appeal is allowed and the orders of subordinate court are set aside.
2. The purported 2 awards are set aside and the appeal will be heard fresh by the ELC court.
3. Costs will abide in the result of this appeal. (costs for the subordinate and this appeal).
4. The Appellant shall get his memorandum of appeal which had been lodged before appeals committee lodged in ELC Court within 30 days.

**Signed and Delivered at Machakos this 6<sup>th</sup> day of February, 2015.**

**CHARLES KARIUKI**

**JUDGE**