IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: MUSINGA (P), M'INOTI & MUCHELULE,

JJA.) CIVIL APPEAL NO. 249 OF 2019

BETWEEN

NDONYE MUSUU 1ST

APPELLANT SAMMY NDUNDA .....

2ND APPELLANT MUSUU MUASYA .....

..... 3RD APPELLANT KIMUYU MUASYA

..... 4TH APPELLANT AND

ALEX KYALO MUTISO 1ST

RESPONDENT FREDERICK MUTUA MUTISO .....

2ND RESPONDENT

(Legal Representatives of the Estate of Mutiso Mumo Kalai (Deceased)

(Appeal from the judgment and decree of the Environment & Land Court at Machakos (Angote, J.) dated 23rd November 2018

in

ELCC No. 72 of 2008)

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JUDGMENT OF THE

COURT

1. This appeal arises from the judgment of the ***Environment and Land Court (ELC)*** at ***Machakos (Angote, J.)*** dated 23rd November 2018. By that judgment, the ELC allowed a suit by ***Mutiso Mumo Kalai*** (deceased) ***(Kalai),*** who is

represented in this appeal by his legal representatives,

Alex Kyalo Mutiso

and Frederick Mutua Mutiso (the respondents*)**. Kalai's suit was against the four appellants in this appeal and another person, ***Mumbua Mwilu, who is not a party to this appeal. The effect of the judgment of the ELC was to declare Kalai the owner and entitled to possession of the property known as ***LR No. Mavuti/Kaani/1678*** situate in Machakos County (the suit property).

2. In his plaint, Kalai pleaded that he was the registered proprietor of the suit property, a subdivision of ***LR. No. Mavuti/Kaani/928***, having purchased the same from ***Muasya Muoki Wavai (Wavai)***, also deceased. He further averred that the suit property was the subject of a dispute in ***Land Dispute Case No. 43 of 1998*** which was determined in his favour and that the award of the Land Disputes Tribunal was adopted as an order of the Magistrate's Court in ***SRMC Misc. Case No 20 of 2001***.
3. It was his further averment that no appeal was preferred against the order of the Magistrate's Court, save that Wavai and his son, ***William Mbithi Muoki (Mbithi)*** filed ***Machakos High Court Suit No. 86 of 2002***, which was struck out. Thereafter, LR. No. Mavuti/Kaani/928 was subdivided and the

suit property duly registered in his name, but the appellants, unlawfully and without any colour of right trespassed into it, demarcated the same among themselves, and erected thereon permanent structure. By way of reliefs Kalai prayed for a declaration that he was the lawful owner of the suit property; an order of demolition of the illegal structure erected by the appellants; damages for trespass; and costs.

4. The appellants, who are relatives of Wavai, delivered their defence and counterclaim on 7th July 2008 and denied Kalai's claim. They pleaded that the original title LR No. Mavuti/Kaani/928 was still registered in the name of Wavai and that if the same was subdivided and the subdivision registered in the name of Kalai, the transactions were procured by fraud. They further pleaded that they were not aware of the award of the Magistrate's Court and that neither Wavai nor themselves, were party to the case.

5. The appellants admitted that Wavai's suit, ***Machakos High Court Suit No. 86 of 2002***, was struck out for being wrongfully instituted. However, they pleaded that Kalai's suit was *res judicata* because he had filed Machakos ***HCCC No. 274***

of 1994 and ***HCCC No. 312 of 1995*** against Wavai and Mbithi.

