REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC APPEAL NO. 4 OF 2016

ELIAS NOEL ALIAS MUSA AKURE.....APPELLANT

VERSUS

EPHRAIM DEMBETE KIROGILI.....RESPONDENT

JUDGEMENT

This is an appeal from the ruling and order of M/s. F.K. Munyi, RM delivered on 8th February, 2008 at Kakamega in KAKAMEGA MISC. CIVIL APPLICATION NO. 262 of 2001. The appellant being dissatisfied with the ruling and order of F.K. Munyi, RM in the above case hereby appeals against the whole of the said decision on the following principal grounds:-

1. That the learned magistrate misdirected herself in law and fact in failing to appreciate that the appellant did not seek review on account of a new matter arising nor an error apparent on the face of the record but on another sufficient cause.

2. That the learned magistrate erred in law in failing to address her mind to the law and facts before her but instead addressed extraneous matters.

3. That the issue before the learned magistrate involved land and the issue of the validity of the award that had been adopted was a fairly weighty issue which deserved more serious treatment than the cursory one accorded it at the hearing of the review application and the ruling and/or order.

4. That the learned magistrate erred in law in not considering the appellant's case at all.

The appellant prays that this appeal be allowed with costs.

The appellant submitted that, the respondent filed a tribunal case No. 12/01 at the Lugari Land disputes Tribunal involving L.R. KAKAMEGA/LUMAKANDA/1935. The tribunal heard the matter and delivered its verdict dated 13th November, 2001 which was adopted by the Resident Magistrate's court at Kakamega on the 17th day of November, 2005 and an order issued thereon on the 20th day of February, 2006. The appellant appealed against the award given by the Lugari Tribunal to the Western Province Appeals Committee which gave its decision in favour of the appellant herein.

The respondent then went before the High Court in Civil Appeal No. 100/02 and appealed against the award of the Provincial Appeals Committee dated 16th September, 2002. The High Court held that the decision was bad in law as parties were not heard nor was it based on any evidence or submissions. Consequently, the decision was set aside. As a result the appellant in his appeal seeks to establish that the learned magistrate erred in law/fact based on the following grounds:-

- That the learned magistrate misdirected herself in law and fact in failing to appreciate that the appellant did not seek review on account of a new matter arising nor an error apparent on the face of the record but on another sufficient cause.

- That the learned magistrate erred in law and fact in failing to address her mind to the law and facts before her but instead addressed extraneous matters.

- That the issue before the learned magistrate involved land and the issue of validity of the award that had been adopted was a fairly weighty issue which deserved more serious treatment than the cursory one accorded it at the hearing of the review application and the ruling and/or order.

- That the learned magistrate erred in law in not considering the appellant's case at all.

The basis of the constitution of the tribunal panel is to ensure decisions by the Tribunal are made by a majority including the chairperson and either two or four elders as per section 6 (2) (b) of the Act. In order for the Tribunal to be properly constituted it would have to encompass either three or five panelists. This is a statutory requirement that was never heeded to as the tribunal constituted of only four members. A strict construction of the Act clearly shows that the tribunal may only establish panels composed of not less than three members. There is no express power conferred upon the tribunal to establish such panels outside the parameters envisaged.

In the case of **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA No. 688 of 2006 [2008] KLR 362** as referred to in **Republic vs. Complaints Commission Media Council for Kenya & 2 others [2013] EKLR** the Court of Appeal expressed the following sentiments:

> *".....There is no provision for the sitting of one Commissioner on the panel ..... The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes regulation 27 (1) & (2) and is unlawful ..... They cannot constitute the panel contrary to provisions of the law ..... In this case we find that Mr. Godana had no power to sit alone on the panel presiding over the dispute between the applicant and the 1st interested party, as it is offends clear provisions of the law."*

The Court of Appeal argued that where the composition of the panel, having been specifically provided for by statute, is a fundamental provision which should ideally have been adopted. As such, any proceedings contrary to statute call for the intervention of the court. The proceedings before the subordinate court were to say the least defective. The tribunal did not have the capacity to render its decision. Therefore any consequential orders based on that decision are a nullity.

