



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 269 OF 2017

HANNAH WAMBUI KIMOTHO

JOSEPH NJOROGE KIMOTHO

PETER NJOROGE KIMOTHO (Suing in their capacity as the Administrator of the estate of

JAMES KIMOTHO THINGA deceased).....APPELLANTS

VERSUS

JAMES KARANJA KARUMA.....RESPONDENT

JUDGMENT

The Appellants through a **Re-Amended Memorandum of Appeal** dated **21st January 2017**, sought for the following orders;

- 1. That the appellants appeal be allowed.**
- 2. The decisions of the Panel of Elders and of the Senior Resident Magistrate's Court at Thika be declared null and void.**
- 3. The dispute between the Appellants and the Respondent and other claimants be referred to another panel constituted in accordance with the Magistrate's jurisdiction (Amendment Act) 1981.**
- 4. The Appellant be awarded the costs of this suit.**

The appeal was premised on the grounds that the Decree was in excess of the respective jurisdiction of the panel of elders and of the Senior Resident Magistrate as the arbitration concerned title to land and the elders lacked jurisdiction to adjudicate the same. It was their allegations that the Appellants are the registered proprietors and that the Personal Representatives of the estate of the **Late Waweru Gichuru**, were not joined in the Arbitration. Further that the panel of elders entertained claims of other parties based on a resulting or constructive trust and failed to reconstitute itself to comply with the provisions of section **9(b) of the Magistrates Jurisdiction (amendment) Act 1981**, and the same was not signed by all the elders.

Further that the appellants and its co-owners were denied a full opportunity to be heard and that in the course of the hearing of the applicant's application to set aside the panel of elders' decision, the magistrate discussed the decision of the panel of elders with the Chairman in the absence of the Appellant and the Respondent contrary to the rules of natural Justice. They further contended that the panel of elders failed to determine the dispute between the parties as it did not indicate who all the owners of the suit land were and their respective shares.

The appeal was canvassed by way of written submissions, wherein the Appellants through the **Law Firm of Dola Magani & Company Advocates** filed their submissions on **25th June 2018**, and submitted that though prayer 3 is not tenable, the Court is capable of entertaining and issuing a determination on the remaining prayers and issue any order which shall be fair and just for the ends of justice to be met. They further submitted that the panel of elders acted in excess of their jurisdiction having resolved a matter that involved title to land and so did the Learned Magistrate in adopting the said award. The Court was therefore urged to allow the Appeal.

The Respondent through the **Law Firm of M. Mutinda & Associates**, filed his Submissions on **3rd September 2018**, and submitted that the appeal was filed more than five years from the date of the Decree and there was nothing on record to show that the appellant sought enlargement of time and the same was allowed. It was therefore submitted that the Appellants appeal is a nullity. It was further submitted that the appeal being prosecuted **26 years** later, and the same being anchored on repealed Act, the Court ought to be careful not to issue orders

which may be humanely impossible to execute. It was therefore submitted that there is no competent appeal before Court.

In reply to the Respondent’s submissions, the Appellant filed further submissions on **23rd October 2018**, and submitted that vide an order issued on **8th June 1984**, they were allowed to file an Appeal out of time. It was further submitted that the Appeal was filed before the Act enabling it was repealed and the fact that the Act was repealed, cannot render it nugatory.

The Court has now carefully read and considered the pleadings of the parties and the written submissions, cited authorities and the relevant provisions of the law and the Court makes the following findings;- The issues for determination are;

- 1. Whether the Court has Jurisdiction to entertain the appeal.**
- 2. Whether the Court is capable of granting the orders sought.**
- 3. Whether the appeal is merited**

1. Whether the Court has jurisdiction to entertain the appeal

The Respondent has submitted that this Court does not have jurisdiction to hear and determine this matter as the Appeal was filed **5 years** after the Decree was issued and further that the Appellant never sought for enlargement of time and therefore the Court does not have jurisdiction. The Court must first determine the issue of Jurisdiction as Jurisdiction is everything and without jurisdiction the Court has no option but to down its tools. See the case of **Owners of the Motor Vessel “Lillian S” ...Vs...Caltex Oil (Kenya) Ltd [1989] eKLR**, where the Court held that;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

This Court must therefore determine whether or not the Appeal was filed out of time and if so whether there was leave granted to the Appellant to file the appeal out of time. This is so because filing an Appeal out of time without leave of Court goes to the jurisdiction of the Court. See the case of **Patrick Kiruja Kithinji...Vs...Victor Mugira Marete [2015] eKLR**, where the Court of Appeal held that;

“in our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159 of the Constitution.”

