



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C.A 20 OF 2014

FORMERLY KERUGOYA ELCA 12 OF 2014

MUGO NJAGI.....1ST APPELLANT

RUFUS KINYUA MUGO.....2ND APPELLANT

VERSUS

MBUGI MATHENGE ALIAS MBUCHI MATHENGE.....RESPONDENT

JUDGEMENT

1. By a notice of motion dated 6th January 2011 under ***Order XLIV of the Civil Procedure Rules*** the Appellants sought the following orders from the magistrate's court in Embu CMCC Award No. 4 of 2007;

a. That the honourable court be pleased to review, vacate and/or set aside the orders of 8th March 2007 adopting the elders' award as judgement of the court.

b. The costs of the application be provided for.

2. The grounds for seeking review were enumerated in the said application as follows:

a. That the Plaintiffs are aggrieved by the orders given by this honourable court on 8th March 2007.

b. That the Plaintiff has sufficient reason and seeks to obtain a review of the said court orders given on 8th March 2007.

c. That there is a mistake and error apparent on the face of the record.

d. That the court adopted the elder's award as its judgement on the same day that it was read to the parties and their right of appeal explained.

e. That although the Plaintiffs filed their appeal within the required period, the decision of the Appeals Committee has been rendered ineffective due to the fact that the court had already adopted the elders award as its judgement.

f. That the Plaintiff will suffer great injustice should the orders sought not be granted.

g. That the application herein is made without unreasonable delay.

3. In a short ruling delivered on 29th June 2011 the learned magistrate dismissed the said application for review on the following grounds;

a. The issues raised in the application were addressed by the court on 8th December 2010 in Award case No. 42 of 2010 viz that the Award of the Tribunal in case No. 29/2004 was adopted as a judgement on 8th March 2007 and that any aggrieved party ought to have sought a remedy within 30 days.

b. The Applicants were guilty of inordinate delay since the relief was sought over one year after the adoption order of 8th March 2007.

c. The court lacked jurisdiction to deal with the matter in view of the provisions of the Land Disputes Tribunal Act, 1990.

4. The Appellants were aggrieved by the said ruling dismissing their application for review and proceeded to file the instant appeal against the orders made on 29th June 2011. They raised the following five (5) grounds of appeal in their memorandum of appeal dated 26th July 2011;

a. That the learned Resident Magistrate erred in law and fact when she failed to consider the fact that the elders award was adopted as judgement of the court on the same day that it was read to the parties was an error apparent on record that was capable of being reviewed. (sic)

b. The Learned Resident Magistrate erred in law and fact when she failed 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 concluded that the Appellants were guilty of laches yet time could only spent turning from 8th December, 2010 when the court declined to read the award of the Appeals Tribunal to the parties. (sic)

d. That learned Resident Magistrate erred in law and fact when she failed to consider that the orders of 8th March 2007 adopting the Tribunal's award as the judgement of the court before the period of appeal had expired effectively took away the Appellants' right of appeal as provided for by section 8 of the Land Disputes Tribunals Act No. 18 of 1990.

e. The learned Resident Magistrate erred in law and fact when she concluded that the court had lacked jurisdiction to deal with the matter, yet the Appellants were only seeking to have a procedural error corrected.

5. The parties to the appeal agreed to dispose of the appeal through written submissions. The Appellants' written submissions were filed on 31st March 2017 whereas the Respondent's were filed on 20th April 2017.

6. The Appellants ventilated all the grounds of appeal in their submissions. The Appellants' counsel pointed what she considered to be various mistakes and irregularities in the manner in which the learned magistrate conducted her proceedings including the striking out of the decision of the Provincial Appeals Committee. The court shall, however, confine itself to the appeal against the refusal to review or set aside the order adopting the Tribunal's Award as a judgement.

