



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC APPEAL CASE NO. 7 OF 2017

(Formerly No. 6 of 2012 (Embu))

WARIO JILLO.....APPELLANT

VERSUS

YUSSUF ALI SALAH.....RESPONDENT

(Being an appeal from the original ruling of the learned Magistrate, D.W Mburu SPM in CMCC No. 1/2012 (Garissa) delivered on 02/03/2012)

INTRODUCTION

This appeal arises from the ruling delivered by Hon. D. W Mburu, Senior Resident Magistrate on 02/03/2012. That ruling emanated from a Notice of Motion filed by the respondent Yussuf Ali Salah who was then objecting to the adoption of an award filed in court on 30th November, 2011 by the then Madogo Lands Disputes Tribunal. The appellant who was the respondent in that application did not file either a notice of preliminary objection, replying affidavit or grounds of opposition in opposition thereto despite consent having been agreed to do so within a stipulated period.

APPLICANTS CASE

The applicant in that Notice of Motion application who is also the respondent in this appeal had moved the magistrate court to decline to adopt the award by the Madogo Land Disputes Tribunal together with the proceedings and other papers filed therewith for being a nullity and ineligible for adoption. In his supporting affidavit sworn on 19th December, 2011, the applicant averred that the said proceedings and award by Madogo Division Land Disputes Tribunal were a nullity by operation of the law. The applicant also contends that he only came to learn about the reading of the alleged award through a Notice served upon him and that he had never attended or otherwise been part of any arbitral process or other proceedings with respect to the land in question at any time prior to that.

The applicant gave a historical perspective of the land standing dispute between him and the respondent over the ownership of a parcel of land in Madogo area within Tana River County which was the subject of the said Land Disputes Tribunal.

The proceedings also included a ruling of the magistrate's court delivered on 02/03/2012 in which the application declaring the award filed in court on 30/11/2011 as a nullity. The applicant/respondent was also awarded the costs of that application.

APPELLANTS CASE

Aggrieved by the decision of the Learned Magistrate, the respondent/appellant lodged this appeal as shown in the Memorandum of Appeal dated 26/03/2012 and filed the same day and proffered the following five grounds;

1. The learned trial magistrate erred in law and misdirected himself by failing to read the award dated 8th day of November 2011 and filed in court on 30th November, 2011 as required by the law.
2. The learned trial magistrate erred in law and misdirected himself in fact and law when he declared the award dated 8th November, 2011 a nullity.
3. The learned trial magistrate erred in law and misdirected himself in fact and law when he failed to observe the requirement and intents of the Gazette Notice Published on 17th February, 2012.
4. The learned trial magistrate erred in law and misdirected himself in fact and law when he failed to note that transitional

provisions required that;

“All proceedings relating to the environment and the use and occupation of and title to land then pending before the court of Appeal, High Court, Subordinate court or Local Tribunals of competent jurisdiction other than Land Disputes Tribunals which existed under the now repealed Land Disputes Tribunals Act No. 18 of 1990 shall continue to be heard and determined by the same courts or tribunal. Any proceedings which shall not have been concluded by the time the environment and land court is established shall be moved to the court upon its establishment.

5. The learned trial magistrate erred in law and misdirected himself in fact and law when he failed to consider the fact that land is a sensitive issue and required to have it read the award as presented.

APPELLANTS SUBMISSIONS

The appellant through the firm of Mulinga Mbaluka & Co. Advocates submitted that the trial court failed to give reasons for failing to read the award and adopt it as an order of the court. The learned counsel also submitted that the trial court failed to adhere to the spirit of environment and Land Court Act of 2011 specifically the provisions of Section 30 (1) on transition of the law. The appellant then sought to allow the appeal on those grounds and submissions.

RESPONDENTS SUBMISSIONS

The respondent through the firm of Onono & Co. Advocates submitted that the appeal has no merit and that the same should be dismissed in its entirety with costs. None of the parties cited any case law.

ANALYSIS AND DECISION

What is before me is an appeal from the ruling of Hon. D. W Mburu SRM Garissa delivered on 02/03/2012. That decision arises from a Notice of Motion brought under Order 51 Rule 1 CPR, Section 3A CPA and all enabling provisions of the law. The present respondent had moved the court to object the trial court adopting an award that had been presented to the court for adoption in accordance with the repealed Land Dispute Tribunal No. 18 of 1990. Section 7 of that Act provides the requirement by the court once such an award is presented 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 judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act”.

The Act does not contemplate the application of the Civil Procedure Act other than the time of enforcement of the decree as stated in section 7 above. Some magistrates who have been presented with awards and decisions which the tribunals have made without jurisdiction rejected the same giving reasons for declining to adopt those awards. Again those aggrieved by the decision of the magistrate to adopt decision have appealed to the High Court who have upheld their decisions while others have overturned the same.

In the impugned ruling by the learned magistrate, the applicant who is the respondent in this appeal was objecting to the adoption of the award of the tribunal by the court on grounds that the repealed Act had become inoperational following the enactment of the ELC Act No. 19 of 2011. The applicant/respondent had also challenged the said award on grounds that the same were forgeries and an abuse of the court process. Though that Notice of Motion was not challenged in writing, I find and hold that the learned magistrate erred both in law and fact in construing that the Land Disputes Tribunal Act No.18 of 1990 became inoperational following the enactment of the Environment and Land Court Act, No. 19 of 2011. Section 30 of the Environment and Land Court Act No. 19 of 2011 gave the following transitional provision;

“30 All proceedings relating to the environment or to the use and occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and delivered by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar”.

The award that had been made and presented to the magistrate court for adoption by the Land Disputes Tribunal, Madogo Division was properly before a competent court to hear and determine the same in accordance with the law. I find that the magistrate erred in law by declining to make the appropriate orders in respect of the said award and declaring the same as nullity. The learned magistrate needed to check the Environment and Land Court Act No. 19 of 2011 which gives transitional provisions which resolved to conundrum.

Having said that, I am alive to this courts powers and obligation sitting as a first Appeal Court is to review and re-evaluate the evidence afresh and arrive at my own independent decision. Upon my analysis and re-evaluation of the evidence adduced before the Land Disputes Tribunal Madogo Division which was presented for adoption before the magistrates court, it is apparent that the dispute revolved on the ownership of land as can be demonstrated in the award as follows;

“DECISION/DETERMINATION OF TRIBUNAL

In accordance with the proceedings Land Disputes Tribunal resolves that Sankuri farm belongs to Wario Jilo (Claimant) Illani clan because of ;

(1) History of this land from panel of elders of that area.....”

(2) From the excerpt of that decision, it is clear that the tribunal was making determination over the dispute of land ownership contrary to Section 3 of the Repealed Land Disputes Tribunal Act No. 18 of 1990 which states as follows;

3(1) Subject to this Act, all cases of a Civil nature involving a dispute as to;

(a) The division of or determination of Boundaries to land, including land held in common,

(b) A claim to occupy of work land, or

(c) Trespass to land shall be heard and determined by a tribunal established by a tribunal established under Section 4.....”

In my mind, the decision by the tribunal was ultra vires the powers spelt out in the statute and such decision cannot stand when it is apparent from the proceeding that the tribunal acted beyond their powers. For all the reasons I have given herein above, I find this appeal lacking merit and the same is hereby dismissed with no order as to costs.

Read, delivered and signed in the open court this 21st day of June, 2018.

HON. JUSTICE E. C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Onono for the respondent
2. Mr. Mbaluka for appellant
3. Court clerk: Ijabo.
4. Appellant : present
5. Respondents: Wife and brother present