REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA APPEAL NO. 71 OF 2014

PAUL MURAYA KAGURI…..…APPELLANT/APPLICANT

-VERSUS-

SIMON MBARIA MUCHUNU……. RESPONDENT

RULING

Introduction

1. The genesis of this matter can be traced to the ruling and order of A. Too, Resident Magistrate, delivered on 15th August, 2012 in Kangema Principal Magistrate Court's Land Dispute case No.29 of 2007. Through that ruling, the lower court dismissed the applicant's application dated 16th July, 2012 in which the applicant prayed that the orders/decree of the lower court dated 14th December, 2007 and 11th April, 2012 and any subsequent orders in respect thereof be reviewed, set aside and vacated. The appellant also sought stay of execution of those orders and any subsequent orders in respect thereof pending the hearing and determination of the application or further orders of the court.

2. The lower court dismissed the application on the grounds that it lacked jurisdiction to hear and determine the issues raised in the application.

3. Aggrieved by the decision of the lower court, the applicant appealed to this court on grounds that the trial magistrate erred by, *inter alia*, fettering her discretion; failing to find that the execution was illegal and premature; dwelling on the merits of the suit and failing to address herself to fundamental issues raised in the application thereby misdirecting herself; failing to find that there was an error on the face of the record; arriving at a decision against the weight of the evidence and all the surrounding circumstances and arriving at a decision that was not in compliance with the Civil Procedure Rules.

4. This court considered the applicant's appeal and found it lacking in merits. Consequently, it dismissed it with costs to the respondent.

5. In dismissing the appeal, this court *inter alia* observed:

> **"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 that their rights were denied. In the circumstances of this case, despite the issues raised being germane, this court cannot fault the decision of the lower court because it is sound in law. Her 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."

6. After this court dismissed the appeal on the aforementioned ground, the applicant filed the notice of motion dated **29th March, 2016** seeking the following orders:

(i) Certification of the application as urgent and deserving to be heard *ex parte* within the first instance;

(ii) Stay of execution and/or conservatory orders in respect of the decree or orders hereto pending hearing and determination of the application;

(iii) Review and/or setting aside of the judgment of this court delivered on 22nd September, 2015 to the extent that the proceedings in the lower court are called for and further directions in respect thereof issued;

(iv) Directions be given to the effect that this matter proceeds from where it had reached under the Land Disputes Tribunal Act (now repealed) and/or declaration of the proceedings in the lower court null and void.

(v) Order for maintenance of status quo obtaining in this matter pending the hearing and determination of the suit;

(vi) Any other orders this honourable court may deem fit to grant.

7. The application is premised on the grounds that at the time the impugned award was adopted as a judgment of the court, the applicant had preferred an appeal to the Provincial Land Disputes Appeals Tribunal and that the appeal is still pending; that the adoption of the award of the Land Disputes Tribunal during the pendency of the appeal was irregular and the adoption of the award, in the circumstances, occasioned miscarriage of justice (appellant was denied an opportunity to be heard on his appeal).

8. Terming the circumstances that led to adoption of the award during the pendency of his appeal sufficient reasons to review this court's decision, the applicant explains that owing to inadvertence on the part of his advocate, this court was not informed about the appeal pending at the defunct Land Disputes Appeals Tribunal.

9. The application is supported by the affidavit of the applicant where in addition to reiterating the grounds on the face of the application, the applicant has annexed documents showing that as at the time the impugned award was adopted, his appeal was still pending before the now defunct Land Dispute Appeals Tribunal. See annexure **PMK-2**.

10. In reply and opposition to the application, the respondent has vide the replying affidavit he swore on 20th September, 2016 *inter alia* deposed that a dispute over the suit property was filed before the defunct Land Disputes Tribunal; that the Tribunal made an award in favour of the respondent; that the award was adopted as a judgment of the court as by law required and a decree issued.

11. The respondent has admitted that the applicant filed an appeal at the defunct Land Disputes Appeals Committee but contended that the appeal was never pursued or set down for hearing before the respondent (now deceased and substituted with his son Simon Mbaria Muchunu) passed on.

12. It is pointed out that the applicant filed an application for review of the decree issued in favour of the respondent but contended that he never raised the issues raised in the current application. For instance, it is contended that the applicant never brought to the attention of the lower court that there existed an appeal at the defunct Provincial Appeal's Tribunal in respect of which directions needed to be issued or that by moving the lower court for adoption of the award, the respondent was taking advantage of the confusion brought by the repeal of the Land Dispute Tribunals Act.

13. Terming the application herein an abuse of the court process, the respondent points out that the applicant lodged an appeal against the decree which was dismissed by this court and that no appeal has been lodged against the decision of this court on which the orders sought can hinge.

14. The applicant is also accused of abusing the process of the court by filing and prosecuting parallel applications before this court and the lower court.

