IN THE ENVIROMENT AND LAND COURT

AT NYERI

ELC PETITION NO. 6 OF 2017

IN THE MATTER OF

ARTICLES 2, 3, 19, 20, 21, 22, 23, 40, 47 AND 48

OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE

ENVIRONMENT AND LAND COURT

ACT, NO.19 OF 2011

AND

IN THE MATTER OF THE

LAND DISPUTES TRIBUNAL ACT

NO.18 OF 1990 (REPEALED)

AND

IN THE MATTER OF

JUDICIAL SERVICE ACT, NO.1 OF 2011

AND

IN THE MATTER OF GAZETTE NOTICES NOS. 1617, 13573 AND 16268 (PRACTICE DIRECTIONS ON PROCEEDINGS RELATING TO ENVIRONMENT AND THE USE AND OCCUPATION, AND TITLE TO LAND

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF FAILURE OR REFUSAL BY THE JUDICIARY AND ANY OTHER STATE ORGAN TO TAKE DECISION IN RESPECT OF MATTERS PENDING BEFORE THE DEFUNCT

PROVINCIAL APPEALS COMMITTEES

BETWEEN

JOSPHAT MWANIKI MWANGI.....PETITIONER

-VERSUS-

THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA.....1ST RESPONDENT

THE CHIEF REGISTRAR OF THE JUDICIARY.....2ND RESPONDENT

THE DEPUTY REGISTRAR, HIGH COURT NYERI.....3RD RESPONDENT

AND

ZACHARIA MWANIKI MWANGI.....1ST INTERESTED PARTY

JOSEPH KINYANJUI.....2ND INTERESTED PARTY

JUDGMENT

1. The genesis of the petition herein can be traced to Kieni Land Disputes Tribunal Case No. 2 of 2010 in which the interested parties herein filed a claim against the petitioner over ownership of the parcel of land known as **L.R No. Nyeri Waraza/36** (hereinafter referred to as the suit property).

2. Apparently, the Tribunal made a decision unfavourable to the petitioner prompting him to file an Appeal before the Central Appeals Committee to wit Land Appeal Case No.Kieni East 4 of 2010. The filing of the appeal is said to have been communicated to the authorities and parties to the dispute vide a letter from the Office of the Provincial Commission dated 25th August, 2010.

3. During the pendency of the appeal, the Land Disputes Tribunals established under the Land Disputes Tribunal Act (LDTA)(now repealed), were abolished and directions issued to the effect that the matters that were pending before the Tribunals be transferred to the the Magistrates courts and to the Environment and Land Court (ELC) established under the Environment & Land Court Act, 2011 to be dealt with by those courts.

4. The petitioner contends that the practice directions issued by the 1st respondent concerning transfer of cases that were pending before the Tribunals established under the LDTA were inadequate in that they did not specify how the cases were going to be transferred to the ELC for determination.

5. Arguing that it was the duty of the respondents to move his appeal and all other appeals pending before the defunct Land Disputes Tribunal to the E LC to be heard and determined by that court, the petitioner avers that it was his expectation that the respondents would move his appeal to the ELC for hearing and determination.

6. It is pointed out that in 2015, the petitioner filed Nyeri ELC Appeal No.10 of 2015 where an order was issued on 22nd September, 2015 requiring him to forward his appeal to this court within 14 days from the said date.

7. Pointing out that he was unable to comply with the order of the court mentioned in paragraph 6 above, the petitioner explains that upon expiry of the time ordered by the court for forwarding his appeal, he approached the court for enlargement of time within which he ought to have filed his appeal but the court, vide a ruling delivered on 28th July, 2016 rejected his plea for extension of time.

8. As a result of the decision referred to in paragraph 7 above, the interested parties effectuated the decree appealed from.

9. Arguing that the duty to transfer his appeal to the ELC for hearing and determination vested with the respondents, the petitioner contends that owing to the failure of the respondents to transfer his appeal to the ELC for hearing and determination, he was unable to prosecute his appeal with the result that his land was alienated to the interested parties.

10. The petitioner further contends that by failing to transfer his appeal to court for hearing, the respondents breached his right to Protection concerning his ownership of the suit property; right to fair administrative action; right to access to justice; and right to a fair hearing.

11. In view of the foregoing, the petitioner seeks the following reliefs:-

(a) A declaration that the respondents have a duty imposed upon them under the constitution and the law to move all matters pending before the defunct provincial appeals committees to the ELC for hearing and determination;

(b) A declaration that the failure by the Chief Justice of the republic of Kenya to give clear and precise guidelines and/or directions on matters pending before the defunct provincial Land Disputes Appeals committees is a breach of his constitutional duty;

(c) A declaration that failure by the respondents to transfer his appeal pending before the defunct provincial Land Disputes Appeals Committee, Central, infringed his right to access to justice, right to a fair administrative action, protection of right to property and right to fair hearing.

(d) An order of mandamus directed at the respondents to transfer his appeal and all such appeals in the Republic of Kenya

to the E & LC for hearing and determination.

