



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 281 OF 2016**

**1. DAVID KIBERENGE**

**2. GAD KIBEREGE.....APPELLANTS**

**VERSUS**

**1. PETER NJOROGE CHUGA**

**2. BEATRICE WAMBUI NGINGA.....RESPONDENTS**

*(Being an appeal from the ruling and order of the Senior Principal Magistrate's Court at Molo (Hon. G. Sagero, District Magistrate II (Prof)) dated 18<sup>th</sup> March 2008 in Land Dispute No. 83 of 2007)*

**JUDGMENT**

1. This appeal traces its roots to proceedings before the Molo Land Disputes Tribunal serialised as Molo Land Dispute No. 6 of 2007. The claim before the tribunal was lodged by Jenifer Njoki and Beatrice Wambui Nginga against Gad Kiberenge and David Kiberenge concerning a parcel of land known as "Plot No. 533/426 in Molo Town". Upon hearing the dispute, the tribunal delivered a decision dated 20<sup>th</sup> November 2007 in which it found as follows:

*After observing this case carefully, this Land Tribunal members have found out that:*

*-Plot No. 533/426 in Molo Town belongs to the 3 partiners (sic):*

*1. Eliud Kiberenge*

*2. Jenniffer Njoki Chiuga*

*3. Beatrice Wambui Nginga*

*- The plot should be divided among the three partiners (sic) equally*

*1. Eliud Kiberenge -5 acres*

*2. Jenniffer Njoki -5 acres*

*3. Beatrice Wambui -5 acres*

*Any other property related to the partiners (sic) should be shared among the 3.*

2. The aforesaid decision of the tribunal was shortly thereafter filed as Land Dispute No. 83 of 2007 at the Resident Magistrate's Court at Molo for adoption pursuant to the provisions of **Section 7** of the **Land Disputes Tribunals Act, 1990** (repealed). Gad Kiberenge and David Kiberenge reacted to that development by filing Notice of Motion dated 29<sup>th</sup> January 2008 seeking the following orders:

*(a) The award now adopted by this honourable court from a body calling itself Molo Land Dispute Tribunal and dated 20/11/07 be reviewed for the purpose of having it (sic) from the record.*

*(b) The court does find that no such body as Molo Land Dispute Tribunal exists in law.*

(c) That the judgement of the said body be declared of no legal consequence.

(d) The costs of this application be provided for.

3. The application was heard before Hon. G. Sagero, District Magistrate II (Prof). In a ruling delivered on 18<sup>th</sup> March 2008, the learned magistrate dismissed the application and stated as follows:

***This is a ruling to the Notice of Motion dated 29<sup>th</sup> January 2008 in which Mr. Mindo Advocate for the applicant/defendant has applied for review of the court's orders on grounds that there is no body called the Molo Land disputes tribunal and that the said body purported to deal with the land of a deceased person.***

***The application is opposed by the respondent's advocate Mrs. Nancy Njoroge who argued that the application is an abuse of court process and that section 7(2) of the land disputes act spells out the duties of the Magistrate as those of reading the award and issuing the decree.***

***I have looked at the land disputes Act and I agree with the respondent's that the work of the magistrate's court is clerical in nature the mandate of the court is reduced to reading and adopting the proceedings of the tribunal. The court is not given room to decide on weighty matters such as those raised by the applicant's advocate. Its unfortunate but since it's the law it must be followed. I order that I have no jurisdiction to grant the orders sought in the application and hereby dismiss it.***

***Right of Appeal explained.***

4. Being aggrieved by the above decision, David Kiberenge and Gad Kiberenge filed the present appeal in the High Court as High Court Civil Appeal Number 49 of 2008. The appeal was transferred to this court on 25<sup>th</sup> July 2016 and was allocated a new number being ELC No. 281 of 2016 (Nakuru). Jenifer Njoki passed away during pendency of the appeal. Leave was therefore to substitute her with Peter Gikonyo Chuga and amend the Memorandum of Appeal. The appellants duly filed an Amended Memorandum of Appeal on 8<sup>th</sup> October 2018.

5. The grounds of this appeal as disclosed in the Amended Memorandum of Appeal are:

*1. The learned District Magistrate erred (sic) in law in accepting the award of a bogus Tribunal when he knew the illegality of its decision in view of the fact that the said body was not known to law.*

*2. The Learned District Magistrate erred (sic) in law in accepting the award of a body which had dealt with a piece of land whose registered owner was dead long before the said body had started deliberating on the said parcel of land when both the learned District Magistrate and the said body were aware of that fact.*

*3. The Learned District Magistrate erred (sic) in law in purporting to deal with the Appellants in connection with piece of land when he knew they were not the registered owners thereof.*

*4. The Learned District Magistrate failed to appreciate the potential danger of allowing the Respondents, to deal with, and purport to dispose of, a piece of land whose owner was not a party to the deliberations.*

*5. The Learned District Magistrate failed to appreciate the potential danger of strangers approaching a tribunal with a view of dealing with property that does not belong to any of them.*

*6. The Learned District Magistrate erred (sic) in law in holding that his role is merely to adopt any award whenever it is presented before him without satisfying himself of the authority of the body filing the award in court.*

*7. In all the circumstances of the case the Learned District Magistrate failed to appreciate the fact that the Court was being used to perpetuate an illegality and therefore the whole matter was an abuse of the process of the Court.*

6. The appellants therefore seek the following relief:

(a) That the adoption of the award by the Learned District Magistrate be set aside.