15. The application is also opposed through the respondent's notice of preliminary objection filed on 29th June, 2016 where it is *inter alia* contended that there is a similar application pending before the lower court; that no appeal has been preferred against the decision of this court in respect of the applicant's appeal; that the current application lacks substratum and that the applicant's counsel is irregularly on record.

16. According to the respondent, this court lacks jurisdiction to grant the order sought because it became functus officio upon issuance of the orders sought to be reviewed and/or set aside.

17. The application and the notice of preliminary objection were disposed of by way of written submissions.

Submissions on behalf of the applicant

18. On behalf of the applicant, it is reiterated that as at the time the judgment hereto was entered, there existed an appeal at the defunct Land Disputes Appeals Tribunal and submitted that entry of the judgment during pendency of the appeal was premature and a denial of the applicant's right to be heard on the appeal; that following repeal of the Land Disputes Tribunals Act, the appeal ought to have been transferred to this court for hearing and determination.

19. It is explained that owing to confusion that followed the repeal of the Act, the appeal was not brought to this court for hearing and determination as by law contemplated. Instead, the lower court was moved for entry of judgment in terms of the award of the Land Disputes Tribunal which action is said to be irregular.

20. Although the issue of the pending appeal was raised before this court, on appeal, it is submitted that the premature entry of the judgment and denial of the right to be heard on the appeal are sufficient grounds for granting the orders sought.

21. With regard to the contention that the applicant is abusing the court process by bringing a multiplicity of applications, it is submitted that the applicant seeks orders of review which are open to a party who is not appealing.

22. Concerning the contention that the application is *res subjudice* the application filed in the lower court dated 3rd May 2016, it is pointed out that the current application was the first to be filed and submitted that it is not *res subjudice* the latter. It is also pointed out that the main prayer in the latter application was for stay pending hearing and determination of the current application.

23. On the allegations that the application is *res judicata* the latter, it is pointed out that the lower court declined jurisdiction to hear and determine the issues raised before it hence the matter was not heard and determined on its merits.

24. On the contention that the application is bad in law for offending **Order 9 Rule 9** of the Civil Procedure Rules, it is pointed out that a consent was filed between the outgoing and the incoming advocate as by law required.

Submissions on behalf of the respondent

25. On behalf of the respondent, it is reiterated that the applicant has resulted in abuse of court process by

filing and prosecuting a multiplicity of applications. Because the applicant did not appeal against the decision of this court, it is submitted that in the absence of an appeal against the decision of this court, this court has no jurisdiction to issue the orders sought.

26. On the propriety of the application, it is reiterated that the applicant's counsel flouted the provisions of **Order 9 Rule 9** of the Civil Procedure Rules and the court is urged to strike out the application or to dismiss it with costs to the respondent.

Analysis and determination

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

> **(i) Whether the application herein is *res subjudice* or *res judicata* the one filed in the lower court?**
>
> **(ii) Whether the applicant complied with Order 9 Rule 9 of the Civil procedure rules before filing this application?**
>
> **(iii) Whether this court has jurisdiction to hear and determine the application herein?**
>
> **(iv) Whether the applicant has made up a case for issuance of the orders sought?**

28. With regard to the first issue, the evidence on record shows that the current application was filed before the one subsequently filed before the lower court. Except the prayer of stay, the other orders sought in the latter application are different from those sought in the current application. For those reasons, I find and hold that the application is not *res subjudice.*

29. Concerning the contention that the application is *res judicata*, there is no evidence that an application similar to the one on record was heard and determined by a court of competent jurisdiction, to warrant a determination that the application is *res judicata*.

30. With regard to the contention that the application offends **Order 9 Rule 9** of the Civil Procedure Rules, the court record shows that, in compliance with the provisions of **Order 9 Rule 9** of the Civil Procedure Rules, a consent was filed between the outgoing and the incoming advocate. The application is, therefore, incapable of turning on that issue.

31. On whether this court lacks jurisdiction to hear and determine the issues raised in the application, as the applicant *inter alia* seeks review of the judgment of this court, I entertain no doubt that under **Section 80** as read with **Order 45 Rule 1** of the Civil Procedure Rules, this court has unfettered discretion to set aside or review its orders. In this regard see **Pancras T Swai Vs Kenya Breweries Ltd (2014) eKLR** where the Court of Appeal observed: -

> "**Order 44 Rule 1 (now Order 45 rule 1 of 2010 Civil Procedure Rules) gave the trial court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason"… As repeatedly pointed out in various decisions of this court, the words "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.**
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> **In Sarden Mohamed V Charan Singh Nard Singh and Another (1959) EA 793, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the court to make such order as it thinks fit on review and that the omission of any qualifying words in that section was deliberate.**
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> **In Shanzu Investments Ltd Vs Commissioner of Lands CCA 100 of 1993) this court with**

respect correctly invoked and applied its earlier decision in Wangechi Kimata & Another Vs Charan Singh (CA 80 of 1985) (UR) wherein this court held:

"**any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction <u>would be a clog on the unfettered right given to the court by Section 80 of the CPA</u>, and that the other grounds set out in the rule did not in themselves form a genus or ……. or things which the third general head could be said to be analogous…"**

32. On whether the applicant has made up a case for being granted the orders sought or any of them, the evidence on record shows that at the time the judgment hereto was entered, an appeal had been filed at the defunct Land Disputes Appeals Tribunal. In this regard see annexure **PMK-2.**

33. Although no evidence of the pending appeal was adduced before this court, upon perusal of the record of appeal hereto, I note that the issue of the pending appeal was raised before the lower court, but disregarded by the trial court for want of proof.

34. The evidence adduced in the lower court also shows that by the time the Land Disputes Tribunal made its award, the defendant had passed on. No substitution of the defendant was made before the award was adopted as a judgment of the court.

35. The court record also shows that there was total disregard of the law and the applicable procedures in that the award was made against a deceased person without substitution as by law required. Similarly, the appeal was filed by a person who had not been appointed as the personal representative of the deceased, Emily Wairimu Kaguri, the deceased wife. It is noteworthy that the appellant is not a party to this suit or application.

36. The evidence on record further shows that the appeal abated on 10th October, 2009 following passing on of the respondent without being substituted as by law required.

37. Having found that there was total disregard of the law and applicable procedures in making of the award, I find entry of the award in respect thereof to have been null and void.

38. In the case of **<u>Peterson Nguchi Kaburi v. Joseph Thuku Kaburi (2015) eKLR</u>** the Court of Appeal held:

"The court is duty bound to prevent illegalities and it would be a dereliction of duty for it to adopt a patent nullity as a judgment of itself. We would respectfully endorse the sentiments of Ombwayo J in <u>THEURI NDIRANGU & ANOR –VS- MUTAHI NDIRANGU & ANOR</u> – Civil Application No. 5 of 2002,

"The learned Magistrate… did not have the power to ratify nullities but had the duty to ensure that the decision of the Tribunal sought to be adopted was arrived at properly by a body that had a mandate to do so. Magistrates adopting the awards of Tribunals had the residual power to reject an award that was illegal. This residual power is recognized by the law as the inherent power to do justice."

Indeed, as this Court has said countless times before, it is public policy that courts should not aid the perpetration of illegalities. (See, <u>NATIONAL BANK OF KENYA –VS- WILSON NDOLO AYAH</u> [2009] e KLR.

It is clear from what we have stated that the learned Judge fell into error in allowing to stand a nullity in the name of the purported award".

39. In rendering its decision hereto, this court appears to have overlooked the said serious issues concerning the impugned award and the subsequent proceedings in respect thereof.

40. As pointed out herein above this court has power to review its judgment on account of an error apparent on the face of the court's record, discovery of new evidence that despite exercise of due diligence was not brought to the attention of the court and for any other sufficient reason.

41. In the circumstances of this case, I am satisfied that there exists an error of the face of the record concerning the propriety or otherwise of the award which was made at a time when the defendant had passed on without being substituted as by law required.

42. In the case of **Mbaki & others v. Macharia & another (2005) 2 EA** the Court of Appeal stated as follows:

> **"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."**

43. In the circumstances of this case, because the defendant was not substituted as by law required, he was denied an opportunity to defend his interests in the suit property.

44. Although the court record shows that an appeal was filed by the defendant's wife, there being no evidence that the wife was the legal representative of the deceased, issues abound concerning the legal propriety of that appeal.

45. The upshot of the foregoing is that the applicant has made up a case for review and/or setting aside of the judgment hereto in the following terms:-

> **"Through the judgment of this court delivered on 22nd September, 2015 this court dismissed the applicant's appeal on among other grounds the ground that he had not followed the dispute resolution mechanism provided in the Land Dispute Tribunals Act (now repealed). It has now emerged that at the time the award was made the defendant had passed on. Because the defendant was not substituted as by law required, he was denied an opportunity to defend his interest in the suit property by say lodging an appeal to the Land Disputes Appeals Committee.**
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> **Although an appeal was filed by the defendant's wife, issues abound concerning the legal propriety of that appeal as it was filed by a person who is not the legal representative of the defendant.**
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> **Being of the view that entry of the award at the time when the defendant had passed on and had not been substituted as by law required was irregular; I find and hold that the appellant has made up a case for setting aside the award and all consequential orders in respect thereof."**

46. The upshot of the foregoing is that the application herein has merit and is allowed in terms of the reviewed judgment.

47. As both parties were to blame for the course this matter took, each party shall bear their own costs of the appeal, this application and the application before the lower court.

48. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 13th day of June, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Kamau h/b for Mr. Kimwere for the appellants

Simon Mbaria Muchunu – respondent

Court assistant - Esther