(e) A declaration that the alienation of the suit property to the interested parties or any other person pursuant to the execution of the orders issued in Nyeri CM Award Case No.10 of 2005 was as a result of the respondent's failure to discharge their constitutional and legal duties in his favour.

(f) A declaration that the alienation of the suit property to the interested parties or any other person pursuant to the execution of orders issued in Nyeri CM Award case No.10 of 2005 is unconstitutional and the same be set aside;

(g) In alternative of (f) above, an order of compensation.

(h) Any other or better relief

(i) Costs and interest.

12. The petition is opposed on the grounds that the petitioner has not demonstrated how the respondents have violated his constitutional rights; that the petition is *res judicata* Nyeri ELC Appeal No. 10 of 2015-Josphat Mwaniki Mwangi vs. Zachary Mwaniki Mwangi & Another; that the petitioner ought to have appealed against the decision made in Nyeri ELC Appeal No. 10 of 2015 as opposed to filing a constitutional petition; that the petitioner was given an opportunity to be heard on his appeal but failed to seize it; that by filing the petition herein, the petitioner is avoiding the procedure provided for dealing with the subject matter of this matter; that the interested parties as innocent proprietors of the portions curved from the suit property, are also entitled to protection of their right to property and that the petition is frivolous, vexatious, incompetent and an abuse of the court process.

13. Pursuant to directions taken on 16th October 2017, to the effect that the petition be disposed off by way of written submissions, the parties filed submissions which I have read and considered.

Analysis and determination

14. From the pleadings filed in this matter and the submissions, I find the issues for determination to be :-

(a) Whether the petition is res judicata Nyeri ELC Appeal No.10 of 2015?

(b) Subject to the outcome of (a) above, whether the petitioner's case discloses any reasonable cause of action against the respondents?

(c) Subject to the outcome of (b) above, whether the petitioner has made up a case for being granted the orders sought or any of them?

(d) What orders should the court make?

15. On whether the petition is *res judicata* Nyeri ELC Appeal No. 10 of 2015, on behalf of the respondents, it is pointed out that both in his pleadings and submissions, the petitioner acknowledges that the 1st respondent issued practice directions No.16268 on how appeals pending at the defunct appeals Tribunals were to be dealt with. It is also pointed out that in acordance with those practice directions, the petitioner moved the court for transfer of his appeal to this court. This court issued directions which the petitioner failed to comply with.

16. On this issue, it common ground that pursuant to the directions issued by the 1st respondent, the petitioner moved this court in Nyeri ELCA No.10 of 2015, by way of an application dated 13th April, 2015 for among other orders an order or direction regarding his appeal which was allegedly pending before Central Province Appeals Committee to wit appeal No. 4 of 2010 filed under the Land Disputes Tribunals Act.

17. Upon considering that application, this court *inter alia* observed:

"According to the documents relied on in this application, the award appealed from was adopted as an order of the court on 10th August, 2010. It appears that after the award had been adopted as an order of the Court, the Appellant filed an appeal at the defunct Land Disputes Appeals Tribunal. Although it is not clear when the Appeal was filed, it is safe to assume that the appeal, if any, was filed after the award dated 14th June, 2010 was read. This is so because when the award was adopted as an order of court, the Appellant was in court and did not inform the court that he had appealed against the award.

Under the Repealed Land Disputes Tribunals Act, any person aggrieved by the decision of the Tribunal had a right to, within 30 days of the decision to appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated. In this regard, see Section 8(1) of the Act which provides as follows:-

"(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."

Sub-Section (2) thereof provides:-

"The appeal shall be registered in a register of appeals in the same manner as the register of claims under section 3 (3); and a notice thereof shall be served on the other party or parties to the dispute in the same manner as provided in subsection (4) of section 3…"

Subsection (4) of Section 3 referred to above provides:-

"(4) Every claim shall be served on the other party, or, where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summonses shall thereafter apply."

I have endeavored to reproduce the above provisions of the law because the issues raised in the appeal herein and the appeal allegedly filed in the defunct Land Disputes Appeals' Tribunal, including the current application will turn on the question as to whether there is a legally recognizable appeal on which the orders sought in the current application can hinge.

In determining whether there is a proper appeal against the award read in favour of the respondents, I reiterate my observation that from the evidence on record, it appears that the appeal, if any, was filed after the award had been adopted as a judgment of the lower Court. The evidence on record shows that the award was adopted way after the appellant's right of appeal had expired (that is nearly two months after the decision of the Tribunal was made). If it is true that an appeal was filed, which fact the Appellant has not sufficiently proved, unless there is evidence that the same was

filed within the time stipulated in Section 8(1), it follows that the same is unsustainable. This is so because, unlike the Civil Procedure Act which provides for extension of time, the Land Disputes Tribunals Act does not have a provision for extension of time within which the Appeal is to be preferred.

For the orders sought to issue in favour of the Appellant, the appellant must satisfy this court that indeed there is a valid appeal pending before this court or any other court.

