



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO.114 OF 2014**

**PETERSON NGUCHU KABURI.....APPELLANT**

**VERSUS**

**JOSEPH THUKU KABURI.....RESPONDENT**

**RULING**

**Introduction**

1. This appeal relates to the award of an unnamed tribunal which was in accordance with the provisions of the Land Disputes Tribunal Act No.18 of 1990 (hereinafter “the Act”) adopted by the Senior Principal Magistrate in Nanyuki Land Case No.2 of 2010 on **28<sup>th</sup> April, 2010** (hereinafter “the lower court”).

2. The appellant, who was the respondent in the case before the tribunal and the lower court, had opposed the adoption of the award of the tribunal on the grounds that:-

- a) **The source of the award was unknown;**
- b) **The capacity of the signatories was unclear;**
- c) **The award was undated; and**
- d) **That signatories of the award were not members of the Laikipia East Land Disputes Tribunal.**

3. Upon considering the issues raised before him, the learned Magistrate overruled the objection by the respondent (now appellant), on the grounds that the award can only be challenged after its contents are read to the parties by the court and that the powers of the court under **Section 7(2)** of the Act was limited to entering judgment in accordance with the decision of the tribunal. According to the adopting magistrate, the court could not refuse to enter judgment even if there were flaws in the award. It is that decision (judgment) of the lower court which is the subject of this appeal.

4. In the memorandum of appeal filed on **19<sup>th</sup> August, 2011** the appellant contends:-

- (i) **That the adopting Magistrate misdirected himself by entering judgment in accordance with an award from an unauthorized or illegal entity or from a person or persons who were not the Laikipia East Land Disputes Tribunal;**
- (ii) **That the adopting Magistrate misdirected himself by deeming that a piece of writing**

**filed in court on 28<sup>th</sup> April, 2011 was an award made by a Lands Tribunal upon which a judgment could ensue; and**

**(iii) That the adopting Magistrate misdirected himself by concluding that the court's duty is mechanical i.e to enter judgment in accordance with an award without inquiring about the legality of the award.**

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

### **Submissions for the Appellant**

6. In the submissions filed on behalf of the appellant, a background of the case at the lower court is given and submitted that there is nothing in the award to show that it was from the relevant Tribunal. The award is also challenged on the ground that the person who forwarded it to court had no role to play in the award. Because of the many flaws and/or omissions in the award, it is submitted that the purported award did not qualify as an award/ decision of the tribunal under **Section 3(7)** of the Act. It is contended that there was nothing in the document filed in court on **28<sup>th</sup> April, 2010** which would undoubtedly indicate that the decision was that of the tribunal.

7. Concerning the lower court's determination that its duty was limited to entering judgment in respect of the award of the tribunal, it is submitted that **Section 7(2)** of the Act enjoined the Magistrate's court to enter judgment in accordance with the Act. In this regard, a decision of the tribunal is said to be not any piece of writing presented to the court purporting to be so. Further that a decision of the tribunal does not include a decision of persons impersonating themselves as a tribunal.

8. In entering judgment in accordance with the decision of the tribunal, it is contended that the adopting Magistrate's work is not mechanical. The magistrate must satisfy himself that such an award has come from the tribunal properly constituted in accordance with the Act. In the circumstances of this case, it is submitted that the court should have entertained considerable doubt as to whether the award really emanated from the Tribunal. According to counsel for the appellant, the burden of discharging the doubts raised about the award lay with the respondent, which burden the respondent failed to discharge.

9. It is reiterated that it was a serious error on the part of the adopting Magistrate to regard as an award something which on the face of it did not appear to be an award.

10. It is pointed out that during the proceedings before the lower court, the court was informed that the persons appearing on the award were not members of the Laikipia East District Land Tribunal under which the Central division fell. Further that the Act does not create an entity by the name "Division Land Disputes Tribunal. An award emanating from such an entity, according to counsel for the appellant, should have placed the Magistrate on guard concerning the legality of the award.

11. The adopting Magistrate is also faulted for having ignored a gazette notice placed before him which showed that the persons who had purportedly signed the award were not members of the Laikipia East District Lands Tribunal.

12. Maintaining that there was no award properly so called before the Magistrate, counsel for appellant has submitted that there was nothing before the court in respect of which the adopting Magistrate could enter judgment. For the foregoing reasons, the court is urged to allow the appeal, set aside the Magistrate's judgment and in its place make an order dismissing the respondent's application dated **10<sup>th</sup> February, 2011**.

### **Submissions for the Respondent**

13. The lower court had no jurisdiction to entertain the issues raised before it. It is opined that those issues ought to have been raised before the Provincial Appeals Committee, by way of an appeal or before the High Court by way of judicial review.

