REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 03 OF 2019

ONESMUS MBINDU.....APPELLANT

VERSUS

ELIPHAS KARIUKI MUGO.....RESPONDENT

JUDGMENT

(Being an appeal against the finding /ruling of the Provincial Land Disputes Appeals Committee dated 18.11.2011 and the subsequent adoption of the same as judgment of the court on 21.12.2018)

1. The Memorandum of Appeal in this appeal states as follows:

MEMORANDUM OF APPEAL

(Pursuant to leave and order by Hon. Njoroge CM Dated 21.12.2018)

The appellant herein being aggrieved by the Award, Ruling of the Eastern Provincial Appeals Committee dated 18.7.2011 and adopted by the Chief Magistrate, Chuka on 21.12.2018 as judgment of the court in Chuka L.D.T. No. 8 of 2009 appeals against the said judgment and sets out the grounds of Appeal:

1. That the Provincial Land Disputes Appeals Committee erred in law and fact in holding that the District Land Appeals Award be dismissed notwithstanding that no such prayer was sought by the appellant in his memorandum of Appeal.

2. That the Provincial Land Disputes Committee erred in law and fact by arriving at a finding/ruling without according the parties any hearing.

3. That the Provincial Land Disputes Appeal Committee erred in law and fact by arriving at a finding/ruling based on the record of the District Land Disputes Tribunal alone.

4. That the Provincial Land Disputes Appeal Committee erred in law and fact by ordering the appellant and his family to vacate the disputed land without according the appellant any hearing.

It is therefore proposed to ask from court orders that:

i) The finding/ruling of the Provincial Land Disputes Appeal Committee dated 18.11.2011 and the subsequent adoption of the same as judgment of the court on 21.12.2018 be set aside.

ii) This appeal be allowed in its entirety.

iii) Costs of this appeal and in the Provincial Land Disputes Appeal committee be awarded to the Appellant.

DATED T CHUKA THIS 16TH DAY OF JANUARY, 2019

NJERU ITHIGA & CO.

ADVOCATES FOR THE APPELLANT

2. The appeal was canvassed by way of written submissions.

3. The appellant's written submissions are reproduced herebelow in full without any alterations whatsoever, including correction of spelling or any other mistakes, if any exist:

APPELLANT'S WRITTEN SUBMISSIONS

Your Lordship,

BACKGROUND AN DPLEADINGS

The appellant ONESMUS MBINDU was the Plaintiff in the District Land Disputes Tribunal Case No 3 of 2008 while the objector was MUGO ZAKAYO NGARI. The land in dispute is within Kiaritha Sub-location, Kamwimbi Location. The land was by that time not adjudicated. The committee of elders hearing the dispute found ***(see page 19 line 28, 29 of the record)***that most of the visible development on the disputed land belongs to ONESMUS MBINDU and that his father had lived in the disputed area for more than twenty years. The decision of the elders is on page 20 of the record. The decision was that the disputed land be allocated to the two parties as per the sketch map (***on page 21 of the record***) with ONESMUS MBINDU getting the western part and MUGO ZAKAYO NGARI getting the eastern part.

This decisions was read and adopted as judgement of the court on 13.5.2009 (see page 3 of the record) MUGO ZAKAYO was aggrieved by that award and judgement. He lodged an appeal before the Eastern Provincial Land Disputes Appeal Tribunal at Embu being appeal No. 64 of 2009. (***See page 32 of the record).*** The findings of the appeal were as follows:-

1) The appellant (MUGO ZAKAYO) and the respondent (ONESMUS MBINDU) have no relationship.

2) The Meru South Tribunal has awarded 3 acres to ONESMUS MBINDU with no evidence of why he was given the land

3) The defendant's father was given a portion of land to cultivate by the appellant but when he was told to move from the land he refused.

The ruling of the Appeals Committee was that the appeal by MUGO ZAKAYO was accepted as the Meru South Tribunal award was dismissed. The Appeals Committee ordered ONESMUS and his family to vacate the land in dispute within 60 days. Right of appeal to any unsatisfied party was given at 60 days (***see page 32 of the record***).

This award and decision of the Eastern Provincial Land Disputes Appeals committee was to be read to the parties and same be adopted as judgement of the court. It was filed in the same LDT No. 8 of 2009 which had the District Land Disputes Award and the same was to be read to the parties on 15.8.2018 before the Chief Magistrate at Chuka. The award could not be read to the parties on that date because the court was told that the defendant MUGO ZAKAYO was deceased. ***(See page 35 of the record***).

