



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 12 OF 2018

(Formerly Machakos ELC Appeal No. 2007 of 2018)

JAMES W. NAIRI.....APPELLANT

VERSUS

NKOONTO NAIRI.....RESPONDENT

JUDGMENT

Introduction

By a Memorandum of Appeal filed on the 2nd December, 2008, the Appellant appeals against the whole of the Award delivered by the Land Disputes Appeals Committee (RVP). The genesis of this appeal is the determination of the Kajiado District Land Disputes Tribunal including decision dated the 28th March, 2007 regarding a dispute relating to ownership of land parcel Nos. Kajiado/ Kaputiei Central/ 68 and Kajiado/ Kaputiei Central/ 39 where the Appellant appealed to the Rift Valley Provincial Appeals Committee that made the following orders:

- a) Parcel No. Kajiado/ Kaputiei Central/ 68 belongs to the Respondent Nkoonta Nairi.
- b) Parcel No. Kajiado/ Kaputiei Central/ 39 belongs to Appellant James Waunka Nairi
- c) We have therefore upheld the Kajiado LDT Case No. 18 of 2007.
- d) Whichever party aggrieved is allowed 60 days R/A to the High Court.

The Appellant being dissatisfied by the decision of the Land Dispute Appeals Committee (RVP) filed an appeal at the High Court of Kenya in Machakos on 2nd December, 2008.

The Memorandum of Appeal contained the following grounds;

1. The Tribunal erred in law in failing to find that the Kajiado District Land Disputes Tribunal had no jurisdiction to entertain and determine the dispute between the Appellant and the Respondent herein.
2. The Rift Valley Provincial Land Disputes Appeals Tribunal erred in law in upholding a decision of the Kajiado District Land Disputes Tribunal, which purports to nullify the registration of LR No. Kajiado/ Kaputiei Central/ 68 in the name of the Appellant.
3. The Tribunal erred in law in insinuating that the Appellant had acquired the suit land fraudulently way back in 1992.
4. That the Tribunal erred in law in purporting to issue edicts on matters that were not before it and matters that it has no jurisdiction to adjudicate.
5. The Tribunal failed to find the matter before it fell outside its jurisdiction and it could therefore only rescind the award of the District Tribunal and not confirm as it purported to do.

The Appellant prays:

- a) That this appeal be allowed

- b) That the award of Kajiado District Land Tribunal and the Rift Valley Provincial Land Disputes Appeals Tribunal be set aside.
- c) That the costs of this appeal be to the Appellant in any event.

I have considered the submissions of both parties in respect of this Appeal.

Analysis and Determination

Upon consideration of the materials presented in respect of the Appeal herein, the following are the issues for determination:

- Whether the Appeal was filed within time.
- Whether the Award delivered by the Land Disputes Appeals Committee (RVP) in respect of the suit lands should be set aside.

As to whether the Appeal was filed within time.

The Respondent submitted that the Appeal was filed out of time without leave but the Appellant insisted that the Tribunal did not have jurisdiction to deal with the suit lands. The Appellant has not indicated the date of the Provincial Appeals Committee Award that he is appealing from, in his Memorandum of Appeal. I note in the Proceedings and Decree from the Magistrates court, it indicates the Award of the Provincial Appeals Committee as dated the 7th September, 2007. In the Award from the Provincial Appeals Committee, it indicates the Award as dated 7th September, 2007 but on the title page, it is indicated 7th October, 2008. To my mind, it seems the Appellant sought to use the date on the top page and not when the Award was issued so as to fit into the time limit set for lodging the Appeal. Based on my analysis above, I find that the Judgement of the Provincial Appeals Committee is actually dated 7th September, 2007 and not 7th October, 2008. I note on 30th April, 2009, the Award from the Land Dispute Appeals Committee (RVP) was adopted as the judgment of the court by the Senior Resident Magistrate and a Decree was issued on the said date. On the 22nd March, 2011, the Senior Resident Magistrate granted a stay pending the instant Appeal.

I note Section 8 (9) of the Land Disputes Tribunal Act (repealed) provides that: ‘ **Either party to the Appeal may Appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of ...**’

From the materials presented herein, it is evident that the Appellant lodged the instant Appeal after the expiry of the 60 days period provided by statute and has not indicated whether he obtained leave before doing so. Since this was a mandatory provision, which the Appellant was expected to adhere to, I find that the instant Appeal having been filed out of time without leave of Court is hence incompetent.