What the Appellant relied on in the Court below and now before this court is a letter dated 25th August, 2015. That letter only makes reference to filing of an appeal but does not indicate when the appeal was filed. The appellant and his advocate, through his supporting affidavit and the further affidavit of his advocate, has not indicated when he filed the appeal and/or whether he served it on the respondent as required of him under Section 3(4) of the Land Disputes Tribunals Act.

That being the case, like the lower court, I entertain doubt whether there exists a legally sustainable appeal on which the orders sought can hinge. Be that as it may, noting that the fourth prayer is for direction on the alleged existing appeal, I direct the Appellant to, within fourteen (14) days following the delivery of this ruling, to forward the appeal allegedly pending before the defunct Provincial Appeals' Tribunal to this Court for further directions, failing which the application herein shall automatically stand dismissed with costs to the respondent. In the meantime, the existing orders of stay are extended until then."

18. Whilst through the application referred to above, the petitioner had an opportunity to move this court for further directions regarding how he could be facilitated in getting the appeal, if indeed it existed, he never moved the court for assistance until the consequences contemplated in the orders issued in that application caught up with him.

19. Without first seeking to reinstate the already dismissed application and without proper explanation for failure to comply with the orders of the court requiring him to bring his appeal to court for hearing, the petitioner moved the court for enlargement of the time within which he ought to have complied with the order requiring him to move his appeal to court. This court found the application bad in law and dismissed it for want of substratum.

20. It is clear from the foregoing, that the petitioner had an opportunity to raise the issues he is now canvassing in the previous proceedings but he failed to do so.

21. Having made its decision concerning the appeal allegedly pending before the defunct appeals Tribunal, this court lacks jurisdiction to entertain issues concerning how the alleged appeal ought to have been dealt with as the petitioner had an opportunity to raise those issues in the previous proceedings but he failed to do so.

22. As the doctrine of res judicata applies to issues that ought to have been taken up in the previous proceedings and which were not taken up and being of the view that the issue of who was to facilitate the transfer of the appeal ought to have been taken in the previous proceedings, I decline the petitioner's invitation to address that issue in the current proceeddings as it is *res judicata* the previous proceedings. If this court were to accede to the petitioner's invitation to revisit that issue, it would fail in his duty of guarding against the tendency of litigants evading the doctrine of res judicata. In that regard, see the case of ***Edwin Thuo v Attorney General & Another*** **Nairobi Petition No. 212 of 2012 (Unreported) where it was held:-**

"courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court.''

23. In that case, it was stated that the test for res judicata is whether or not the litigant in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.

24. **Similar sentiments were raised in the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 where it was**

held:-

> **"*Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.'* In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and Another* Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, *'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata .....* I **am of the firm view as that of Justice R. Kuloba in his book, *Judicial Hints on Civil Procedure, 1984 (Vol 1)* at page 46 in a paragraph headed, "Guard against attempts to evade the doctrine [of res-judicata]" where he states that**, ***"One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more …. Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter."***

25. Whereas the petition herein raises issues which in my view are germane concerning the adequancy of the practice directions issued by the 1st respondent in ensuring that the suits pending before the defunct Land Disputes Tribunals are transfered to the ELC, being of the view that the issue ought to have being raised in the previous proceedings for directions concerning the petitioner's appeal, I find the attempt to prosecute that issue in this matter to be a scheme calculated at circumventing the orders issued in the previous proceedings and refuse to entertain it. The petitioner's case as framed, discloses a case of inadequancy of the law or the guidelines issued in respect of the cases that were pending before the defunct Tribunals as opposed to failure by the respondents to undertake any duty imposed on them by law.

26. It is trite law that an order for mandamus only issues to compel a duty imposed by law but not to dictate how the duty ought to be performed. The duty imposed on the Chief Justice under **Section 30** of the ELCA was to issue practice directions on how the matters pending before the Tribunals were to be dealt with. The duty did not extend to the specifics of the directions. Having complied with that duty, the 1st respondent cannot be said to have failed to fulfil any duty imposed on him by law. In fact, through those practice directions, the petitioner found himself before this court and the court offered him an opportunity to get the issues he had concerning his appeal addressed, which opportunity he failed to seize.

27. Can the petitioner, who had an opportunity to be heard in his appeal be heard to say that his right to fair administrative action, fair hearing, access to justice and right to property were violated by the respondents; in my view he cannot.

28. I find the many cases cited in support of the petitioner's case to be inapplicable to the circumstances of this case because he did not demonstrate that the respondents owed him a duty which they fail to fulfil or that he was denied opportunity to urge his pending appeal. That opportunity was availed to him but he failed to seize it.

29. The upshot of the foregoing is that the petition herein is found to be lacking in merits and is dismissed with costs to the respondents.

Dated, signed and delivered in open court at Nyeri this 27th day of September, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms Muthoni for the applicant

Mr. Njoroge for the respondents

N/A for the interested parties