The Respondent has submitted that the appellant filed the appeal out of time without the leave of Court. However the Appellants have availed before this Court a copy of an order issued on the **8th of June 1987**, but dated **19th October 1984**, that evidenced that the initial Appellant was allowed to file an appeal out of time. As was held in the case of **Patrick Kiruja Kithinji...Vs...Victor Mugira Marete(Supra)**, the Court has jurisdiction to entertain appeals filed out of time with leave of the Court. With evidence that the Appellant was allowed to file the instant appeal out of time, by **Justice Okubasu** (as he then was), this Court therefore finds and holds that the Court has jurisdiction to hear and determine this appeal.

2. Whether the Court is capable of granting the orders sought.

The Respondent has submitted that the Appeal is anchored on a repealed Act and the Court should be careful not to issue orders that may be impossible to execute. The right of Appeal lies as a matter of right for any party. A party should not be denied a chance to be heard solely based on the fact that an Act has been repealed. The Appellant has rightly submitted that they were granted Leave to appeal out of time and there being no application to dismiss the Appeal, there would therefore be no reason not to hear and determine the Appeal on merit.

The Environment and Land Court is established as a Specialized Court under **Article 162(2)(b)** of the **Constitution** that empowered Parliament to establish a Court with equal status of a High Court to hear and determine disputes relating to the environment, use occupation and title to land. Further **Section 13(4)** of the Environment and Land Court Act states that in addition to the matters referred to in **subsection (1) and (2)**, the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of the matters within the jurisdiction of the Court. Further when the Environment and Land Court Act was enacted pursuant to **Section 30, ‘Practice Directions’** were issued by the then Chief Justice and **Practice Direction No.6** was to the effect that all proceedings which were pending before the Magistrates Courts, having been transferred thereto from the now defunct District Land Disputes Tribunal shall continue to be heard and determined by the same Courts. Further **Practice Direction No.11** also provided that appeals from Magistrates Courts and Tribunals shall lie in the Environment & Land Court and as such it is in order that appeals that came from the Magistrates Court having been heard by the disputes tribunals be heard by this Court as it is this Court that is seized with the power and jurisdiction

to hear and determine disputes relating to use and occupation of land. Further **Section 23(3) (c)** of the **Interpretation and General Provisions Act** provides;

- (3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—**
- (a)**
- (b)**

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed

In line with the above therefore, the repeal of the Land Disputes Tribunals Act did not affect any rights, privileges or obligations acquired, accrued or incurred under it. See the case of Patrick Mwai Mwande...Vs... Isaac Waweru Kori [2017] eKLR, where the Court held that;

“Section 23(3) of the interpretation and general provisions Act provides that the repeal of the Land Dispute Tribunal Act did not affect any rights, privileges or obligations acquired, accrued or incurred under it unless a contrary opinion was indicated. I have not seen anything to the contrary. The applicant’s right to appeal which had accrued under the repealed Land Dispute Tribunals Act should not be abrogated without justifiable cause.”

3. Whether the appeal is merited

The Appellants’ contention in this matter is that the panel of elders did not have jurisdiction to hear and determine the matter that was before them in accordance with the Law at the time being the ‘Magistrates

Jurisdiction Act’ as they acted in excess of their Jurisdiction. The dispute between the parties was one that involved the ownership or title of the suit land. It is not in doubt that the parties submitted their dispute over **L.R 10087/6** at Juja directly to the District Officer for arbitration. The panel of elders was then constituted to which they arrived at a decision to which the Respondent was granted some acres of land.

From the foregoing, it is clear that the dispute between the parties was one that involved title of the suit land. The Court has considered the provisions of **Section 9A(1) of the Magistrates’ Jurisdiction (Amendment) Act 1981**, which provides as follows:-

“Notwithstanding the provisions of Sections 5 & 9 or of any written law conferring jurisdiction but subject to the provisions of this part, no Magistrate’s court shall have or exercise jurisdiction and powers in cases of a Civil nature involving:-

- a) The beneficial ownership of land;**
- b) The division of, or the determination of boundaries to land including land held in common**
- c) A claim to occupy or work land;**
- d) Trespass to land”**

The above provisions of law provide what kind of cases were to be referred to the panel of elders. The panel of elders did not have jurisdiction to determine cases involving entitlement to land or title to land. It is evident that disputes over ownership of land do not fall under the jurisdiction of the panel of elders as the case herein was directly referred to the panel of elders. In this case, the **South West of Thika**