(b) That a declaration be made that the body called Molo Land Dispute Tribunal did not exist in the year 2007 and that its award dated 20-11-07 is null and void for all purposes.

(c) The Respondent be condemned to pay the costs of this Appeal and of the proceedings before the court at Molo and the body called Molo Land Dispute Tribunal.

7. The appeal was canvassed through written submissions. Appellants filed submissions on 12<sup>th</sup> May 2016 and further submissions on 8<sup>th</sup> October 2018. On their part, the respondents relied on their submissions filed on 26<sup>th</sup> May 2016. I have considered the grounds of the appeal, Notice of Motion dated 29<sup>th</sup> January 2008 together with its supporting affidavit, the replying affidavit sworn on 13<sup>th</sup> March 2008 by Beatrice Wambui Nginga, the entire record and submissions filed by parties.

8. This is a first appeal. This court therefore has a duty to re-evaluate the material that was before the subordinate court and draw its own

independent conclusions. The principles applicable while considering such an appeal were stated in **Selle v Associated Motor Boat Co. & others [1968] E.A. 123** as follows:

*An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed sholan (1955), 22 E.A.C.A. 270).*

9. I further remind myself that the appeal emanates from an order in exercise of discretion. The circumstances in which this court can interfere with the learned magistrate's exercise of discretion are well circumscribed. In **Mbogo and Another v Shah [1968] EA 93**, the Court of Appeal stated thus:

*We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.*

10. The learned magistrate had before him an application seeking review brought under **Order XLIV Rule 1** of the then applicable **Civil Procedure Rules** which provided as follows:

*(1) Any person considering himself aggrieved -*

*(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed,*

*and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced to him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.*

11. With the foregoing in mind, I now proceed to consider the appeal. I will deal with grounds 1 and 7 of the appeal together, then grounds 2, 3, 4 and 5 together and finally ground 6.

12. Since a lot turns on ground 6 of the appeal, I will begin with it. Under this ground, the appellants faulted the magistrate for holding that his role was merely to adopt the award presented before him and that he had no jurisdiction to grant the orders sought by the appellants in the Notice of Motion. It must be remembered that the orders sought in the application were that the award be reviewed and perhaps be removed from the record; that the court makes a finding that no such body as Molo Land Dispute Tribunal existed in law and that the tribunal's award be declared of no legal consequence. In submissions filed by the appellants, it is argued that although Molo District had been created by the time the tribunal's award was made, no statutory bodies including a Land Dispute Tribunal for Molo had been set up. The respondents on the other hand submitted that Molo was part of the wider Nakuru District which had a tribunal whose members had been duly gazetted pursuant to Gazette Notice Number 9050 of 19<sup>th</sup> November 2004.

13. I am unable to ascertain from the record the exact date when the award of the tribunal was filed in court. It is however manifest that it was filed towards the end of the year 2007. **Section 7** of the **Land Disputes Tribunals Act, 1990** (repealed) which required such filing in court provided as follows:

*7. (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.*

*(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act. [Emphasis supplied]*

14. It is thus abundantly clear that the court was required to enter judgement in accordance with the decision of the tribunal once an award was filed in court. The particular award herein clearly stated on the face of it that it emanated from Molo Land Dispute Tribunal. In view of the provisions of **Section 7 (2)** of the **Land Disputes Tribunals Act, 1990** (repealed), the magistrate cannot be faulted for refusing to grant the review orders whose effect would have amounted to reversing the tribunal's decision. I therefore agree with the respondents that the appellants' recourse lay in moving the appropriate superior court for orders to nullify the decision of the tribunal. Ground 6 of the appeal therefore fails.

15. Under grounds 1 and 7 of the appeal, the magistrate is faulted for accepting an illegal award from a tribunal that was legally non-existent. To support these grounds, the appellants relied on their argument that although Molo District had been created by the time the tribunal's award was made, no Land Dispute Tribunal for Molo had been set up and that the tribunal and its decision were thus nullities. As observed above, the magistrate's court was required to enter judgement in accordance with the decision of the tribunal once an award was filed in

court. He had no jurisdiction to declare the tribunal illegal or to nullify its decision. His refusal to grant the orders sought in the application was clearly in line with what the law expected of him. Thus, grounds 1 and 7 of the appeal equally fail.

16. Pursuant to grounds 2, 3, 4 and 5 of the appeal, the appellants contend that both the tribunal and the magistrate knowingly dealt with land whose registered owner was deceased, that they both knowingly dealt with the appellants in respect of land which the appellants were not the registered owners of and that they failed to appreciate the dangers of dealing with strangers in respect of a property not belonging to them. Suffice it to restate that an enquiry into all these allegations and ultimately reversing the decision of the tribunal were matters beyond the scope of the learned magistrate. The appellants ought to have raised those issues in the proper forum. I find no merit in grounds 2, 3, 4 and 5 of the appeal.

17. In view of the foregoing, I find no valid reason to interfere with the exercise of discretion by the learned magistrate. If there were any grounds to warrant nullification of the proceedings or the award by the tribunal, those grounds ought to have been pleaded in the appropriate court and not by an application in the nature of the Notice of Motion that was placed before the magistrate.

18. In the end, the appeal herein is dismissed with costs to the respondents.

19. Judgment herein was to be delivered on 10<sup>th</sup> April 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of September 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Mindo for the appellants

Mr Mburu holding brief for Ms Nancy Njoroge for the respondents

Court Assistants: Beatrice & Lotkomoi