Similarly it was held in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003** as referred to in **Republic vs. Complaints Commission Media Council for Kenya & 2 Others [2013] eKLR** as hereunder:-

> *"As the Constitution of the Provincial Land Disputes Appeals Committee is expressly provided for by statute, it may well be that the improper constitution thereof may deny the committee the legal capacity to Act."*

Jurisdiction is paramount without which nothing can stem. It is the duty of the decision maker to comply with the law when coming to a finding. In **Republic vs. Chairman Land dispute Tribunal Amukura Division & 2 others Ex-parte Jared Mwimali Mukuma & Another [2014] eKLR** the High Court quashed a decision of the Amukura Land disputes Tribunal as it had been given under the hand of two of its members instead of the three or five as per the Act.

> *"It was held that the Amukura Land disputes Tribunal was improperly constituted, exceeded its jurisdiction and issued orders that were beyond its powers."*

Review as mode to remedy a discontented litigant is limited to the following grounds.

- Discovery of new and important matter of evidence,

- Mistake or error apparent on the face of the record,

- Any other sufficient reason.

The Notice of Motion review application raised a central issue that was never canvassed by the learned magistrate. The application gave the trial court an opportunity to make a determination based on merit within the confines of the law. However, it received a cursory reception as was dismissed purely on extraneous grounds.

The learned magistrate at page 18 of the Record of Appeal draws her mind to the public nature of the award of the tribunal to point out that both parties had access to the document. However, the issue at hand is that the decision itself was based on an incompetent tribunal. The learned magistrate goes on to state that the issue of the Tribunal's lack of jurisdiction to the extent of its constitution was neither an "error/mistake on the face of the record nor a new matter or evidence not within their knowledge."

In **Wangechi Kimita & Another vs. Mutahi Wakibiru (1982-88) 1 KAR 977** as referred to in the **Official Receiver and Liquidator vs. Freight forwarders Kenya Limited [2000] e KLR** with regards to the words "for any other sufficient reason" Nyarangi JA said:-

> *"..... I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly S.80 of the civil Procedure Act confers unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the order ..... the third head under Ord. 44 r. 1 (1), enabling a party to apply for a review namely "or for any other sufficient reason" is not necessarily confined to the kind of reason stated in the two proceeding heads in that sub-rule, which, do not themselves form a "genus or class of thing s with which the third general head could be said to be analogous."*

Essentially the trial court failed to pay any regard to the aforementioned ground which they submit was and is still a valid cause for the setting aside of the decision.

Procedural impropriety was most undoubtedly a "sufficient reason" to warrant the court to review its adoption of the award given by the tribunal. It is in the spirit of the constitution to provide an end to litigation. If the superior court had addressed the issue of the tribunal's incapacity they would not be here. It is well-settled that a party is not entitled to seek a review of a judgment delivered by a court merely for

the purpose of a rehearing and a fresh decision of the case. However, theirs was important and meant to bring to the attention of the subordinate court and significant injustice flowing from juridical process.

In **Niazons (K) Ltd. Vs. China Road & bridge Corporation (K) Civil Appeal No. 187 of 1999** as referred to **in Republic vs. Complaints Commission Media Council for Kenya & 2 others [2013] eKLR** the court held that jurisdiction cannot be conferred by estoppel, consent acquiescence or default.

They submit that likewise jurisdiction cannot be conferred by the Doctrine of Laches. The respondent contends that the appellant delayed in bringing the issue of the tribunal's constitution before the court. For the doctrine to stand, the delay should be unreasonable. Nevertheless, delay whether inordinate or reasonable, does not change the fact that the court's attention was not drawn to a material statutory provision during the original hearing. It is their submission that the situation the appellant found himself in constituted the ground, "any other sufficient reason" to warrant a review of the previous order.

Justice should not only be done but be seen to be done. The court cannot countenance nullities and any other response other than striking out the decision appealed against would be paramount to the court's abdication of its supervisory role. Similarly it is trite law that the existence of a right of appeal or alternative remedy like judicial review will not preclude an applicant from seeking a remedy in such as that provided under review.

The respondent submitted that, in this appeal, Efraim Dembete Kirogoli, filed a dispute at the Lugari division Land Dispute Tribunal against the appellant herein, ERASTUS NDEI alias MUSA AKURE, claiming a portion measuring 3.2 acres out of the parcel of land known as Kakamega/Lumakanda/1935. This was in tribunal case No. 12 of 2001. In its award read on 13/11/2001, the tribunal awarded of land measuring 3.2 acres out of the parcel of land known as Kakamega/Lumakanda/1935 to the respondent, Efraim Dembete Kirogoli.