14. Terming the appeal herein without merit and an abuse of the court process, counsel for the respondent submits that under **Section 8(9)** of the Act, the only appeal to the High Court is that contemplated under the said Section. That is to say an appeal against the decision of the defunct Provincial Appeals Committees. The law does not contemplate a situation whereby an appeal can lie against the judgment and the decree of the lower court to the High Court. For those reasons, the court is urged to dismiss the appeal with costs to the respondent.

### **Analysis and determination**

15. It is not in dispute that the lower court was seized with what the forwarding letter from the District Land Registrar, Laikipia described as the Award from the Central Division Dispute Tribunal in respect of Land Dispute Tribunal Case No.108 of 2007. It is also noted in the dispute that the said award had no indication as to its source, was not dated and it did not indicate the respective capacities of the persons who signed it.

16. It is the said glaring omissions in the award that made the appellant challenge it before the lower court before it was adopted. Counsel for the appellant contended that before entering judgment in accordance with the decision of the tribunal, the adopting Magistrate ought to have ascertained that the award was indeed from the entity contemplated in law. In the circumstances of this case, it is submitted that since the material was placed before him suggesting that the award was not from an entity empowered to make the award, the adopting Magistrate ought to have required the respondent herein to prove that the award was from the entity contemplated in law. The adopting magistrate is said to have erred in holding that his role was merely to adopt the award of the tribunal.

17. In the submissions filed in opposition to the appeal herein, it is acknowledged that there were reasonable grounds for challenging the award but argued that the lower court was the wrong forum. In challenging the impugned award, it is submitted that the appellant ought to have used the procedure contemplated in the Act that is to say, the appellant ought to have filed an appeal to the Provincial Appeals Committee and if dissatisfied with its decision file a further appeal, on questions of law, to this Court.

18. After considering the pleading and submissions filed by the respective Counsels I find the issues for determination to be:-

**(i) Whether the lower court had jurisdiction to enquire into the legality or otherwise of the award filed before it?**

**(ii) Whether the procedure adopted by the appellant in challenging the award and judgment in respect thereof is the right one?**

**(iii) Whether the appellant has made up a case for issuance of the orders sought?**

19. Concerning the first and the 2<sup>nd</sup> issues, **Musinga J.** (as he then was) expressed himself as follows:-

**“The jurisdiction of the Land Disputes Tribunal is clearly set out in Section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, Section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal...The provisions of Section 7(2) of the Act are explicit as to what has to be done by the magistrate’s court. That provision of the law does not leave any room for the magistrate to review, alter, amend or set aside the Tribunal’s award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under Section 8(1) of the Act or if there are reasonable grounds of challenging the decision by way of judicial review application proceed to institute such proceedings before the High Court and not otherwise.”** See the case of **Peter Ouma Mitai vs. John Nyarara HCCA NO.297 of 2005**, quoted with approval in the case of **Republic vs. Kajiado North District Ngong Land Disputes tribunal & Another Ex parte Caroline Wambui Ngunjiri & 2 others (2014) e**

KLR.

20. In the case of **International Centre for Policy and Conflict & 5 others vs. The Attorney General & 4 others** (2014) e KLR it was stated:-

**“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant bodies or state organs to deal with the dispute under the relevant provision of the parent statute....”**

21. The principle espoused in **International Centre for Policy and Conflict & 5 others vs. The Attorney General & 4 others** (*supra*) was emphasized in the case of **Re Francis Gitau Parsinei & others vs. National Alliance Party & others Nairobi Petition No. 356 of 2012** thus:

**“Where the Constitution and or a statute establishes a dispute resolution procedure, then that procedure must be used.”**

22. In the circumstances of this case, the Land Disputes Tribunal Act (now repealed) had a mechanism for challenging the decision of a tribunal. That mechanism included lodging an appeal to the provincial appeals committee and thereafter a final appeal to the High Court on a matter of law. Clearly, the appellant herein did not use that mechanism. Instead he chose to challenge the adoption of the award filed before the lower court for the reasons enumerated hereinabove. As observed by **Musinga J.** in the case of **Peter Ouma Mitai vs. John Nyarara** (*supra*), the adopting Magistrate had no power to review, alter, amend or set aside the Tribunal’s award. The questions of legality or otherwise of the purported award could only be challenged through the process contemplated under the Act, that is filing an appeal to the provincial appeals Committee or by bringing judicial review proceedings for quashing of the impugned award.

23. For the aforesaid reasons, I find that the appeal has no merit and I dismiss the same with costs to the respondent.

**Dated, signed and delivered at Nyeri this 12<sup>th</sup> day of March 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Peterson Nguchu Kaburi/appellant

No appearance for the respondent

Lydia – Court Assistant