The process of substitution of the deceased defendant was commenced. (***See pages 23,24,25,26,27 and 28 of the record).***

The deceased MUGO ZAKAYO NGARI was substituted by his son ELIPHAS KARIUKI MUGO who was issued with Limited Grant of Letters of Administration ad litem on 16.11.2018 for purposes of taking over the proceedings in land case LDT No. 8 of 2009 (***see page 28 of the record***).

Thereafter on 21.12.2018 the Award by the Eastern Provincial Land Dispute Appeals Committee dated 18.7.2011 was read to the parties and adopted as judgement of the court. Any aggrieved party was given a right of appeal within 60 days. The Plaintiff (ONESMUS MBINDU) (now appellant) was aggrieved by the decision of the Appeal committee which overturned that of the District Land Disputes Tribunal. The right of appeal is provided under Section 8 (g) of the Land Disputes Act 1990 to the High court on a point of law within 60 days from the date of the decision and order adopting it as judge of court.

The decision and order of the court from which this appeal lies was made on 21.12.2018. (***See page 39 of the record***). This appeal was filed within time on 16.1.2019 .***(See page 1 and 2 of the record***). Directions were given on 15.5.2019 that the appeal be canvassed by way of written submissions and same be filed and exchanged within 14 days by either party. That is the background and basis of these submissions.

THE APPEAL AND GROUNDS

By the Memorandum of Appeal dated 16.1.2019 the appellant ONESMUS MBINDU being aggrieved by the award/decision of the Eastern Provincial Appeals committee dated 18.7.2011 which was adopted by the Chief Magistrate Chuka on 21.12.2018 as judgement of Court listed four (4) grounds on points of law in support of his appeal as follows:-

1. THAT the Provincial Land Disputes Appeals Committee erred in law in holding that the District Land Disputes Award be dismissed not-withstanding the fact that no such prayer was sought by the appellant MUGO ZAKAYO NGARI in his appeal before the Provincial Appeals committee.

2. THAT the Provincial Land Disputes Appeal committee erred in law by arriving at a finding/ruling without according the parties any hearing.

3. THAT the Provincial Land Disputes Appeal Committee erred in law and fact by arriving at a finding/ruling based on the record of

the District Land Disputes Tribunal alone.

4. THAT the Provincial Land Disputes Appeal Committee erred in law and fact by ordering the appellant and his family to vacate the disputed land without according the appellant any hearing.

The appellant therefore prays that the finding/ruling of the Provincial Land Disputes Appeal Committee dated 18.11.2011 and subsequent adoption of the same as judgement of the court on 21.12.2018 be set aside and the appellant's appeal be awarded costs.

For the sake of brevity and to minimize the rise of repetition, we shall argue and submit on the 4 grounds together.

Your Lordship,

The record is very clear – that the appeal by MUGO ZAKAYO NGARI before the Provincial Land Disputes Appeal Committee was not availed. What was availed to the adopting court is only a one page document. (***See page 32 of the record***). That one page document contains the title of the appeal and the number of the appeal, the parties and the quorum (members of the appeals committee).

The document indicates that there were minutes taken by S. MURIITHI. The document further indicates that both parties to the appeal were sworn in Kiswahili. The minutes taken by S. MURIITHI were not attached to the finding/ruling of the appeals committee forwarded to the chief Magistrate, Chuka for reading and adoption. What the parties to the appeal testified after they were sworn in Kiswahili was also not recorded or availed. There were simply no proceedings to indicate what exactly proceeded before the Appeals committee on 16.7.2011 in respect of the appeal No 64 of 2009 lodged by MUGO ZAKAYO against ONESMUS MBINDU.

From the same document (***page 32 of the record***) it is very clear that the finding that was made by the Appeals committee was arrived at from "***reading through the file***" but not from hearing the parties (even after swearing them in Kiswahili).

The appellant's grounds 1,2 and 3 listed in the Memorandum of Appeal are therefore well grounded.

The appellant was not given any hearing during the appeal before the Appeals Committee. The Appeals committee made some drastic orders against the appellant – that he and his family do vacate from the disputed land within 60 days. There is no evidence that this was a prayer sought by the appellant MUGO ZAKAYO in his appeal. The right to be heard has always been a vital ingredient of natural justice.

It has always been enshrined in the old and new constitution. No party should be condemned unheard. The instant appellant was never heard by the Appeals committee. Yet he was condemned together with his family to vacate the disputed land. There are no proceedings to show that at least the parties were heard on the appeal. That is a travesty of justice. To deny a party the right to be heard should be the last resort of any court or tribunal. This is a fundamental right granted under Chapter V of the old constitution and under Articles 47 and 48 of the Constitution of Kenya, 2010.

