



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
ENVIRONMENT & LAND COURT
CIVIL APPEAL NO.105 OF 2009

BERNARD NGETHA.....APPELLANT

VERSUS

SAMUEL KAROBIA MURIUKI.....RESPONDENT

J U D G M E N T

(a) Introduction

In the year 2006, the respondent herein lodged a complaint against the appellant at the Central Division Land Disputes Tribunal vide Tribunal case No.11 of 2006 over the ownership of 1½ acres comprised in the parcel of land known as **Laikipia/Nanyuki Marura Block 3/899**. The Land Disputes Tribunal heard the complaint and delivered its decision on 11th May 2006 in which it directed the parties to respect the boundary fixed by the surveyor appointed by the Tribunal. The decision was filed at Nanyuki Senior Principal Magistrate's Court for adoption. The aforesaid Court adopted the Tribunal's decision on 18th May 2007.

It would appear from the record that the respondent moved to this Court and filed HCCC No.27 of 2006 alleging the appellant had trespassed on his parcel of land known as Nanyuki/Marura/Block 111/193. On the 10th June 2008 the appellant successfully applied to have the suit struck out as being **res judicata**. When the respondent realized his suit had been struck out, he then filed an application before the Senior Principal Magistrate's Court in which he sought for enlargement of time to enable him to appeal to the Provincial Land Disputes Appeals' Committee against the Tribunal's decision. On the 2nd September 2009, the learned Senior Principal Magistrate ultimately granted the respondent leave of 21 days to file an appeal out of time against the Tribunal's decision.

Upon obtaining the order for leave, the respondent moved and filed appeal case No.55 of 2009 on 23rd September 2009 which is now pending before this court by virtue of the direction by the honorable Chief justice that all matters pending before the appeals' Committee will be heard by the Environment and Land Court.

(b) Grounds of Appeal

Being dissatisfied with the order granting leave, the appellant preferred this appeal. The Memorandum of Appeal dated 21/9/2009 contains 12 grounds of appeal namely:-

- 1. The learned Magistrate erred in law by granting enlarged time for the respondent to appeal to the Provincial Appeals' Committee when she lacked powers to the grant of such orders.**
- 2. The learned Magistrate erred in law and in fact by failing to appreciate that the award and/or decision of the Land Disputes Tribunal having been adopted as the judgment of the court and decree issued the award ceased to exist independently.**
- 3. The learned Magistrate erred in law and in fact by enlarging time for the respondent to appeal to the Provincial Appeals Committee contrary to Section 8(i) of the Land Disputes Tribunal Act No.11 of 1990.**
- 4. The learned Magistrate erred in law and in fact by failing to appreciate the mandatory provisions of Section 7(1) and (2) of the Land Disputes Tribunal Act.**
- 5. The learned Magistrate erred in law and in fact by failing to hold that the court was *functus officio*.**
- 6. The learned Magistrate erred in law and in fact by failing to hold that the delay to bring the application if indeed it was proper was brought with inordinate delay.**
- 7. The learned Magistrate erred in law and in fact by failing to consider all submissions made by the counsel for the appellant.**
- 8. The learned Magistrate erred in law and in fact by not appreciating the fact that the application by the respondent for leave to be appealed out of time amounted to an abuse of the court process.**
- 9. The learned Magistrate erred in law and in fact by failing to appreciate that she was bound to consider the court record as opposed to submission by the counsels only.**
- 10. The learned Magistrate erred in law and in fact by not holding that the orders sought were ambiguous.**
- 11. The learned Magistrate erred in law by conferring herself jurisdiction which she did not have.**
- 12. The learned Magistrate erred in law and in fact by failing to consider the merits of the application and just granting the orders sought.**

(c) Issues For Determination

In the appellants submissions he correctly summarizes the issues for determination as follows:-

- a. Whether the subordinate court has jurisdictions to enlarge time.**
- b. Whether an appeal lies to the provincial appeals committee from the award or decree of the court.**
- c. Whether once the award has been adopted as the judgment of the court and decree issued, an appeal lies to the Provincial Appeals Committee.**
- d. Whether the subordinate court is “*functus officio*” once it has adopted the awards as the judgment of the court.**
- e. Whether the court considered the merits of the application.**

f. Whether the matter was Res Judicata.

g. Whether the application amounted to an abuse of the court process.

