



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C.A CASE NO. 15 OF 2014**

**ERASTUS GILBERT KIMANI.....1<sup>ST</sup> APPELLANT**

**MURIITHI FRANCIS KIMITA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PETER KARIUKI NJERU.....RESPONDENT**

***(Being an appeal from the ruling and order of the Honourable E.K. Nyutu – Resident Magistrate in Embu CM’S Award No. 59 of 2011 dated 16<sup>th</sup> November, 2011)***

**JUDGEMENT**

1. This is an appeal against the ruling and order of Hon E.K. Nyutu (RM) dated 16<sup>th</sup> November 2011 in *Embu CM’s Award No. 59 of 2011*. By the said ruling, the learned Magistrate declined to read and adopt the award of the Eastern Provincial Land Disputes Appeals Committee (hereinafter the *Appeal’s Committee*) as a judgement of the court under the provisions of the repealed **Land Disputes Tribunals Act, 1990**. The court also proceeded to strike out the award on the basis that the Award of the Embu Land Disputes Tribunal (hereinafter the *Tribunal*) in respect of the same subject land had already been adopted as a judgement of the court in Embu Chief Magistrate’s Award Case No. 47 of 2011.

2. The brief background to the appeal is that the Respondent herein had filed a claim before the *Tribunal* in *Tribunal Case No. 6 of 2011*. The subject of the dispute was expressed as a boundary dispute concerning *Title Nos. Kyeni/Kigumo/1805, 1793, 3034, 3035 and 1806*. Upon hearing the said claim, the Tribunal found a discrepancy of 1.1173 ha which the Respondent claimed should have been part of his *Title No. Kyeni/Kigumo/3035*. The verdict of the Tribunal was that the Land Registrar and District Surveyor were to harmonize the ground measurements and the records using the Registry Index Map (RIM). The Respondent was to bear the costs of the survey whereas the costs of the case were to be borne by the loser upon harmonization.

3. The Respondent thereafter filed the award of the Tribunal for adoption in Embu *CM Award No. 47 of 2011*. The award was read to the parties on 26<sup>th</sup> May 2011 and the parties informed of their right of appeal within 30 days. The matter was thereupon fixed for mention on 30<sup>th</sup> June 2011 for possible adoption of the award. On that day, the record shows that the Respondent was present whereas the Appellants were absent. The award of the Tribunal was adopted as a judgement of the court.

4. It would appear that the Respondents had in fact filed an appeal to the Appeals Committee against the award of the Tribunal after the award being read to the parties. There is no indication on record that the court was informed of the filing and pendency of the appeal on 30<sup>th</sup> June 2011 when the award was adopted. However, the Appellants prosecuted their appeal to its logical conclusion whereupon they obtained an award from the Appeal’s Committee overruling the award of the Tribunal.

5. When the Appellants sought to have the award by the Appeal’s Committee read and adopted, the Respondent’s advocate raised an objection to the effect that the matters in issue had effectively been dealt with in Embu CM Award No. 47 of 2011 whereby the award of the Tribunal had been adopted as a judgement of this court.

6. The record shows that the learned Magistrate, Hon E.K. Nyutu called for the file in *Award case No. 47 of 2011*. Upon perusing it, the learned Magistrate was satisfied that there was already a judgement in respect of the same subject matter between the same parties. She, therefore, declined to read the award of the Appeal’s Committee. The Respondent’s advocate, therefore, applied for the proceedings in *Award No. 59 of 2011* to be struck out with costs. The court obliged and struck out those proceedings with costs.

7. The Appellants were not deterred by that setback. They filed a notice of motion dated 21<sup>st</sup> October 2011 under **Order 45 Rules 1 & 2, Order 50 Rule 1** of the **Civil Procedure Rules and sections 3 & 3A** of the **Civil Procedure Act (Cap 21)** seeking the following orders;

**a. The court do review and set aside the orders of 5<sup>th</sup> October 2011 striking out award No. 59 of 2011 with costs.**

**b. Award No. 59 of 2011 be consolidated with Award No. 47 of 2011.**

8. The said application was based upon the grounds which were cited on the face of the motion and supported by an affidavit sworn jointly by the Appellants on 21<sup>st</sup> October 2011. The gist of the application was that there was an error on the face of the record and that the Appellants were not directly involved in the filing of the award in *Award Case No. 59 of 2011*. It was contended that the award in the latter file was sent directly by the Appeal's Committee hence it was not their fault if the award was wrongly filed.