7. The Respondent opposed the appeal and supported the orders of the learned Magistrate on the basis that the court had absolutely no jurisdiction to review or set aside the adoption order even if there were glaring errors or irregularities in the adoption thereof. She submitted that the options available to an

aggrieved person were to either file an application for judicial review or to appeal to the High Court on a point of law. She relied upon the case of **Nairobi High Court Misc Application No. 72 of 2012 Republic Vs Senior Resident Magistrate Gatundu Law Court and 3 others and Nyeri ELC Appeal No. 71 of 2014 Paul Kaguri Vs Simon Mbaria Muchunu**. The Respondent therefore asked the court to dismiss the appeal.

8. In my view, all the Appellants' grounds of appeal really boil into only one issue. Assuming that there was an error of law apparent on the face of the record as stated in the first grounds; that an appeal had been filed in time against the Tribunal's award; that the Appellants were not guilty of laches; and that the adoption order of 8th March 2007 had taken away the Appellants' right of appeal, did the learned magistrate have jurisdiction in law to review and set aside the orders of 8th March 2007? That is the real question in controversy in this appeal.

9. The court has carefully considered the regime of the **Land Disputes Tribunals Act, 1990** (now repealed) and relevant case law including the authorities cited by the parties herein. The court is satisfied that the role of the Magistrate's Court in adopting awards from the Tribunals was merely perfunctory and once adopted, it had no jurisdiction to review or set aside the resultant judgement. A party who considered himself aggrieved by the actions of the magistrates in respect of the adoption had either the option of seeking a judicial review remedy or appealing to the superior court on a point of law upon certification. There was no provision for variation, review or setting aside in the parent legislation.

10. I would associate myself with the judgement of Hon. Justice L.N. Waithaka in **Nyeri ELC Appeal No. 71 of 2014 Paul Muraya Kaguri Vs Simon Mbaria Muchunu** where she stated as follows:

"14. From the memorandum of appeal herein and the submissions made in respect thereof, it is clear that the appellant is challenging the decision of the TM to decline jurisdiction to review her judgement and decree adopting the award of the Kangema Land Disputes Tribunal. That being the case, the question to answer is whether the TM was right in holding that she had no power to review her decision adopting the impugned award and/or to stay execution of the decree on the reasons advanced by the appellant.

15. In answering this question, I adopt the decisions cited in the submissions filed on behalf of the respondent which aptly capture the legal position regarding the power/jurisdiction of the magistrate court's concerning an award of the defunct Land Disputes Tribunal. That jurisdiction was merely to adopt the award as it is and enter it as its judgement. The Land Disputes Tribunal did not cloth the magistrate courts with jurisdiction to review or entertain any arguments concerning the award.

16. With regard to the contention that what the lower court was handling were civil proceedings in respect of which section 80 of the Civil Procedure Rules applied, I wish to point out that that Land Disputes Tribunal Act had its in built mechanisms for dealings with disputes preferred to it. In this regard, once the Land Disputes Tribunal read its award to the parties, any aggrieved party had a right to appeal to the Provincial Appeals Committee for his/her area. If still dissatisfied with the decision of the Appeals Tribunal, the law allowed for further Appeal to the High Court.

17. It is not 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.

11. In view of my persuasion above, I find and hold that the learned magistrate had no jurisdiction to review the order of 8th March 2007 by which the Tribunal's award was adopted as a judgement of the court in a bid to correct any previous errors and mistakes. There were only two options available to the Appellants in addressing their grievances namely, through judicial review proceedings or an appeal to the superior court.

12. The court does not agree with the Appellants' submission that the application for review was merely

procedural which was intended to correct technical errors. The setting aside of an order which adopted an award as a judgement of the court does not appear procedural or technical to me.

13. The upshot of the foregoing is that the court finds no merit in the Appellants' appeal and the same is hereby dismissed.

14. Each party shall bear own costs.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th day of SEPTEMBER, 2017**

In the presence of Mr Okwaro holding brief for Ms Beth Ndorongo for the Respondents and in the absence of counsel for the Appellants.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

28.09.17