(d) Appellant's Submissions

The first issue for determination according to appellant is whether the subordinate court has **jurisdiction to enlarge the time** to enable a party to appeal out of time in respect of the decision of the Tribunal. By Notice of Motion dated 7/5/2009 the respondent sought to have time enlarged to file an appeal to the Provincial Appeals Committee out of time. The court granted the orders sought by the respondent. The appellant submits that once the award was adopted as the judgment of the court the award ceased to exist independently as it became the decree of the court. The decree once issued is enforceable in the manner provided under the Civil Procedure Act. The Civil Procedure Act does not provide for appeals from the subordinate court to the Provincial Appeals' Committee as appeals from the subordinate court lie to the High Court and not the Provincial Appeals Committee.

The appellant argues further that under Section 7 of the Land Dispute Tribunal Act the award once filed in the Magistrate's Court and it is adopted as the judgment of the court, a decree is issued which is legally enforced in a manner provided under the Civil Procedure Act and believes that the award ceases to exist independently so that an appeal can lie to the Provincial Appeals Committee. The appeal to the Provincial Appeals Committee shall lie under Section 8 of the Land Dispute Tribunal Act before the award is filed in the subordinate court within 30 days from the award.

The provisions of Section 7 of the Land Dispute Tribunal are worded in mandatory terms. The subordinate Court is supposed to adopt the award as the judgment of the court and shall not enquire or entertain matters or new evidence from the parties. The decree issued shall be enforceable in a manner provided under the Civil Procedure Act. The provisions under Sections 7 does not grant the subordinate court powers to enlarge time.

The right to appeal from the Land Disputes Tribunal to the Provincial Appeals Committee is provided under Section 8(1) of the Land Dispute Tribunal Act No.18 of 1990.

The appeal must be from the decision of the Tribunal and not the decree of the subordinate court. The respondent's application amounted to an abuse of the court process. Prior to the filing of the application which is subject to this appeal, the respondent had filed a civil suit in the High Court (Nyeri HCCC No.27/06. The suit was struck out for being Res judicata on 10th June, 2008. the respondent never disclose of the existence of the said civil suit in the high court. The amounted to an abuse of the court process.

The appellant submitted further that the learned magistrate did not consider the record when writing her ruling. The Magistrate should have found out from the record the existence of HCC No.27 of 2006 which annexures were annexed to the replying affidavit sworn by the appellant on 10/11/2008 and filed in court on 13/11/2008 and specifically paragraph 4 of the replying affidavit. The learned magistrate instead chose to go personal and attacked the appellant's counsel. The court was bound to consider the record and not merely the submissions by the counsels. The court did not consider the merits of the application.

(e) Respondent's Submissions

The respondent also filed written submissions whose **gravamen** was that the only issue that lies before this court is whether the subordinate court had the jurisdiction to enlarge time within which to appeal from the decision of the tribunal.

According to the respondent, it is clearly obvious that Section 8(1) of the Land Disputes Tribunals Act no 18 of 1990 (now repealed) was in discretionary terms. The operational word there is 'May'. The interrelation between the tribunal and the subordinate court was very clear in that the duty of the court was to merely adopt the award without making any alterations and/or amendments to it. The award

therefore remained the decision of the tribunal.

In this matter, the court had already adopted the award as its decision. The provisions of the Civil Procedure Act therefore came into operation immediately upon its adoption. In sum therefore, the subordinate court had the jurisdiction to enlarge time within which to appeal. He submits that the court had an absolute discretion which in his opinion was properly exercised once the reasons as to why the respondent could not appeal in good time were given.

Finally, the respondent is desirous to know the fate that would befall the appeal before the Provincial Tribunal now that Act No.18 has been repealed. Were this Honorable Court to decide that the subordinate court had no jurisdiction, the appeal nevertheless remains. All matters pending before the Tribunal have by law been transferred to the court now seized of the matter. It is therefore immaterial whether the appeal in the Provincial Tribunal is proper or not. This appeal therefore lacks merit and ought to be dismissed with costs.