The Appeals committee was enjoined to hear the parties in the appeal and record the proceedings as a basis of the committee's final ruling and order. Instead the committee only relied on record from the file of the District Land Disputes Tribunal which had ruled that the disputed land be partitioned and be shared by the two parties.

Further, the land in dispute had not been demarcated. There was no basis for the Appeals Committee to rule that the respondent (ONESMUS MBINDU) had been awarded 3 acres by the District Tribunal without any evidence. The appellant herein therefore faults the decision/ruling of the Appeals Committee on two concise grounds – that there were no documented proceedings before the Appeals Committee and that he was not given an opportunity to be heard before being condemned. The procedure of conducting the appeal was unlawful and skewed in favour of the appellant MUGO ZAKAYO.

We submit that these are sufficient grounds on points of law in this appeal to set aside the finding/ruling decision of the Appeals committee dated 18.11.2011 and subsequently read and adopted as judgement of the court on 21.12.2018.

We submit and pray that the appeal be allowed in its entirely.

Although this is not contained in the grounds of appeal, as officers of the court we feel obligated to bring to the court's attention that since the decision of the Land Disputes Tribunal and the Appeals Committee in court and the subsequent repeal of the Land Disputes tribunal Act 1990, the land in dispute and in the general location has been adjudicated, surveyed and allocated numbers and parties now know their respective land parcels and numbers and live in peace as they await issuance of title deeds. Aggrieved parties have been given opportunities to ventilate their disputes as provided for under the Land Adjudication Act. In other words, the decision under the Land Disputes Act and the Provincial Appeals Committee have been overtaken by events and reviving and implementing such decisions will tantamount to opening old wounds and disturbing the current peace and tranquility prevailing among the inhabitants of Kiaritha Sub-location and Kamwimbi Location.

We nevertheless submit that the appeal is merited and pray that the same be allowed as prayed with costs.

We rest our humble submissions.

DATED AT EMBU THIS 28TH DAY OF MAY, 2019

NJERU ITHIGA & CO.

ADVOCATS FOR THE APPELLANT

4. The Respondent's written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if any exist:

RESPONDENT SUBMISSION.

INTRODUCTION AND BACKGROUND

Your lordship these are the respondent final submission in respect of the instant appeal. This appeal, for reasons to be advanced latter in this submission, is a second appeal in the same court. It is for this reasons that we submit as early as now that this appeal is a clear abuse of the court process. Simply put this appeal is res judicata. We shall revisit this principle in the meanwhile.

The events leading to the lodging of this appeal have been well and correctly put by the appellant in his introduction to his final submission. They is nothing to be challenged or faulted on this background information reading to the instant appeal. We would be grandly adopt the background information thereon as the correct information leading to this appeal. The only error and omission by the appellant when stating out the background information to this appeal is that the appellant concealed or failed to disclose to the court that there was a similar appeal in this court to wait CHUKA ELC CIVIL APPEAL CASE NO.121 OF 2017 , FORMELY MERU ELC CIVIL APPEAL NO.94 OF 2011 where this court pronounced itself over the provincial appeals committee decision which the instant appeal is all about. The appellant is therefore guilty of non disclose which is an abuse of the court process.

PRELIMINARY.

(a) Your lordship before coming to the principle grounds of appeal , we would wish to address the court over some preliminary issues on points of law which go to the root of the appeal . We submit that these preliminarily objection lender the appeal to lack merits and the court should consider its dismissal based on these preliminary issues. The preliminary issues are as follows;

(i) No application to the court to certify that the grounds of appeal are issues of law only as required by provisions of land dispute tribunal act no.18 of 1990 (repealed).

(ii) The matter is res judicata.

(iii) The Remedy of the appellant lies to the court of appeal.

(iv) The record of appeal is not complete and its deceptive.

(b) Before an appeal from the land dispute appeals committee can be admitted it was a requirement of the land dispute tribunal act that the appellant do move the court for the court to certify that the grounds of appeal are issues of law only. The appellant did not move the court for the court to certify that the grounds of appeal are based on law only. It was a legal requirement but such an application be made ,it was not made by the appellant . This is not a technicality that can be cured by article 159 of the constitution. The application was a legal requirement . which the appellant cannot be allowed to look up and pretend not to see. For this reason the appeal should be disallowed.