6. By way of counterclaim, the appellants pleaded that the proceedings in the Land Disputes Tribunal were a nullity because Wavai was deceased and no legal representative had been appointed for his estate. They further pleaded that those proceedings and the subdivision and registration of the suit property in Kalai's name were obtained fraudulently, the particulars of which they pleaded. Accordingly, they prayed for orders nullifying the proceedings of the Land Disputes Tribunal and of the Magistrate's Court, as well as the subdivision and registration of the suit property in the name of Kalai, and costs.
7. Kalai filed his reply to defence and defence to counter claim on or about 25th July 2025.
8. Angote, J. heard the suit with Kalai testifying on his behalf and the 2nd appellant testifying on belief of the appellants. By the judgment impugned in this appeal, the learned judge found that the Land Disputes Tribunal, in which Wavai was represented by Mbithi, awarded the suit property to Kalai; that the decision of the Tribunal was challenged by Mbithi

in

Machakos High Court Suit No. 86 of 2002*;* and that the said suit was struck out with costs on 28th January 2004. The ELC concluded as follows:

> ***"19. Having challenged the decision of the Tribunal, the Defendants cannot now raise the same issues that should have been raised in HCCC No. 86 of 2002. Indeed, whether the Award of the Tribunal was lawful or not could only have been canvassed either by way of an Appeal or Judicial Review which was done in HCCC No. 86 of 2002. This is the same position that the Magistrate took in SPMCC No. 20 of 2001 when William Mbithi attempted to have the decision of the Tribunal annulled.***
>
> ***20. Considering that the Title Deed that was issued to the Plaintiffs 'father arose out of the decision of the Tribunal, which decision the Defendants have never set aside, and in view of the fact that this court cannot sit as an appellate court in these proceedings, I find that the Plaintiffs have proved their case on a balance of probabilities. I therefore allow the Plaintiffs 'Plaint as prayed."***

9. In the current appeal, the appellants challenge the above findings on six grounds of appeal. For precision and avoidance of verbosity and repetition, the grounds can be

recast as follows, namely, that the ELC erred by:

i) ***holding that the award of the Land Disputes Tribunal could only be challenged by an appeal or application for judicial review;***

ii) ***finding that Wavai was represented in the Land Disputes Tribunal by Mbithi, who was not his legal representative;***

iii) ***failing to hold that the proceedings before the Land Disputes Tribunal and the transactions founded there on were a nullity;***

iv) ***failing to hold that Wavai's suit was res judicata; and***

v) ***deciding the case against the weight of evidence*.**

10. In support of the appeal, Mr. Kabu, learned counsel for the appellants, relied on written submissions and a list of authorities both dated 4th November 2024 and submitted, as regards the first ground of appeal, that the ELRC had jurisdiction to entertain the challenge to the decision of the Land Disputes Tribunal because Wavai's suit, namely, ***Machakos High Court Suit No. 86 of 2002***, in which he was challenging the decision of the Tribunal, was struck out rather than heard on merits. He cited the decision of this Court in ***Tee Gee Electrics & Plastic Co Ltd v. Kenya Industrial Estates Ltd.***, CA No. 333 of 2001 (Kisumu) in support of the submission that *res judicata*

applies only when

a prior suit has been heard and determined on merits by a court of competent jurisdiction.

11. On the 2nd ground of appeal, the appellants submitted that even though during his lifetime Wavai had appointed Mbithi to represent him in the dispute over the suit property, Mbithi was not his legal representative and could not have represented the estate of Wavai in the Tribunal. In support of the submission, the appellants relied on the decision of the High Court in ***In the Estate of Karani Migwi (Deceased)*** [2019] KEHC 2133 (KLR).

12. Turning to the third ground of appeal, the appellants submitted that the ELC also erred by failing to nullify the proceedings and processes that led to the subdivision of the original land into the suit property and transfer thereof to Kalai by Mbithi. They argue that they were neither served nor involved and relied on the decision of this Court in *James* ***Kanyiita Nderitu & Another v. Marios Philotas Ghikas & Another*** [2016] KECA 470 (KLR) in support of the contention that an irregular default judgment must be set aside.

13. As regards the fourth ground of appeal, the appellants submitted that Kalai's suit in ***HCCC No. 274 of 1994***

and

his claim in the Land Disputes Tribunal were *res judicata* because the Minister of Lands had already determined in ***Appeal No. 993 of 1986*** that ***LR. No. Mavuti/Kaani/928*** belonged to Wavai. They relied on ***Matolo v. Attorney General & 2 Others*** [2024] KECA 1425 (KLR) regarding the application of *res judicata*.

