



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**APPEAL NO. 80 OF 2016**

**FLORENCE NYABOKE MACHANI.....APPELLANT**

**VERSUS**

**MOGERE AMOS OMBUI .....RESPONDENT**

**J U D G M E N T**

**(Being an appeal from the Ruling of Hon. J. Mwaniki, SPM issued in Keroka PMCC Misc. Application No. 18 of 2007 dated on 11<sup>th</sup> October 2016)**

1. This judgment arises from an appeal against the ruling of Hon. J. Mwaniki, SPM delivered on 11<sup>th</sup> October 2016 in the Principal Magistrate's Court at Keroka Misc. Civil Application No. 18 of 2007. The ruling arose from the applicant's application before the Keroka Court, dated 5<sup>th</sup> May 2016 where the appellant had sought review, vacation or setting aside of that court's orders given on 23<sup>rd</sup> May 2008 in respect to an award filed in court on 20<sup>th</sup> September 2007 from the Borabu Land Disputes Tribunal. The application also sought the setting aside of all the consequential orders emanating from the court's adoption of the Tribunal's award.

2. The application before the court was grounded on the grounds set out on the body of the application. Inter alia it was contended by the appellant that; there was an error apparent on the face of the record; that the Tribunal lacked the jurisdiction to deal with title to land; that the High Court and Court of Appeal have held that the award having been adopted as judgment of the court, it was only the same court or an appellate court in appropriate proceedings that could have varied, vacated, set aside or reviewed the judgment of the court; and further that there existed sufficient reason for the appellant to obtain review of the court order given on 23<sup>rd</sup> September 2008.

3. The learned magistrate in his ruling delivered on 11<sup>th</sup> October 2016 dismissed the application for review holding that the options the appellant had after the award was presented before the court for adoption was either to appeal to the provincial appeals committee or to move the High Court in appropriate proceedings for the award to be quashed. The learned magistrate observed that the appellant adopted inappropriate procedures in challenging the award.

4. It is against this ruling that the appellant has appealed to this court and has set out the following grounds of appeal:

**1. The learned magistrate erred in law and in fact in holding that the court was functus officio.**

**2. The learned magistrate erred in law and fundamentally misdirected himself in holding that the magistrate court has no jurisdiction to review and/or vary its decision upon adopting the award of the land dispute tribunal.**

**3. The learned magistrate erred in law and in fact in not holding that the award it adopted was null and void and made without and/or in excess of the jurisdiction of the relevant land disputes tribunal.**

**4. The learned magistrate erred in law and in fact in failing to apply the fundamental principle of interest of justice, which is the pivotal aspect of the function of any court.**

**5. The learned magistrate erred in law and in fact in not holding that there existed no award duly filed by the chairman of the relevant land dispute tribunal.**

**6. The learned magistrate erred in law and misdirected himself fundamentally in holding that the appellant ought to have appealed to the Provincial Land Appeals Committee.**

5. The appeal was argued by way of written submissions and counsel for the parties made brief oral submissions in court highlighting their filed written submissions. The appellant filed her submissions on 9<sup>th</sup> April 2018 and the respondent also filed his submissions on the same

date.

6. The appellant's submission was that the Borabu Land Disputes Tribunal did not have jurisdiction to make the award that they did in so far as it involved title to land. The appellant's argued that the award was a nullity and that the Magistrate's Court erred in adopting the same as a judgment of the court. The appellant acknowledges that after the Tribunal's award was adopted by the Magistrate's Court at Keroka she filed a suit vide Kisii High Court No. 139 of 2009 seeking the award/decision of the Land Disputes Tribunal to be declared null and void. The High Court dismissed the suit holding that it had no jurisdiction to declare the award a nullity since the same had already become a judgment of a competent court. The appellant's appeal to the Court of Appeal against the decision of the High Court was dismissed and the Court of Appeal affirmed the decision of the High Court. The appellant's application for certification to appeal to the Supreme Court was declined both by the Court of Appeal and the Supreme Court. The appellant having exhausted the appeal process on the option she had elected in challenging the award of the Tribunal, which did not end in a favourable decision for her, the appellant opted to retrace her steps back to Keroka Magistrate's Court where the Tribunal's award was sanctified by being adopted as a judgment and sought a review of the court's said judgment. The present appeal is against the Magistrate's refusal to review and/or set aside the judgment.

7. The respondent's submissions were to the effect that the Magistrate's Court did not have jurisdiction to review, vary or set aside the orders it made in 2008 as its role was merely to adopt the Tribunal's award as it did. The respondent further submitted that, the appellant having been unsuccessful in the High court, the Court of Appeal and the Supreme Court, the appellant was through the application for review before the Keroka PM's Court seeking to have a second bite of the cherry by kick starting another round of litigation. The respondent's contention was that the appellant's application was unmerited since the Land Disputes Tribunal Act Cap 303A of the Laws of Kenya had a clear dispute resolution mechanism set out under Sections 7 and 8 of the Act which the appellant was obliged to follow. The respondent's position was that the Magistrate's Court's role was finalized once it adopted the Tribunal's award as judgment under Section 8(2) of the Land Disputes Tribunals Act and it could therefore not entertain an application for review as sought by the appellant.