The appellant in this appeal ERASTUS NDEI MUSA alias MUSA AKURE, was dissatisfied with award and, according to the then applicable law, appealed to the Western Province Appeals Tribunal vide appeal No. 78 of 2002. At this time the appellant never raised the issue of jurisdiction or the composition of the members of the Division Land dispute Tribunal. The appellant had, therefore, submitted to the jurisdiction of the tribunal by participating in these process both at the Division and Provincial levels. In the decision of the Western province Land Disputes Tribunal decision made on 16th September, 2002 an award was made in favour of the appellant herein in which the appeal was allowed.

The respondent in this appeal, Efraim Dembete Kirogoli, was dissatisfied with the decision of the Western Province Land Tributes Appeal Committee and, accordingly, file an appeal being No. 100 of 2002 at the High Court at Kakamega. This appeal was heard and both counsel for the parties made their submissions. Again in this appeal none of the parties raised the issue of jurisdiction in its decision delivered on 3rd December, 2004 the High Court allowed the appeal and set aside the orders of the Western Provincial Land Dispute Appeals Committee dated 16th September, 2002. The effect of this decision was to re-instate the decision of the Lugari Division Land disputes Tribunal awarding a portion of land measuring 3.2 acres out of the parcel of land known as Kakamega/Lumakanda/1935 to the respondent in this appeal.

In order to have this order executed the respondent in this appeal then filed an application dated 6th November, 2005 seeking to adopt the Lugari Division Land Disputes Tribunal award made on 13th November, 2001 in tribunal case No. 12 of 2001. This application was heard interparties and the same was on 17th November, 2005 allowed and this order was extracted for execution purposes.

While the respondent in this appeal was in the process of having the order adopting the Lugari Division Land disputes Tribunal executed and, therefore, the present respondent gets the 3.2 acres awarded to him registered in the respondent's name, the appellant in the present appeal filed an application in the Chief Magistrate's court dated 4th September, 2007 seeking to review the orders made on 17th November, 2005, adopting the award among others. This application was heard interparties and disallowed on 8th February, 2008. The present appeal now arising from the ruling of 8th February, 2008.

It is important to note that by the time the present appellant filed the application for review dated 4th September, 2007 it was almost two (2) years from the date of the order sought to be reviewed which was granted on 17th November, 2007. In that application the present appellant sought review on jurisdiction the basis principally that the Lugari Division Land Disputes Tribunal lacked jurisdiction, and that the tribunal was incompetent.

The magistrate in dismissing this application found no merit in it. Quite clearly there were no reasons to allow the application as the essential grounds to be proved for the grant of orders of review were not demonstrated by the appellant in this appeal. In particular, and not considering other grounds for award of orders of view lightly, the present appellant never demonstrated that there was any other sufficient cause to warrant the award of an order for review.

Indeed, if it was the issue of lack of jurisdiction and incompetence on the part of the Lugari Division Land Disputes Tribunal the present appellant ought to have raised this issue in the High Court by way of judicial review. They submit further that the appellant is breathing hot and cold in the same threat when he alleges that the Division Land Disputes Tribunal lacked jurisdiction and competence when at the same time proceed to the Western Province Land disputes Tribunal by way of an appeal.

They further submit that the trial magistrate did not address any extraneous matters in her ruling and that the appellant has not shown that. This was, indeed, a land matter which was and still is weighty at all this levels when the disputes have been heard and decisions made the appellant cannot say that this matter has been handled in a casual manner.

Finally, the issues raised by the appellant in his submissions and the authorities quoted are not relevant in the present appeal. These issues ought to have been canvassed at the High Court if the appellant would have filed an application for judicial review. They have sufficiently

been heard and they ought to have accepted the decisions of the court as earlier made. This matter ought to come to an end. To allow this appeal would be to allow the application for review that had been disallowed by the lower court, and it would not be clear as the state of affairs of this dispute as it relates to the parties. They urge the court to disallow this appeal with costs.