14. Lastly, the appellants submitted that the trial court did not consider their evidence, like that relating to Kalai's claim being *res judicata,* Mbithi not being the legal representative of the estate of Wavai, and lack of service and representation of the estate of Wavai in post-Land Disputes Tribunal proceedings. For the above reasons the appellants urged the Court to allow the appeal with costs.

15. The respondents, represented by Mr. Maingi, learned counsel, opposed the appeal vide written submissions dated 3rd June 2025. They submitted that the appeal was incompetent because the appellants applied for certified copies of proceedings two months after delivery of the judgment and filed the appeal outside the 60 days prescribed by rule 84 of the Court of Appeal Rules. For that reason, the

respondents urged the Court to strike out the appeal with costs.

16. On the merits of the appeal, the respondents set out the history of the dispute and submitted that the neither Wavai, nor the appellants appealed against the decision of the Land Disputes Tribunal and the award of the Magistrate's Court and therefore the award crystallised and became final. It was also contended that the only way the appellants could challenge the decision of the Tribunal was by way of appeal or an application for judicial review as held by the ELC.

17. On the second ground of appeal, the respondents submitted that Wavai had appointed Mbithi to represent him in the Tribunal and that the latter had fully participated. It was contended that the appellants were fully aware of the proceedings and their representation by Mbithi.

18. On the question of *res judicata*, the respondents submitted that the doctrine had no application in this case because the case before the Minister related to ownership of the original property, namely, ***LR. No. Mavuti/Kaani/928,*** **while** ***Machakos HCCC No. 312 of 1995*** and the claim

before the Land Disputes Tribunal related to Kalai’s claim to a

subdivision of the original land as compensation agreed between him and Wavai to cover the costs of ***Kshs 83,396.80*** awarded to him in District Magistrate's Court ***Case No. L 96 of 1956***. As regards the suit before the ELC which gave rise to this appeal, the respondents submitted that the same was a claim for trespass against which a plea of *res judicata* could not be sustained. They relied on ***Kennedy Mocha Ongiri v John Nyasende & Another*** [2022] eKLR and submitted that the issues in the various suits were different and that the parties were not litigating under the same title. For the foregoing reasons the respondents urged the Court to dismiss the appeal with costs.

19. We have carefully considered this appeal. The first issue to dispose of is the respondents' contention that the appeal is incompetent and should be struck out. The Court of Appeal Rules provide a specific remedy to a party who alleges that an appeal is incompetent for being filed out of time. Rule 86 requires such a party to apply, through a notice of motion to strike out such an appeal. That application must be made within 30 days of the service of the record of appeal alleged to be incompetent, and if no

application is made within the

specified time, the proviso to rule 86 prohibits the bringing of such applications subsequently.

20. In this case, the respondents did not apply to strike out the appeal within the prescribed time and are accordingly barred from alleging that the appeal is incompetent. We find no merit in the respondent's objection to the competence of the appeal. (See ***Salama Beach Hotel Ltd & 4 Others v. Kenyariri & Associates & 4 Others*** [2016] eKLR; ***Esther Anyango Ochieng v. Transmara Sugar Company*** [2020] eKLR; and ***Afrison Export Import Ltd & Another v. Okiya Omtatah Okoiti & 11 Others*** [2024] KECA 1155 (KLR).

21. Although the parties have argued and submitted on a number of issues, in our perception this appeal turns on only one issue, namely, whether the ELC erred in holding that the appellants, having failed to challenge the award of the Tribunal as prescribed by the law applicable at the time, the same had crystallised and become final. If we uphold that holding by the ELC, then there is no basis for delving into the other issues raised and canvassed by the parties.

22. The Land Disputes Tribunals Act (the Act) was enacted in

1990 and established Tribunals chaired by the District

Commissioner for the area in which the land in dispute was situate. The jurisdiction of the Tribunals was to hear and determine all cases of a civil nature involving a dispute as to the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work land; or trespass to land.