(c) Your lordship as pointed supra this matter is res judicata. The same appellant in this appeal had appealed against MUGO ZAKAYO NGARI who was substituted with the current respondent. The subject matter was the same and the court pronounced itself over eastern province appeal committee decision. See item number 7 page 32 of the record of appeal. The appeal was dismissed for want of prosecution. The court did not stop at that . in it ruling dated 9th may 2018 , this court inpart rendered itself as follows.

1) ……

2) ……..

3) ……

4) ……

5) 'this appeal is therefore dismissed'

6) ' in the circumstances, this court declares that the decision of the Eastern Provincial land disputes tribunal at Embu made on 18th July 2001 still stands and should be implemented by the chief magistrates court at chuka.'

The appellant in ELC CIVIL APPEAL NO.121 of 2017 who is also the appellant in the instant appeal faced with the above circumstances had two options. First since the appeal had been dismissed for want of prosecution the appellant therein could have gone back with the application seeking to set aside the dismissal order. The appellant therein did not do so. Secondly the appellant therein , could have appealed to the court of appeal against the dismissal order. The appellant therein did not appeal to the court of appeal. The dismissal order therefore stand. The appellant remedy was not another appeal in the same court that had rendered itself in a ruling and an order extracted thereof.

We have pointed out that this court in a ruling dated 9th May 2018 pronounced itself over the eastern provincial appeals committee decision dated 18th July 2011. This court up held the decision of the eastern provincial appeals committee decision . This court went further to direct that the decision of the eastern provincial Appeals committee be enforced by the chief magistrates. The current appeal is an appeal against the eastern provincial appeals committee decision of 18th July 2011 which this court had pronounced itself over and directed that it be enforced. The appellant therein faced with such circumstances had two options the first was to go back to the same court and seek for review over the ruling and order. The second option was to appeal to the court of appeal. The appellant therein choose to ignore the foregoing and lodge a fresh appeal. for the foregoing reasons , we submit that this appeal is res judicata and the same should be disallowed with cost.

(d) Your lordship on account of the fore going submission the remedy of the appellant herein is to be found elsewhere and not in this court. This court, through this appeal is being asked to seat on appeal over his own decision . This would be unlawful and illegal. The appellant aught to have been wiser by going to the court of appeal rather than going back to the same court he had appealed and appealed to. In fact this court is functus officio over the matters raised by the appellant in this appeal and which issues were determined by this court in ELC civil appeal case no.121 of 2017.

(e) Your lordship the record of appeal is not complete , we dare say that this was by design knowingly and deliberate. The record of appeal does not mentioned that there was this appeal no.121 of 2017. The appellant was avoiding the principle of res judicata to catch up with him. The appellant did not include the ruling issued on 9th may 2018 and an order extracted out of the said ruling issued on 17th may 2018. We attach the ruling and the order issued on 17th may 2018 regarding the issue of res judicata.

GROUNDS OF APPEAL.

1. Your lordship we will now embark on submitting on each ground of appeal as presented by the appellant. We will go out to show that the ground are not meritorious and the appeal as whole is an abuse of the court process. We will be urging this court to dismiss the appeal with cost to the respondent.

2. The first ground of appeal is to the effect that the eastern provincial appeals committee errered in law and fact in holding that the district land appeal award be dismissed not withstanding that no such prayer was sought by the appellant in his memorandum of appeal. we have perused the record of appeal and we cannot find a memorandum of appeal to the eastern provincial appeal committee. Without this particular memorandum of appeal to the Eastern Provincial Appeals Committee. It would be difficult for the respondent and the court to confirm that the eastern provincial appeals committee awarded the respondent let alone any other person what they had not prayed for in the memorandum of appeal. The appellant has the burden to show that indeed the respondent appeal to the eastern provincial appeal committee had no prayer for the dismissal of the appeal. Nothing would have stopped the tribunal to dismiss the appeal if it was not meritorious. Failure to do so would have amounted to abdication of the mandate to determine issues placed before them. In one or the another way they had to make a decision either allow the appeal or dismiss the appeal. After all this was legitimate expectation of both parties . This ground your lordship should fail.

3. Your lordship ground two was to the effect that the provincial land dispute appeal committee erred in law and fact by arriving at a finding /ruling without according the parties any hearing. The eastern provincial appeals committee tribunal is being accused by doing exactly what the law required of them. Once the appeal was before them they were not under any legal obligation to re - hear the case. All that which was required of them was to interrogate the evidence from the sub ordinate tribunal and arrive at a decision either in support of the appellant or against the appellant. We would urge the court to disallow this ground.

