



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**  
**CIVIL APPEAL NO OF 12 OF 2015**  
**(FORMERLY ELC SUIT 1497 OF 2014)**

**ROBERT GITAU KIMANI.....APPELLANT**

**VERSUS**

**PETER KIMANI NGERA.....1<sup>ST</sup> RESPONDENT**

**TERESIA NJERI.....2<sup>ND</sup> RESPONDENT**

**PAULINE WANJIKU NGERA.....3<sup>RD</sup> RESPONDENT**

**(Appeal arising out of the ruling of the Senior Resident Magistrate, Hon. Mrs Murage delivered on 19<sup>th</sup> July 2002 in Nairobi PMCCC N. 10477 of 1994)**

**JUDGMENT**

**Introduction**

This appeal was first filed as High Court Civil Appeal No. 451 of 2002 in the Civil Division of the High Court, before it was transferred to the Environment and Land Court and inadvertently given a new suit number as ELC Suit 1497 of 2014. This anomaly was addressed and the appeal has now been given an appeal number as ELC Civil Appeal No 12 of 2015.

The appeal originated from the dispute before the trial Court which related to a parcel of land known as L.R No. Limuru/Kimirithu/851 (hereinafter referred to as “the suit property”). A plaint dated 18<sup>th</sup> October 1994 was filed in the trial Court on 25<sup>th</sup> October 1994 by the Respondents herein in Nairobi PMCCC No 10477 of 1994, and a Defence thereto filed on 24<sup>th</sup> March 1995 by the Appellant. The Appellant is a step-brother of the Respondents, and it was alleged in the said Plaint that the suit property was transferred to the Appellant by the parties’ father and registered in his name fraudulently, and that the same was held in trust by the Appellant for himself and the Respondents. The Respondents accordingly sought a declaration that the Appellant was holding the suit property in trust for himself and the Respondents in equal shares, and that the said property be subdivided equally among the Appellant and the Respondents.

When the suit came up for hearing on the 21<sup>st</sup> January, 1999 in the trial Court, the trial Magistrate made an order staying the proceedings in PMCCC No. 10477 of 1994 and referred the matter to the Kiambu District Land Disputes Tribunal for determination. The said Tribunal's award was subsequently adopted as a judgment of the Court on the 28<sup>th</sup> day of June, 1999 and a decree issued on the 23<sup>rd</sup> day of February, 2001. The decree was to the effect that the Respondents herein would share approximately 2¼ acres of the suit property, and the Appellant herein would get 2 acres of the said property. The Appellant subsequently filed an application dated 13<sup>th</sup> May, 2002 seeking substantive orders that the trial court reviews, varies and/or sets aside the decree made on the 28<sup>th</sup> June 1999 and issued on the 23<sup>rd</sup> February 2001. This application was dismissed by the trial court on 19<sup>th</sup> July 2002, hence this appeal.

The Appellant in this respect in the Memorandum of Appeal dated 14<sup>th</sup> August 2002 and filed in court on 15<sup>th</sup> August 2002 states that he is dissatisfied with the ruling and order dated the 19<sup>th</sup> July 2002 made by the Hon. Mrs. Murage, Senior Resident Magistrate, in PMCCC No. 10477 of 1994. The Respondent did not file any response to the appeal, and directions were given on 24<sup>th</sup> July 2009 that the appeal be heard at Nairobi before one Judge for one day. Both parties at the hearing of the appeal on 5<sup>th</sup> February 2015 submitted that they would fully rely on the pleadings and submissions they had filed in Court.

The specific jurisdiction of this court to hear this appeal is provided by the provisions of section 13 (1) of the Environment and Land Court Act, which provides that this Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution, and the provisions of the Environment and Land Court Act or any other law applicable in Kenya relating to environment and land. Lastly, as regards procedure, section 19(2) of the Environment and Land Court Act binds this court to apply the Civil Procedure Act.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**. The duty of this court as the first appellate court is therefore to examine and re-evaluate the evidence in, and findings of the trial court, and to reach its own independent conclusion as to whether or not the findings of the trial court should stand.