23. By dint of section 7 of the Act, the decision of the Tribunal was to be filed in the Magistrate's Court, which in turn was required to enter judgment in accordance with the decision of the Tribunal. A decree then issued, which was to be executed in the matter provided in terms of Civil Procedure Act.

24. Any party to the proceedings before the Tribunal aggrieved by its decision had a right of appeal to the Provincial Appeals Committee within 30 days from the date of the decision of the Tribunal. Section 8(8) of the Act provided as follows:

> ***"The decision of the Appeals Committee shall be final on any issue of fact and no appeal till lie thereafter to any court."***

25. As regards matters of law, section 8(9) the Act created a right of appeal to the High Court exercisable within sixty days from the decision of the Appeals Committee. Even

such appeal

could not be admitted without the High Court first certifying that an issue of law was involved. It is apt to point out that the Land Disputes Tribunal Act continued in force until it was repealed by the Environment and Land Court Act, 2011.

26. In this appeal, it is common ground that the Tribunal made its award which was subsequently adopted as an order of the Magistrate's Court as required by the Act. This is clear from the ruling of the Senior Resident Magistrate, Hon. Soita, dated 11th February 2002. The decision of the Tribunal was thereafter implemented and the original parcel of land subdivided, with the subdivision, which became the suit property, being registered in the name of Kalai on 11th October 2007.

27. The appellants did not challenge the decision of the Tribunal as and within the time frames provided in the Act. They waited for more than six years to challenge the award of the Tribunal, not through the provided mechanism and procedure, but through a counterclaim. We agree with the ELC that the options open to the appellants were to either appeal in accordance with the procedure provided in the Act, or apply for an order of

certiorari to quash the decision of the

Tribunal, which had to be done within six months from the date of the Tribunal's award. The appellants opted for none of those avenues.

28. It is a well-established principle in our jurisdiction that where the Constitution or the law has provided a dedicated procedure for agitating a grievance, that procedure must be followed and it is not open to a party to employ a different procedure. Thus, for example, in ***Speaker of the National Assembly v. Karume*** [1992] KECA 42 (KLR), this Court held as follows:

> ***"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

29. Similarly, in ***International Centre for Policy and Conflict & 5 Others v. The Attorney General & 4 Others*** [2013] KEHC 5367 (KLR), the High Court held that:

> ***"[The] unlimited original jurisdiction (of the High Court) however, cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the petitioners…***

Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.”

30. In ***Mutanga Tea & Coffee Co. Ltd v. Shikara Ltd & Another*** [2015] eKLR, this Court, in upholding a decision of the High Court in circumstances similar to those of the present appeal, explained the reason for insisting that parties follow prescribed mechanism, as follows:

“We are therefore satisfied that the learned judge did not err by striking out the appellant’s suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d’etre of the mechanisms provided under the two Acts.”

31. Even the Supreme Court has reiterated that position in ***Albert Chaurembo & 7 Others v. Maurice Munyao & 148 Others*** [2019] eKLR where it held that when jurisdiction is vested in a body, a dispute falling within that jurisdiction must first be determined by the body established by law to hear and pronounce itself on the legal issues. The Court concluded that:

> ***"…even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."***

(See also ***Kones v. Republic & Another exp. Kimani wa Nyoike & 4 Others*** [2008] 3 KLR (ER) 296; ***Vania Investment Pool Ltd v. Capital Markets Authority & 8 Others***, [2014] KECA 452 (KLR) and ***Meir Mizrah & Another v. Nairobi City Council & 3 Others*** [2018] KECA 63 (KLR)).

32. In light of the foregoing authorities and pronouncements, we do not find any basis for disagreeing with the decision of the ELC. Having failed to utilise the dedicated mechanism provided for challenging the decision of the Tribunal, the appellants could not proceed as they did.

Once the ELC found

that the appellants were not properly before the court, there was no basis on which that court could entertain and determine the issues raised by the appellants against the decision of the Tribunal.

33. For the above reasons, we have come to the conclusion that this appeal has no merit. Accordingly, the same is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 19th day of December, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.