8. The appeal before this court is limited to the refusal by the SPM Keroka to grant the appellant's application for review dated 5<sup>th</sup> May 2016 and in my view would not constitute going into the merits of the award made by the Borabu Land Disputes Tribunal. The submissions by the parties have largely been on whether or not the land disputes tribunal had the jurisdiction to render the award that it did. The issue for determination in this appeal is whether on the basis of the material before him, the learned magistrate arrived at the correct decision in dismissing the appellant's application for review.

9. As is the norm, this being a first appeal, the court is obligated to appraise the evidence before the trial court to determine whether the trial court arrived at the correct decision in its determination. The court can draw its own inference of fact and upon evaluation of the evidence it can draw its own conclusions. See the Court of Appeal case of **Selle -vs- Associated Motor Limited Company [1968] E.A 123**.

10. The application by the appellant for review was premised on Section 80 of the Civil Procedure Act which allows any person aggrieved by a decree or order to apply for review, and Order 45 Rule (1) of the Civil Procedure Rules which sets out the conditions that a person seeking review needs to satisfy for an order of review to be granted.

11. Section 80 of the Civil Procedure Act provides:

**80. Any person who considers himself aggrieved-**

**(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

Order 45 Rule (1) of the Civil Procedure Rules provides for applications for review and provides as follows:

**45.1(1) Any person considering himself aggrieved –**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by decree or order from which no appeal is hereby allowed; and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

12. The appellant's application for review before the Magistrate's Court at Keroka had to satisfy the conditions for review as provided under Order 45 Rule 1 for it to be granted. The appellant had to demonstrate there was discovery of new and important matter or evidence which was unavailable at the time the decision was made; or that there was some mistake or error that was apparent on the face of the record; and/or that there was some other sufficient reason to warrant a review of the decision. Finally, the appellant had to show that the application was brought without unreasonable delay.

13. The fulcrum of the appellant's review application was that the Borabu Land Disputes Tribunal did not have the jurisdiction to make the award that they made as it affected title to land parcel **Kineni Settlement Scheme/70** to the extent that the Tribunal ordered the subdivision of the same. The appellant contended that under Section 3(1) of the Land Disputes Tribunals Act, the Tribunal had no jurisdiction to entertain the dispute that touched on title to land. The appellant thus argued to the extent that the Tribunal made an award that touched on title to land, they acted in excess of their jurisdiction and the award they made was null and void. The appellant argues the award adopted as judgment by the Keroka Magistrate's Court was a nullity having been made by the Tribunal without jurisdiction and therefore should not

have been adopted as a judgment of the court. On that basis, the appellant sought for the review of the court's decision adopting the award as judgment. In essence, the appellant was contending there was an error on the face of the record that warranted a review of the court's order given on 23<sup>rd</sup> May 2008.

14. The role of a Magistrate's Court in regard to awards emanating from Land Disputes Tribunals was clearly provided under Section 7 of the Land Disputes Tribunals Act which provides thus:-

**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 judgment 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.**

15. My understanding of the above provision is that the Magistrate's Court did not have the jurisdiction and/or mandate to review an award made by the Tribunal. The wording of Section 7(2) is in mandatory terms that the court shall enter judgment in accordance with the decision of the Tribunal. The Magistrate's Court had no discretion to vary or review the decision of the Tribunal. Section 8(1) of the Act provided for appeals to the Appeals Committee while Section 8(9) of the Act provided for Appeals to the High Court from the decision of the Appeals Committee.

Section 8(1)

**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 for the province in which the land which is the subject matter of the dispute is situated.**

**8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:-**

**Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved.**

16. The option of an aggrieved party from a decision of the Tribunal was either to appeal to the Appeals Committee and/or to institute judicial review proceedings to quash the decision of the Tribunal if it is alleged it acted in excess of its jurisdiction. Before the Appeals Committee, the appellant would have been perfectly entitled to raise the issue of the jurisdiction of the Tribunal and if not satisfied with the Appeals Committee's decision could appeal to the High Court on issues of law. Jurisdiction is an issue of law and could have been taken on appeal to the High Court if the appeals committee had disallowed the Appellant's appeal on the issue.

17. The appellant as observed earlier in this judgment, instead of pursuing the dispute resolution mechanism set out under the Disputes Tribunals Act, chose to file a fresh suit where she eloquently argued that the Tribunal lacked the jurisdiction to make the award. The High Court and the Court of Appeal in their turn unambiguously told the appellant she had chosen the wrong forum to challenge the award of the Tribunal. Once the appellant had come to a dead end in her pursuit, she retraced her steps to the Magistrate's Court Keroka where the whole episode began nearly 10 years ago and here she sought to review the order made by the court on 23<sup>rd</sup> May 2008 adopting the Tribunal's award as judgment of the court.