9. The said application was fully canvassed before Hon E.K. Nyutu who delivered a ruling dated 16<sup>th</sup> November 2011. She dismissed the said application with no order as to costs. That is the ruling which provoked the instant appeal.

10. By their memorandum of appeal dated 13<sup>th</sup> October 2011, the Appellants raised the following grounds of appeal;

*a. The learned Resident Magistrate erred in law and fact when she failed to consider the fact that the Provincial Tribunal's Proceedings and Award were sent directly to the court by the Tribunal and thus it was not the Appellants' mistake that the same were not filed in the proper court file.*

*b. The learned Resident Magistrate erred in law and fact in failing to consider that the Appellants had filed an appeal against the elders' award within the period of 30 days granted.*

*c. The learned Resident Magistrate erred in law and fact when she failed to consider that her ruling effectively took away the Appellants' right of appeal as provided for by section 8 of Land Disputes Tribunal's Act No. 18 of 1990.*

*d. The learned Resident Magistrate erred in law and fact when she failed to consider her jurisdiction was limited to reading the Provincial Tribunal's Award to the parties and enforcing the said award and she therefore did not have the power to strike out the said award.*

*e. The learned Resident Magistrate erred in law and fact when she failed to consider that the Appellants were only seeking to have a procedural error corrected and that her orders would cause a miscarriage of justice.*

11. A perusal of the said grounds of appeal reveals that they are mainly challenging the decision of the learned Magistrate made on 5<sup>th</sup> October 2011 striking out *Award No. 59 of 2011* with costs. There is very little in the appeal in terms of a challenge to the ruling and order of 16<sup>th</sup> November 2011 which dismissed the Appellants' notice of motion for *review* of the earlier ruling dated 5<sup>th</sup> October 2011.

12. When the appeal was fixed for mention for directions on the hearing hereof, the parties agreed to canvass it through written submissions. The Appellants were granted 30 days to file and serve their submissions whereas the Respondent was granted 30 days to file and serve his submissions upon service by the Appellants. The record shows that the Appellants filed their submissions on 13<sup>th</sup> September 2018 whereas the Respondent filed his on 18<sup>th</sup> October 2018.

13. The Appellants argued two main grounds in their written submissions. First, it was submitted that the learned trial magistrate erred in declining to allow the application for review and consolidation. It was submitted that the said application was merely intended to correct procedural errors in the filing of *Award No. 59 of 2011*. Second, it was submitted that the learned trial magistrate erred in declining to read the award of the Appeal's Committee. It was contended that the learned magistrate was duty bound to read the award and had no discretion to review, alter or set it aside. The Appellants relied on the case of **Masagu Ole Koitelet Naumo Vs Principal Magistrate Kajiado Law Courts & Another [2014] eKLR** and **Peter Ouma Vs John Nyarara Kisii HCCA No. 297 of 2005** in support of that submission.

14. The Respondent, on the other hand, addressed the first four grounds set out in the memorandum of appeal. The court shall not reproduce them here but shall refer to them as and when need arises in the course of the judgement.

15. The court is aware that the instant appeal seeks to challenge the exercise of judicial discretion by the learned trial magistrate. The jurisdiction donated to a court to consider and determine applications for review under **Order 45 of the Civil Procedure Rules** is discretionary. However, like all judicial discretion, it must be exercised in a judicious manner. It must be exercised upon reason and not caprice, whim or sympathy. See **CMC Holdings Ltd Vs James Mumo Nzioki [2004] eKLR**.

16. The court is also aware that whilst sitting as an appellate court, it should not lightly interfere with the exercise of judicial discretion by the Magistrate's court unless the court is satisfied that it was not exercised judicially or that the court misdirected itself on a point of law. This court may also interfere if upon examination of the case as a whole, it is satisfied that the exercise of discretion was plainly wrong.