An Appeal in Black's law dictionary is defined as follows'' a proceeding undertaken to have a decision reconsidered by a higher authority ; especially the submission of a lower court's or agency's decision to a higher court for review and possible reversal.'' In HIGH COURT OF KENYA AT MERU HIGH COURT CIVIL APPEAL NO.106 OF 2008 JUSTICE MARY KASANGO JUDGE at page 9 paragraph 2 rendered herself on the issue of re –hearing of an appeal as follows;''…….what the appeals committee should have done is to consider the evidence tendered before the district tribunal. The appeals committee therefore erred in subjecting the matter to fresh re-hearing.'' The appellant is therefore not right to suggest that the provincial appeals committee ought to have re- heard over the matter.

4. The third ground of appeal as presented is to the effect that the provincial land disputes appeal committee erred in law and fact by arriving at a finding/ruling based on the record of the district land disputes tribunal alone. Infact the provincial appeal committee should be recommended for following the law. we have already submitted that an appeal concern itself with the record of the lower court or in this case the record of lower tribunal and interrogate the same and arrive at their consider decision. The provincial appeals committee were not obligated by any law let alone the land dispute tribunal Act to collect fresh evidence. The land district tribunal act did not provide and the appellant did not seek for leave to adduce fresh evidence. Even if the appellant had sought for such leave we are doubtful whether it would have been granted that land district tribunal act which donated authority to hear appeals from the district land district tribunal did not give such powers as to extend time or to allow fresh evidence to be adduced. This ground completely lack merits and should fail.

5.The fourth and the final ground of appeal was to effect that the provincial land disputes appeal committee erred in law and fact by ordering the appellant and his family to vacate the disputed land without according the appellant any hearing. The Eastern Provincial Appeals Committee had the power and the authority to order the loosing side , the appellant herein to vacate the suit land. After hearing the appeal and making a decision what was to fall was the execution. If the appeals committee had left this issue of the appellant vacating the suit land on the fence , execution would have been difficult. As pointed supra , the re-hearing of the appeal was not necessary and it would have amounted to illegality. An appeal is an appeal and not a re-hearing , the provincial appeals committee are being blamed and condemned for doing exactly what the law required of them when presented with an appeal from

the district land district tribunal.

(f) In conclusion your lordship we submit that this appeal lack merit . at the same time the appeal is res judicata and this court cannot be asked to sit on appeal for its own ruling and order. By design , knowingly and deliberately the record of appeal is not complete and the appellant concealed the existed of a similar appeal to this court ELIC CIVIL APPEAL no 121 of 2017 which was heard and substantive orders issued by this court. This ruling and order stand and the appellant did not seek to have the ruling and the order reviewed neither did he appeal to the court of appeal. This court ordered that the Provincial Appeals Committee decision dated 18th July 2011 (where of this appeal is preferred from) that the same be enforced by the chief magistrates court , the appellant did not seek for review of this ruling neither did he appeal to the court of appeal. The entire appeal should be dismissed with cost to the respondent

(g) We rest our submission and pray.

DATED AT CHUKA THIS 30TH DAY OF MAY, 2019

DRAWN AND FILED BY

……..

I.C MUGO & CO ADVOCATES

FOR THE RESPONDENT

5. I have considered the pleadings and the submissions proffered by the parties in support of their diametrically incongruent assertions. The respondent has proffered one case authority which I opine is good law and precedent in its facts and circumstances.

6. I do note that the subject matter in this appeal was the same subject matter in Chuka ELC Civil Appeal Case No. 121 of 2017 (Formerly Meru ELC Civil Appeal No. 94 of 2011.)

7. In dismissing Chuka ELC Civil Appeal No. 121 of 2017 (op.cit), this court gave an order in the following terms at paragraph 6 of its ruling delivered on 9th May, 2018: **6.*"In the circumstances, the court declares that the decision of the Eastern Province Land Disputes Tribunal at Embu made on 18th July, 2011 still stands and should be implemented by the Chief Magistrates Court at Chuka."***

8. This appeal is challenging the implementation of the order issued by this court. This is tantamount to asking the court to sit as an appellate court in a matter that concerns the implementation of its own order. I find this state of affairs legally untenable. The appellant ought to have appealed against this court's order issued in its ruling delivered on 9th May, 2018.

9. In the circumstances, I find this appeal devoid of merit and I hereby dismiss it.

10. Costs are awarded to the respondent.

11. Orders accordingly.

Delivered in open Court at Chuka this 21st day of November, 2019 in the presence of:

CA: Ndegwa

Njeru Ithiga for the Appellant

Eliphas Kariuki Mugo – Respondent

P. M. NJOROGE,

JUDGE.