As to whether the Award delivered by the Land Disputes Appeals Committee (RVP) in respect of the suit lands should be set aside. The Appeal has arisen as a result of the Land Disputes Appeals Committee (RVP) that upheld the decision of the Kajiado District Land Disputes Tribunal that had directed that land parcel number Kajiado/ Kaputiei Central/ 68 belongs to the Respondent while Kajiado/ Kaputiei Central/ 39 belongs to the Appellant. The said Award was adopted on 30th April, 2009 by the Senior Resident Magistrates’ Court Kajiado. The Appellant submitted that the District Land Disputes Tribunal as well as the Land Appeals Committee (RVP) while vesting including according proprietary interests upon parties did not have any jurisdiction to deal with registered land hence their decisions should be nullified. He insists the Appeal’s Committee should have rescinded the Award of the District Land Disputes Tribunal. I note that these are actually the basis of their grounds of Appeal as enumerated in the Memorandum of Appeal. He further submitted that the Land Appeals Committee (RVP) erred in finding that the Appellant used KShs. 20,000/= he was sent to pay for parcel number Kajiado/ Kaputiei Central/ 39 yet the said land is registered in his name and this imputes fraud. He reiterates that the Land Appeals Committee (RVP) erroneously dealt with a matter not before it by determining that Kajiado/ Kaputiei Central/ 39 belongs to the Appellant while Kajiado/ Kaputiei Central/ 68 belongs to the Respondent.

The Respondent opposed the Appeal and submitted that the Appeals Committees Decision is dated 7th September, 2007 while the instant Appeal was filed out of time without leave hence incompetent. He contended that the decision of the Appeals Committee which was adopted by the Magistrates Court has been overtaken by events and has become the decision of the Magistrates Court. He reiterated that since there is a confusion of dates, the Appellant should have lodged two separate Appeals and that the judgment of the Magistrate’s Court still stands since no Appeal has been lodged against it.

Section 3 (1),(a), (b), (c) and (7) of the repealed Land Disputes Tribunal provided that:’ **(1) Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common;(b) a claim to occupy or work land; or (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.’..... (7) The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party’s witness or witnesses.’**

The said Act provided the procedure to be adhered to once an Award was made at section 7 while section 8 provided for the Appeals mechanism 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. 8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the

Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.'

I note the Award of the Provincial Appeals Committee (RVP) and the Kajiado Land Disputes Tribunal were both adopted as Judgments of the Court and Decrees issued to that effect. This in essence means that there are two judgments existing in respect of the dispute herein.

In the case of **Peterson Maina Karitu V Augustine Mwangi Ndonyi & Another (2009) eKLR**, Justice Makhandia held that: **'The legal effect of the entry of judgment in terms of the award was that the award ceased to exist.Unless and until this judgment is set aside, the award of the Land Disputes Appeals Committee is incapable of being challenged since it is of no legal consequence. Whether the award of the Appeals Committee is set aside or not does not change the status of the judgment of the subordinate court.'**

From the legal provisions cited above, it was pertinent for the Applicant to apply to quash the said Awards through Judicial Review before their adoption by the SRM's Court. In the case **MASAGU OLE KOITALEL NAUMO v PRINCIPAL MAGISTRATE KAJIADO LAW COURTS & ANOTHER (2014) eKLR**, the Learned Judge was very clear that **once the Award was adopted it ceased to exist but as a judgment of the court and hence could not be challenged on its own.'**

In associating myself with the aforementioned decisions, I find that since the two Awards had been adopted by the Senior Resident Magistrates Court, they ceased to have effect and the Decrees issued thereafter still stand. I note the Appellant herein never sought to quash the decisions of the LDT and Appeals Committee by way of Judicial Review and only lodged this Appeal late. Based on my analysis above, I find that the orders the Appellant is seeking in his Memorandum of Appeal are untenable and incapable of being granted since the Awards he seeks to quash ceased to have effect after they were adopted by the Magistrates' Court.

The upshot of the foregoing is that the appeal is unmerited and dismissed with costs to the Respondent.

Dated signed and delivered in open court at Kajiado this 14th day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Ochieng for applicant

Munyoka holding brief for Moreni for Respondent

Court assistant - Mpoye