



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C MISC NO. 6 OF 2017

PATRICK MWAI MWANDE - APPLICANT

VS

ISAAC WAWERU KORI - RESPONDENT

RULING

1. By way of a Miscellaneous Application filed on 8/11/2016 the applicant sought orders as follows;-
 - a) That this Honourable Court be pleased to transfer and dispose the Central Provincial Appeals Committee Land case number 1 of 2011, Patrick Mwai Mwande –vs-Isaac Waweru Kori, which is still pending.
 - b) That costs of this application be provided for.
2. The application is based on the following grounds;-
 - a) That an award was made by the Makuyu Division Land Disputes Tribunal in case No. 20 of 2009, and the award subsequently read and adopted in the Principal Magistrate's Court at Kigumo L.D.T. No. 29 of 2010.
 - b) That the applicant filed Central Provincial Appeals Committee Land Case No. 1 of 2011, Patrick Mwai Mwande –vs- Isaac Waweru Kori after being dissatisfied with the decision made in Land Dispute Tribunal No. 29 of 2010 in the Principal Magistrate's Court at Kigumo.
 - c) That the Land Dispute Act No. 18 of 1990 was later repealed and the appeal has never been determined as a result.
 - d) That it is therefore necessary for the appeal to be transferred to this Court for disposal.
3. It is supported by the Supporting Affidavit of the Applicant filed on even date. He deponed that on 16/11/10 the Makuyu Division Land Disputes Tribunal made an award in favour of the Respondent. The award was adopted by the Principal Magistrate Court at Kigumo on 18/2/11. Being dissatisfied with the award he filed an appeal at Central Provision Land Appeals Committee which appeal was not decided as the Land Tribunals Act was repealed, hence this application to transfer the matter to the Environment and Land Court for disposal. That the delay in filing the application is not intentional and was occasioned by the repeal of the Land Disputes Tribunal Act. Further that the Respondent stands to suffer no prejudice if the appeal is transferred to the Environment and Land Court.
4. In his Replying Affidavit the Respondent opposed the application on 2 grounds;

a) That application is defective and incompetent under the law and in particular no substantive suit can be commenced by way of a Notice of Motion.

b) The Honourable Court in the circumstances of the dispute herein would lack physical/territorial jurisdiction as the suit subject is within the jurisdiction of the Environment and Land Court as constituted and sitting at Murang'a.

5. Further he deponed that the decision of the District Tribunal was binding as the Judgement of the Court which can only be challenged vide Judicial Review. Further that no appeal lies to the Environment and Land Court from an Order or Judgement of the tribunal. That the delay in filing this application is inordinate and he stands to be prejudiced.

6. In his submissions the Applicant stated that the appeal pending at the Defunct Central Appeals Committee is a proper appeal which should be transferred to the Court for proper adjudication. He averred that in any event the tribunal purported to determine issues *ultra vires* its legal mandate and jurisdiction.

7. Further that section 31 of the Environment and Land Act No. 19 of 2011 empowers the Environment and Land Court to determine such an appeal so that litigants, the applicant included is not locked out of the seat of justice. He averred that the applicant is the registered owner of the property and is in occupation.

8. In his submissions the Respondent states that the Land Dispute Tribunal did not have jurisdiction to determine outstanding issues relating to registered land under Registered Land Act Cap 300 (as it was then). Effectively the tribunal lacked jurisdiction to determine a claim involving ownership, involving land registered with a title deed and also in entertaining claims that were time barred as the title to the suit land was registered in the name of the applicant in 1988. That the decision of the tribunal having being illegal the Court cannot transfer that, which is void and nullity. The Respondent opined that the best route for the applicant is to file a fresh suit in the lower Court or file a Judicial Review in the Environment and Land Court.

9. The learned Counsel for the Respondent placed reliance on the following cases to support on his case for dismissal of the application; Republic Vs Gachoka Division (Mbeere South District) & 2 others Exparte Nephath Gikinji Karinga (206) EKLR; Republic Vs Chairman Makuyu Land Disputes & 2 Others Exparte Beth Wanjiru Mungai (2015) EKLR; Masagu Ole Koitalel Naumo Vs Principal Magistrate Kajiado Law Courts & Anor (2014) EKLR; Republic Vs Resident Magistrates Court Limuru & 3 others (2012) EKLR. I have reviewed these decisions and have found them most unrelated to the issue at hand. I therefore distinguish them to the extent that they are on the merits of the appeal.

Analysis & determination

10. It is on record that the applicant filed a dispute with Makuyu Land Disputes Tribunal in Tribunal case No. 20 of 2009. An award was issued in favour of the Respondent. The same was adopted as an award of the Court in Kigumo Principal Magistrate Court LDT Case No. 29 of 2010. Being dissatisfied, the applicant filed an appeal with the Provincial Appeals Committee Nyeri vide Case No. 1 of 2011. It is this appeal that the applicant seeks to transfer to this Court.

11. The Jurisdiction of the Land Tribunals as stated in the now repealed Land Disputes Tribunal Act 303A is stated in Section 3(1) as follows;

“Subject to this Act, all case of a civil nature involving a dispute as to ;-

a. The division of, or the determination of boundaries to land, including land held in common;

b. A claim to occupy or work land; or

c. Trespass to land,

Shall be heard and determined by a Tribunal established under section 4”.

12. The Environment and Land Court Act repealed the Land Dispute Tribunal Act No. 18 of 1990 vide section 30. Pursuant to Section 30 of the said Environment and Land Court Act the then Chief Justice Hon. CJ Dr. Willy Mutunga vide Gazette Notice No. 16268 issued Practice directions following the establishment of the Environment and Land Court. Practice direction No. 6 stated as thus;

“all proceedings which were pending before the Magistrates Courts, having been transferred thereto from the now defunct District Land Disputes Tribunal shall continue to be heard and determined by the same Courts”.

Under practice direction No. 11 the Hon. Chief Justice directed that appeals from Magistrates Courts and Tribunals shall lie in the Environment and Land Court pursuant section 13 (4) of the Environment and Land Court Act. The position therefore is that the Environment and Land Court Act has jurisdiction to hear and determine appeals from tribunals such as the Land Dispute Tribunals as they existed then.

13. That notwithstanding I note that the application is for transfer of an appeal to the Environment and Land Court. The applicant had deponed that he filed an appeal with the Provincial Appeals Land Dispute Tribunal No. 1 of 2011 on 25/2/11. It is his evidence that the appeal was never heard nor determined. That as was the practice he was never given a date for the hearing of the appeal and only learnt later that the said tribunal had been repealed. The question is what happens to appeals pending before the defunct Provincial Land Disputes Appeals Board?

14. In answer to the above question, Section 4 of the Environment and Land Court Act states as follows;-

“(1) There is established the Environment and Land Court. (2) The Court shall be a superior court of record with the status of the High Court.

(3) The Court shall have and exercise jurisdiction throughout Kenya.”

Section 13 (1) of the Environment and Land Court states that the Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other written law relating to the Environment and Land.

Section 13(4) states that in addition to the matters referred to in subsection (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of the matters within the jurisdiction of the Court.

15. In the case of **Christopher Wafula Mutoro vs Richard Lordia Lokere (2017) eKLR** the Court of Appeal held that the Jurisdiction of a Court is conferred either by the Constitution or by statute. In this case the Constitution by dint of Article 162(2) commanded Parliament to establish a Court with the status of a High Court to hear and determine disputes relating to the environment, use occupation and title to land.

Under Environment and Land Court Act, the Environment and Land Court has both original and appellate jurisdiction. Upon the repeal of the Land Tribunal Act, all the appeals that were pending before the Provincial Appeals Board are deemed to be assumed by the Environment and Land Court under its appellate jurisdiction.

16. Section 23(3) of the interpretation and general provisions Act provides that the repeal of the Land Dispute Tribunal Act did not affect any rights, privileges or obligations acquired, accrued or incurred under it unless a contrary opinion was indicated. I have not seen anything to the contrary. The applicant’s right to appeal which had accrued under the repealed Land Dispute Tribunal should not be abrogated without justifiable cause.

In my considered opinion the applicant is entitled to pursue his right of appeal that accrued under the Repealed Act, and the Environment and Land Court is the competent Court that he should so pursue it.

17. The Respondent has urged this Court to entertain the merits or otherwise of the appeal. The answer to that assertion is that what is before the Court is an application to transfer the appeal in the Central Provincial Appeals Committee Land case No. 1 of 2011 to this Court and not the merits or otherwise of the actual Appeal. I leave that to the Court to consider it when the time comes.

18. For the reasons given above the application succeeds and the same is granted as prayed.

19. Costs be in the cause.

DELIVERED, DATED AND SIGNED THIS 7TH DAY OF DECEMBER 2017.

J.G. KEMEI

JUDGE