Municipality District Land Disputes Tribunal, heard and determined questions of ownership of registered land which had a title deed. The said **South West of Thika Municipality District Land Disputes Tribunal** did not have jurisdiction to entertain such dispute and therefore the said Land Disputes Tribunal exceeded its jurisdiction. See the case of M’Marete...Vs.. Republic & 3 others, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR, where the Court held that:-

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

Since the **South West Thika Municipality District Land Disputes Tribunal** had no jurisdiction to determine disputes relating to ownership of registered land, then whatever award they made was **null and void for want of jurisdiction**. Since the award of the tribunal was **null and void**, the **Thika Senior Resident Magistrate’s Court** had no jurisdiction to read and confirm an award that was null and void. Therefore, this Court finds that the decision of **South West Thika Municipality Land Disputes Tribunal** in D.0 12 of 1983, was *ultra vires* as the said Tribunal had no jurisdiction to interfere with a title of property. See the case of Masagu Ole Naumo...Vs...Principal Magistrate Kajiado Law Courts & Another, Nairobi, High Court, JR 370 of 2013 [2014] eKLR, where the Court held that:-

“In my view the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.

Assuming the dispute that was to be adjudicated by the tribunal was one that fell under its jurisdiction, which the instant one the Court has held it did not, the parties did not follow the laid down procedure before presenting the award to the Magistrate for the confirmation and therefore the award was **null and void**. It is clear that by the time the parties were appearing before the Disputes tribunal, they did not have any authority to appear before the said panel. There were no proceedings upon which such reference were made for arbitration. The Magistrate in her ruling acknowledged that the dispute was forwarded to the District officer directly. However, **Section 9A** of the **Magistrates’ Court Act(Repealed)** provided that:-

(1) Notwithstanding the provisions of sections 5 and 9 or of any other written law conferring jurisdiction but subject to the provisions of this part, no Magistrate’s court shall have or exercise jurisdiction and powers in cases of a civil nature involving:

(a) the beneficial ownership of land;

(b) the division of, or the determination of boundaries to, land including land held in common;

(c) a claim to occupy or work land;

(d) trespass to land;

(e) an issue relating to any matter set out in paragraphs (a) to (d) of subsections (1) shall be referred to a panel of elders to be resolved.

Given that there was no valid suit that was in existence and parties having appeared before the panel of elders without any reference by the Court, therefore the panel of elders had no authority simply because parties had submitted to them. The proper procedure that the parties had to follow was first filing the suit in a Magistrate's Court then the Magistrate's Court would refer the matter to the panel of elders in accordance with the provisions of the Act. See the case of **Khayadi...Vs... Herbert Aganda [1988] eKLR**, in which the Court of Appeal held that:-

“The suit has to be filed in court for the Magistrate to determine the issues involved and then be referred to the elders who should file their award in court. Only by this procedure would the court have jurisdiction. If the award was filed in Court and then the magistrate having perused it and has suggestions to make, he can then refer it to the panel of elders; only then would the panel be seized with the jurisdiction. But as the reference was referred to the elders before coming to court, and without the court order, the panel of elders had no jurisdiction to hear and determine the matter. The magistrate had no jurisdiction to grant the order as he did.”

This Court having come to a conclusion that the panel of elders had no jurisdiction to deal with the dispute and therefore acted in excess of its jurisdiction, any decision therefore that was made subsequent to the said award including the Ruling by the Magistrate was **null** and **void**. The subsequent adoption of the award therefore by the Magistrates Court was consequently **null** and **void** and must therefore be set aside.

The upshot of foregoing is that the Appeal is merited and the Court finds and holds that it has Jurisdiction to entertain the instant appeal and consequently, the decision of the panel of elders and of Senior Residents Magistrates Court is declared **null** and **void**. As was already held that that the 3rd prayer is untenable, the parties are at liberty to file another suit before a competent Court without any reference to Limitations of time. Consequently, the Appeal herein is allowed entirely in terms of **prayers No. 1, 2 & 4** with costs to the Appellants.

It is so ordered.

Dated, Signed and Delivered at Thika this 12th day of September 2019.

L. GACHERU

JUDGE

12/9/2019

In the presence of

Mr. Waigwa holding brief for Magani for Appellants

Mr. Mungai holding brief for Mutinda Mutiso for Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

12/9/2019