18. The trial magistrate at Keroka, as I have observed earlier in this judgment did not have the mandate and/or jurisdiction to vary or review the award filed by the Tribunal. The magistrate's role is limited as provided under Section 7(2) of the Land Disputes Tribunals Act. The magistrate was not given any leeway to consider whether or not to adopt the Tribunal's award once it was filed. The magistrate could not consider the merits of the award and/or consider whether or not the Tribunal had jurisdiction to entertain the dispute. It was up to any aggrieved party to challenge the decision of the Tribunal by way of appeal under Section 8(1) of the Act and/or to challenge the decision of the Tribunal by way of judicial review before the High Court, if he/she considered the Tribunal lacked the jurisdiction to handle the dispute.

19. The appellant in my view did not satisfy any of the conditions upon which review could be granted under Order 45(1) of the Civil Procedure Rules. There was no error apparent on the face of the record and neither was there any discovery of any new and important matter or evidence that was not available at the time the order sought to be reviewed was made. It is true that the Tribunal may have acted in excess of its jurisdiction but it was not for the Magistrate to make an inquiry and make a determination in that regard as he was not clothed with any such authority. The magistrate acted in compliance with the law in adopting the award. The High Court in HCCC No. 139 of 2009 (Kisii) as per Makhandia, J. (as he then was) observed as follows regarding the role of the Magistrates court:

**"...In any event I do not think that the SRM's court at Keroka has jurisdiction under Land Disputes Tribunal Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is regular, bad in law and therefore void abinitio..."**

I agree with learned Judge's observations and therefore hold there is no basis upon which the learned magistrate can be faulted for failing to review the order dated 23<sup>rd</sup> May 2008.

20. The appellant cannot properly argue that the fact that the Tribunal did not have jurisdiction to entertain matters relating to title to land was a new matter of evidence that was not within her knowledge at the time the order was made. That was the law as Section 3(1) of the Land Disputes Tribunals Act expressly provided as much. If the appellant's position is that the trial magistrate misapprehended the law, that

also would not have been proper ground to seek a review but would have been a good ground of appeal.

21. It is noteworthy that the appellant after the award was adopted by the Magistrate's Court as judgment did not apply for review then but rather filed a fresh suit in the High Court which triggered an appeal to the Court of Appeal and thereafter to the Supreme Court and that it was only after that avenue closed that the appellant came back to make an application for review before the Magistrate's Court. The appellant in my view could not demonstrate she had made the application for review within a reasonable time and consequently the application would have been liable to be declined on account of having not been made without unreasonable delay.

22. I am conscious of the authorities that the parties have referred me to, but with respect, I do not consider them to be relevant to the instant appeal. The authorities refer to primary suits where the issue of the Tribunals jurisdiction and the awards emanating therefrom had been challenged and the courts have pronounced themselves respecting the effect of the awards in those matters. In the present appeal the issue concerns the Magistrate's exercise of discretion in an application for review and the considerations are totally different. In the cases of **Republic -vs- Chairman Borabu Land disputes Tribunal & 2 Others Ex parte Florence Nyaboke Machani [2014] eKLR & Republic Ex parte Peter Nicholas Mauti -vs- Keumbu Land Disputes Tribunal & 2 Others [2016] eKLR** referred to the court by the appellant, the decisions of the Land Disputes Tribunals were properly challenged in judicial review proceedings and the courts clearly pronounced themselves that where the Tribunals acted in excess of their jurisdictions, the awards cannot stand.

23. In the present appeal, the Keroka Magistrate cannot be faulted for making an order adopting the award of the Tribunal. He did what was expected of him. There was no basis upon which the magistrate could have reviewed the order he made. True, the resultant implementation of the decree arising from the judgment may effectively mean a decision made without jurisdiction by the Tribunal may have been sanctified but that is why it is often said the law is an "ass" as it can at times produce unjust results. The courts merely interpret the laws handed down by the legislature. The appellant perhaps may have had a different result if the appropriate dispute resolution mechanism established under the Land Disputes Tribunals Act, was aptly followed. There was a misstep in her pursuit of legal redress and owing to that, she may have to live with the consequences. See case of **Paul Muraya Kaguri -vs- Simon Mbaria Muchunu [2015] eKLR** where in a similar matter as the one before me L. N. Waithaka, J. stated:

**"It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.**

**...the Trial Magistrate's duty under the law was merely to adopt the award of the Land Disputes Tribunal, she had no mandate to enquire into the legality or otherwise of the judgment.."**

24. I believe I have said enough to show that this appeal lacks any merit and is for dismissal. The same is ordered dismissed with costs to the respondent.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 26<sup>TH</sup> DAY OF OCTOBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Moracha for Bosire for the appellant

Mr. Abobo for the respondent

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**