(f) **Determination**

I have considered the appeal, rival submissions and do summarize the main issues to be determined as :-

(a) **Whether the magistrates court are clothed with jurisdiction to enlarge time to appeal from the decision of the Tribunal to the Appeals' Committee**

(b) **Whether appeal lies to the provincial Appeals Committee from both the Tribunal and Magistrates Court or Tribunal alone**

(c) **Lastly, Whether the application was res judicata and therefore an abuse of court process.**

This court holds that where the decision of the Tribunal has been adopted by the court it becomes the judgment of the court and therefore it is subsumed in the said judgment. The same ceases to exist separately the moment it becomes a judgment of the court. I agree with the decision of Justice Khamoni J as he then was in ***R.V. Chairman Land Dispute Tribunal, Kirinyaga District and Another exparte Kariuki 2005 2KLR10*** when he held that;

“The Court judgment having been entered by a Court, in law, not only was it improper but was also irregular for this notice of motion to have been filed praying for an order of *certiorari* to quash the decision of the Land disputes Tribunal since under section 7(2) of the Land Disputes Tribunals Act the Court enters judgment in accordance with the decision of the tribunal and upon judgment being entered a decree issues and is enforceable in the manner provided for under the Civil Procedure Act. Once such a decision is adopted by a Court, it becomes a judgment of the court thereby ceasing to exist as a decision, which can be separately quashed as contemplated in this notice of motion. What has to be dealt with now is a judgment of a court and not a decision of a tribunal just as a party would have appealed against the decision of the Provincial Land Disputes Appeals Committee and not against the decision of the Land Disputes Tribunal had the appellant’s appeal in the Provincial Land Disputes Appeals Committee been heard and determined without the existence of an intervening court judgment adopting the tribunal’s decision.”

In Zedekiah M. Mwale -VS- Bikeke Farm Directors & another Kitale HCCC No.25 of 1998, it was held that a Magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a Land Disputes Tribunal award filed in court as Section 7(2) only compels the magistrate to adopt it no matter how repugnant or unjust the magistrate may deem the award to be.

Likewise this court holds that section 7(2) does not cloth the Magistrate with the power to enlarge time for purposes of filing an appeal out of time and therefore it has no jurisdiction to make such an order. Jurisdiction of the court is derived from statute and therefore any attempt to grant an order not authorized by statute shall be ***ultra vires*** the powers conferred by statute. I agree with ***Mr.Chweya*** that no appeal lies from the court to the Appeals' Committee and therefore the court cannot purport to have inherent

jurisdiction to extend or enlarge time. Further I do find that an appeal lies to the Appels' Committee only from the decision of the Tribunal.

Moreover, I agree with counsel that once the award of the Land Disputes Tribunal is subsumed in the decree of the subordinate court, the court becomes *functus officio* hence the decree becomes the decision of the court to be enforced through the Civil Procedure Act.

The appellants argument on ground No.8 that the application for leave to enlarge time to enable the appellants to appeal out of time amounted to an abuse of the process of the court because prior to the filing of the application the subject of appeal the respondent had filed a Civil suit in the High Court being Nyeri HCCC No.27 of 2006 which had been struck out for being *res judicata* fails as the materials placed before me are not enough to make a conclusion that the principles of *res judicata* have been satisfied and therefor I cannot find that the application was an abuse of the process of the court.

I do not agree with the submissions of **Mr. Ng'ang'a Munene** that the court had absolute discretion to issue the orders sought. In my view section 8(1) of the Land Disputes Tribunal does not give the subordinate court jurisdiction to enlarge time. There is a distinction between a *discretion* and *jurisdiction* as a discretion is derived from jurisdiction hence lack of jurisdiction means the court has no absolute and unfettered discretion to exercise as jurisdiction is the power to act whilst a discretion is the manner to exercise the power.

What happens to the appeal before the Appeals Committee? as asked by Mr. Ng'ang'a Munene, the answer will come when the appeal is placed before this court. However in the interest of justice the two appeals should have been heard together and the second appeal treated as a cross appeal.

I do find that the Honourable Court considered all the matters before it but arrived at the wrong decision on the issue of jurisdiction. Having found that the court lacked jurisdiction I do not wish to deal with the other issues. The appeal is ultimately allowed, the subordinate court order given on 2/9/2009 is set aside. Costs of the appeal to the appellant.

Dated, signed and delivered on 11th day of July 2014.

A. OMBWAYO

JUDGE