17. In the case of **Mrao Vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, it was held, *inter alia*, that;

**"...an appellate court may only interfere with the exercise of judicial discretion if satisfied that either,**

**a) The judge misdirected himself on law; or**

**b) That he misapprehended the facts, or**

**c) That he took account of considerations of which he should not have taken into account, or**

d) That he failed to take account of considerations, of which he should have taken account or

e) That his decision, albeit discretionary, was plainly wrong.”

18. Similarly, in the case of **Mbogo & Another Vs Shah [1968] EA 93**, the defunct Court of Appeal for East Africa held that;

**“We now come to the second matter which arises on this appeal, and that is the circumstances in which this court can upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”**

19. The court shall now consider the two main grounds which were argued by the Appellants in their written submissions. The court has considered the entire record of proceedings before the learned Magistrate in *Award No. 59 of 2011*. The proceedings were not struck simply because the award had been filed in a new file ie *No 59 of 2011* instead of *Award No. 47 of 2011*. The reasons given by the trial court at page 27 of the record of appeal are as follows;

*“I have perused the said Award No 47 of 2011 and noted that the award of the District Tribunal was adopted as a judgement of the court on 30<sup>th</sup> June 2011 as such the award of the Provincial Tribunal cannot be read as there is a judgement on record.”*

20. When the Appellants applied for a review of the order striking out *Award No. 59 of 2011* and its consolidation with *Award No. 47 of 2011*, the circumstances had not changed in any respect. No new evidence had arisen; no error apparent on the face of the record was demonstrated; and no other sufficient reason was demonstrated to justify a review in terms of **Order 45 of the Civil Procedure Rules**.

21. Although the learned trial magistrate had judicial discretion to grant the orders of review and consolidation as sought, it was not mandatory for her to do so. She was obligated to exercise that discretion judiciously and upon reason. The court is of the view that if she had read the award and adopted it as a judgement afterwards, that would have created a legal absurdity. How could we possibly deal with two contradictory awards and two contradictory judgements in one file in respect of the same subject matter and the same parties?

22. This court is satisfied that the learned trial magistrate was right in declining to read the second award. The trial court was also right in declining to grant the application for review. It has not been shown that such exercise of discretion fell within the description of cases fit for interference as enunciated in the cases of **Mbogo & Another Vs Shah** (*supra*) and the **Mrao Vs First American Bank of Kenya Ltd** (*supra*).

23. The second ground argued by the Appellants was that the trial court was duty bound to read the award and thereafter adopt it as a judgement of the court. The court agrees with the statements of law propounded in the two cases cited by the Appellants’ advocates on the duty of a magistrate upon receiving an award under the **Land Disputes Tribunals Act, 1990**. The court agrees that the magistrate would have no jurisdiction to review, amend, alter or set aside the award. Indeed, there is no material on record that the trial magistrate took any of the said actions.

24. What the record shows is that the trial magistrate declined to read the award for the reason that another award had been read and adopted in *Award Case No. 47 of 2011*. The **Land Disputes Tribunals Act of 1990** did not envisage a situation where multiple awards would be read and adopted in respect of the same subject matter and between the same parties. The authorities cited by the Appellants did not, similarly, envisage the adoption of multiple awards which would result into multiple judgements.

25. If the Appellants were aggrieved by the adoption of the Tribunal’s award in *Award Case No. 47 of 2011*, it was up to them to take legal steps within the establishing legislation (now repealed) to correct any anomalies in the process. It was also upon the Appellants to inform the trial court in *Award Case No. 47 of 2011* that there was a pending appeal in order to prevent adoption of the Tribunal’s award as a judgement. The record shows that the Appellants were absent on the date the award was adopted on 30<sup>th</sup> June 2011. As indicated elsewhere, it would be a legal absurdity to have two contradictory judgements in one case relating to the same subject matter and parties.

26. The upshot of the foregoing is that the court finds no merit in the appeal. The same is consequently dismissed in its entirety with costs to the Respondent.

27. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 22<sup>nd</sup> day of NOVEMBER, 2018.**

In the presence of Ms Muriuki holding brief for Ms Rose Njeru for the Appellants and in the absence of the Respondent.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

22.11.18