



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 7 OF 2017**

**JEROME LIYAYI**

**ALPHONE LUKONGO.....APPELLANTS**

**VERSUS**

**JOSINA MUSOGA.....RESPONDENT**

**JUDGEMENT**

This appeal arises from the decision of C. Kendagor (RM) delivered on 24<sup>th</sup> May 2012 in Kakamega Magistrate's Civil Mics Application (Award) No. 163 of 2007. Being dissatisfied with the decision aforementioned the appellants hereby appeals against the same and set forth the following principal grounds of appeal.

1. THAT the trial learned magistrate erred in fact and law in failing to decide on the issues that were before the court.
2. THAT the learned trial magistrate erred in fact and law in failing to properly interpret the issues of law relating to the matter before deciding on the same.
3. THAT the learned trial magistrate erred in fact and law in making a finding that the reading of an award is/was the same thing as adopting the same award.
4. THAT the learned trial magistrate erred in fact and law in deciding on the issue before the court without considering that an appeal that had been lodged at the Western Province Appeals committee against the award of the Shinyalu Division Land Disputes Tribunal had not been determined.

The appellants pray that this appeal be allowed with costs and the order adopting the award as aforementioned be set aside.

The appellant in submissions stated that, this appeal arises from the decision in the ruling read by C. Kendagor (RM) on 24<sup>th</sup> May 2013 that related to the application dated 1<sup>st</sup> March 2012 seeking for order that the award of Shinyalu Divisional Land Disputes Tribunal dated 15<sup>th</sup> August 2007 be adopted as the decision of the Honourable court. The appellant in his response opposed the application vide the appellant's replying affidavit sworn on 24<sup>th</sup> April 2012 and filed in court on 25<sup>th</sup> April 2012.

In her ruling the learned trial magistrate made a finding that the prayer for adoption was dealt with at the same time when the reading of the award was made to the parties. To the trial magistrate reading of an award was the same as adopting the same award. To the trial court, therefore, this application was of no legal effect since the applicant was, according to the trial court, seeking to be given orders that had already been made. It was on this basis that the appellant is aggrieved and appeals on the ground that reading of an award is not the same thing as adopting of the same award. They submit, therefore, that, the trial court erred in this regard. They further submit that in making these findings the trial court did not decide on the issues before her. The issue was either to adopt the award of the tribunal or not. The trial court did not decide on either of this.

Further, the decision of the tribunal in the award had been appealed against and through the appeal an order for stay had been sought and obtained in favour of the appellant. This fact was clearly brought to the attention of the court. Once the attention of court was drawn to the fact that there was an order of stay of the decision in award the trial court ought not to have entertained the application in the first place. It is in light of the afore going that they submit, therefore, that this appeal has merit and pray that the same be allowed with costs and specifically that the decision of the trial court be set aside.

The respondent submitted that, the order sought to be appealed against has not been extracted and certified and availed to the court as required by law. The appellants herein purport to be aggrieved by the decision of the C. Kendagor (RM) delivered on 24<sup>th</sup> May 2013. The problem is that the appellants have not extracted the offending order being appealed against and the same is therefore fatal to this appeal. The

facts surrounding this appeal are that in the year 2006 or there about the respondent herein instituted and or sued the appellants herein at the Shinyalu Land Disputes Tribunal vide case No. 18 of 2006. The Shinyalu Land Disputes Tribunal fully heard all the parties herein and fully pronounced itself and gave its verdict. As was the law then the decision of the Shinyalu Land Disputes Tribunal was to be read to the parties herein in lower court and later adopted by the same court which read the same to the parties.

The respondent herein applied and or made an application to the lower court vide Kakamega Magistrate's Civil Mics Application (Award) No. 163 of 2007 for the reading of the said decision of the Shinyalu Land Disputes Tribunal and later for the adoption of the same. From the record of Appeal at page 19 which captures the proceedings of the lower court it is evident that the respondent herein fixed for the reading of the award of the Shinyalu Land Disputes Tribunal for reading on 19<sup>th</sup> October 2007. On 19<sup>th</sup> October 2007 the coram clearly shows that the presiding magistrate (F.Munyi - RM) saw and indicated that all the parties applicant and respondents were present in court when the said award was read to the parties herein. It is therefore not true that the appellants herein have not been well aware of the reading of the award of the Shinyalu Land Disputes Tribunal to the parties herein or what was going on in the lower court case. From the court record it is clear that on 3<sup>rd</sup> May 2012 that what was coming up for hearing was respondent's application for adoption of the decision of the Shinyalu Land Disputes Tribunal.

This court has carefully considered both the appellant's and the respondent's submissions herein. From perusal of the record of appeal I find that on the said 3<sup>rd</sup> May 2012 the appellants herein were present in court and were represented by their advocates Ms. Rauto in court. On the said 3<sup>rd</sup> May 2012 the trial court C. Kendagor (RM) heard both parties herein and reserved her ruling for 24<sup>th</sup> May 2013 when she delivered her ruling stating that the ward had been adopted. In the ruling the trial court held that;

*“That is why after the reading the trial magistrate indicated that the right of appeal had been explained to both parties. The application is thus seeking what had already been granted. The reasons/grounds deponed to in the supporting affidavit are such that they are to be considered in an application for execution which has not yet been filed.”*

I find that the trial magistrate did not misdirect herself in her ruling which she did on the said 24<sup>th</sup> May 2013. They the trial magistrate was within the law and did what the law required her to do at that point in time. The proceedings clearly show that the trial magistrate quoted the gazette notice she was relying on and stated as follows;

*“On the issue of whether the court has jurisdiction or not, the honourable Chief Justice has vide gazette notice 1617 given practice directions on proceedings relating to the subject and this court has jurisdiction (dated 9/2/2012)”*

The appellants have not disputed the authenticity of the said gazette notice quoted therein.

In **Mwanasokoni v Kenya bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7<sup>TH</sup> DAY OF MARCH 2018.**

**N.A. MATHEKA**

**JUDGE**