This court has carefully considered both the appellant's and the respondent's submissions herein. The appellant being dissatisfied with the ruling and order of M/s. F.K. Munyi RM delivered on 8th February, 2008 at Kakamega in KAK MISC. CIVIL APPLICATION NO. 262 of 2001 brought before this honourable court the appeal herein. Section 80 of the Civil Procedure Act gives the substantive right of review in certain circumstances, while Order 45 of the Civil Procedure Code provides the procedure thereof. The appellant by an application dated 4th September, 2007 sought to review and set aside the ruling and order given under the hand of the learned magistrate. That application was premised on the following grounds:

1. The award of the Lugari Disputes Tribunal case No. 12 of 2001 is incapable of being adopted as it was made without jurisdiction.

2. Where a tribunal lacks jurisdiction, its award is a nullity and incapable of being adopted as judgment.

3. The tribunal was a panel of four members instead of the three or five as provided for by the Act.

4. In fact and in law there is no tribunal and so legally there was no award.

According to the Land disputes Tribunal Act at Section 4 thereof it is provided that:-

(1) There shall be established a tribunal, to be called the Land Disputes Tribunal, for every registration district.

(2) Each Tribunal shall consist of –

(a) A chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and

(b) Either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5.

From a perusal of the record of appeal page 79 I find indeed the panel at the tribunal were four members namely, Japheth Namunyu, Harun Sgavanga, Jotham Wepukhulu and Francis Munkanzi. Clearly the tribunal was a panel of four members instead of the three or five as provided for by the Act. In their application therefore the present appellant sought review on jurisdiction the basis principally that the Lugari Division Land Disputes Tribunal lacked jurisdiction, and that the tribunal was incompetent.

The magistrate in dismissing this application found no merit in it. That there were no reasons to allow the application as the essential grounds to be proved for the grant of orders of review were not demonstrated by the appellant in this appeal. In particular, and not considering other grounds for award of orders of view lightly, the present appellant never demonstrated that there was any other sufficient cause to warrant the award of an order for review. The respondent argues that indeed, if it was the issue of lack of jurisdiction and incompetence on the part of the Lugari Division Land Disputes Tribunal the present appellant ought to have raised this issue in the High Court by way of judicial review.

In the case of **PETER MMINI SHAKA v JAMES SHAKA MARTIN (2006) eKLR,** the court held as follows when it found the panel did not have three or five members;

"While the Land Disputes Tribunal is required to have a panel of three or five members pursuant to section 4(1) of the Land Disputes Tribunals Act No.18 of 1990, the Appeals Committee is enjoined to have a panel of three members pursuant to section 8 (5) of the said Act.

Under section 8(7) of the said Act, the decision of the Appeals Committee is required to be reasoned. But more fundamental, the jurisdiction in both the Tribunal and the Appeals Committee does not include adjudication of title to or interest in title to land.

Mrs. Osodo, learned counsel for the Appellant urged me to allow the appeal as the Appeals Committee was not properly constituted and as it acted beyond its jurisdiction. The appeal was not opposed. The Respondent was served as evidenced by the affidavit of service sworn on 6.3.06 by Zablon Ochieng Senge, a process server.

I have perused the record of appeal and given due consideration to the submissions of Mrs. Osodo. It is my finding that both the Land Disputes Tribunal and the Appeals Committee were not properly constituted. It is also my finding that both acted outside the purview of their jurisdiction."

In the case of **Grace Akinyi v Gladys Kemunto Obiri & another [2016] eKLR,** the court held that;

"Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However this discretion should be exercised judiciously and not capriciously."

In Court of Appeal, ***Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau***, the Court of Appeal held that;

> *"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceed on an incorrect expansion of the law".*

I find that the learned magistrate misdirected herself in law and fact in failing to appreciate that the appellant did not seek review on account of a new matter arising nor an error apparent on the face of the record but on another sufficient cause. I find that the award of the Lugari Disputes Tribunal case No. 12 of 2001 is incapable of being adopted as it was made without jurisdiction due to its consitution. The tribunal lacked jurisdiction, its award is a nullity and incapable of being adopted as judgment. The tribunal was a panel of four members instead of the three or five as provided for by the Act. I find that this appeal has merit on these grounds and I allow the same. I quash the decision/ruling of the trial magistrate with costs to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE