



**REPUBLIC OF KENYA**

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

**AT NYERI**

**ELC MISC. CIVIL APPLICATION NO. 21 OF 2015**

**DOMINIC MBATIA CHUCHU ..... PLAINTIFF/APPLICANT**

**VERSUS**

**ANYONY KIBANYA GICHUGU.....DEFENDANT/ RESPONDENT**

**RULING**

1. Vide the notice of motion dated **1st January, 2015** Dominic Mbatia Chuchu, hereinafter referred to as “the applicant”, seeks to remove an appeal allegedly pending at the Central Land Disputes Appeals Committee to this court for hearing and determination.
2. The application is premised on the grounds that the appeal was pending before the Appeals Tribunal when the Tribunals were abolished by the Environment and Land Court Act, 2011 (hereinafter referred to as “the Act”). It is the applicants case that under **Section 30** of the the Act, all matters pending at the Appeals Tribunal were to be moved to the nearest High Court for hearing and determination.
3. The application is supported by the affidavit of the applicant in which the grounds on the face of the application are reiterated.
4. The application is opposed through the grounds of opposition dated **9th March, 2016** and the replying affidavit filed on **11th July, 2016** in which it is contended that there is no evidence that the appeal exists, that the appeal, if it exists, is incompetent for having been filed out of time and that granting the orders sought will not serve any useful purpose.
5. In reply to the issues raised in the grounds of opposition, the applicant filed the supplementary affidavit he swore on **25th May, 2016** where he introduces the following documents to counter the respondent’s contentions:
  - a) Copy of the grounds of appeal filed at the Appeals Tribunal and a receipt in respect of the payment he made in respect of the appeal marked **DMC (1(a) and (b)** respectively;
  - b) Copy of a letter dated 18th August, 2011 from the office of the Provincial Commissioner confirming that he had filed an appeal at the Land Disputes Appeals Committee.
  - c) Proceedings of the lower court showing that the award appealed from was read to the parties by the court on 8th August, 2011 and a 30 days’ right of appeal given to them.

6. When the matter came up for hearing, the parties relied on the filed pleadings.

7. In addition to reiterating the averments contained in the pleadings, counsel for the respondent argued that the Tribunal had no jurisdiction to hear the matter preferred before it.

### **Analysis and determination**

8. The application herein being for transfer of the appeal allegedly pending at the defunct Provincial appeals Tribunal, the issues for determination are whether there exists such an appeal and if it does, whether the appeal should be transferred to this court for hearing and determination.

9. Some of the issues raised in the grounds of opposition and the replying affidavit of the respondent like, the question as to whether the Tribunal had jurisdiction to hear and determine the dispute preferred before it and the alleged time bar, cannot be determined in the current proceedings/application. In my view, those are issues that will, subject to the outcome of this application, be determined in the appeal.

10. On whether there is a pending appeal, from the documents annexed to the applicant's supplementary affidavit, I am satisfied that the applicant had filed an appeal at the defunct Provincial Appeals Tribunal.

11. On whether the appeal should be transferred to this court for hearing and determination, I will adopt the decision in the case of **Chege Macharia v. Francis Kimani Kirimira (2015) eKLR** where the Court of Appeal stated:-

**“We are of the considered view that where, as in this case an award had been properly forwarded by the Chairman of the Tribunal but was not yet read when the Act was repealed, the proper course would have been for the magistrate to adopt the award and read it as a judgment of the court to be followed by the usual process of decree and execution and appeal where parties so desire. Such appeals would be to the High Court by dint of clause 13 of the practice direction, the Provincial Appeals Committee also having met their quietus with the repeal of the Act.**

**Such a course of action is inescapable from a proper reading of the Practice Direction as framed and also accords with the doing of justice in a timely, efficient and cost effective manner as commanded by Article 159 of the Constitution and the Practice Direction itself...”**

12. From the record before me, it is clear that the award of the Tribunal had been read to the parties as by law required. All what remained was the hearing and determination of the appeal preferred to the Appeals Tribunal. That being the case, in accordance with the decision of the Court of Appeal herein, this court is the right forum for hearing and determination of the Appeal. Consequently, I find and hold that the application herein has merit and allow it as prayed.

**Dated, signed and delivered at Nyeri this 25 th day of October, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Ms kainga h/b for Mr. Muhoro for the applicant

N/A for the respondent

Court assistant - Lydia