### **The Grounds of Appeal**

The Appellant has appealed to this Court on the following grounds;

1. The trial Magistrate erred in law and in fact by holding that she had no jurisdiction to entertain the Appellant's application dated the 13<sup>th</sup> June, 2002 to review, vary and or set aside the decree made on the 28<sup>th</sup> June, 1999 pursuant to an elders award adopted as a judgment of the Court.
2. The trial Magistrate erred in law and in fact, by failing to review, vary and or set aside the said decree, despite having found and held that the Elders had no jurisdiction to entertain matters of ownership of land registered under the Registered Land Act.
3. That trial Magistrate erred in law and in fact by dismissing the Appellant's application dated the 13<sup>th</sup> May, 2002 despite having established that she had no jurisdiction to entertain it, despite the fact that the Appellant was acting in person when the Elders award was confirmed as a judgment of the Court.
4. The trial Magistrate erred in law and in fact by sustaining on record, a decree obtained and issued by the trial Court, the dispute having been adjudicated and determined by the panel of Elders to the Appellant level, who had no jurisdiction to hear and determine the same.
5. The trial Magistrate erred in law and in fact by failing and or refusing to correct the apparent error on the face of the record, by dismissing the Appellant's application dated the 13<sup>th</sup> May, 2002 despite having noted the said error.

The Appellant is thus seeking the following orders:

- a. The Orders made on the 19<sup>th</sup> July, 2002 dismissing the Appellant's Application dated the 13<sup>th</sup> May, 2002 be set aside and the said application be allowed as prayed.
- b. Costs of this Appeal be awarded to the Appellant.

### **The Facts and Evidence**

This appeal is from a ruling delivered by the trial Court on the Appellant's application filed by way of a Notice of Motion dated 13<sup>th</sup> May 2002. The Appellant in the said application sought orders that pending the hearing and determination of the application, a temporary stay of execution be granted of the decree made on 28<sup>th</sup> June 1999, which was made pursuant to an Elders award which was adopted as a judgment/decreed of the court. Further, that the trial court reviews, varies and/or set aside the decree made on the 28<sup>th</sup> June 1999 and issued on the 23<sup>rd</sup> February 2001 and all consequential orders made thereafter, and in particular the effects of cancellation, subdivision and registration of the Respondents as owners of the parcel of land known as L.R Limuru/Kamirithu/851 measuring 4.25 acres.

The grounds for the said application were that the Appellant stood to suffer irreparable loss in the event of execution, as he has always been in occupation of the said land and has made substantial development thereon, and that the Respondents do not utilise and/or reside on the said land and will therefore suffer no prejudice if the orders are granted. Further, that the panel of elders had no jurisdiction to hear and determine a dispute concerning a parcel of land registered under the provisions of the repealed Registered Land Act, and that both the panel of elders and the trial court lacked the requisite jurisdiction to entertain a claim based on a declaration of trust. The application was supported by an affidavit sworn on 13<sup>th</sup> May 2002 by the Appellant.

The Respondents filed Grounds of Opposition to the said application dated 17<sup>th</sup> June 2002, wherein it was stated that the matter herein was heard by arbitration and the award given on 23<sup>rd</sup> April 1999 and filed in the trial court on 19<sup>th</sup> May 1999. Further, that the trial court is the one that ordered the arbitration, which therefore fell within Order 45 of the then Civil Procedure Rules. The application was also opposed on the ground that if the Appellant was aggrieved by the decision of the lower court, the proper procedure would have been to set aside the award as clearly laid down in law; that the trial court was within its jurisdiction to determine the matter; and that the delay in bringing the application was unreasonable.

The said application was heard by the trial court on 20<sup>th</sup> June 2002, and the Appellant's Advocate submitted that the elders in the Kiambu District Land Disputes Tribunal had no jurisdiction to make the orders as to the existence of a trust, and as to cancellation of the title deed to the suit property. Further, that the issues before the Court including the claims of fraud were beyond the jurisdiction of the Tribunal. The Advocate submitted that the delay in bringing the application was caused by pending appeals in the Provincial Appeals Tribunal and in the High Court, and that the ruling in the appeal in the High Court resulting in the application was given in April 2002.

The Respondents' Advocate on his part submitted that section 2 of the repealed Land Disputes Tribunal Act defined land to include land registered under the repealed Registered Land Act. Further, that the Tribunal did not make any determinations on trust and/or fraud and only made recommendations to the Court in this regard to adopt. The Advocate also cited two decisions namely **Francis Munene Paul Muthuita vs Mila Wanoe w/o Paul Muthuita & 2 Others (1982-1988) 1 KAR 42** and **Nakabugo vs The Attorney General of Uganda (1967) E.A 60** to argue that the trial Magistrate had jurisdiction to declare a trust within her pecuniary jurisdiction, and that it was the Order 45 of the then Civil Procedure Rules that was applicable and not the Order 44 because the trial court had ordered the matter to go to arbitration. Lastly, it was also submitted for the Respondents that the delay of over one year in bringing the application was unreasonable.

The trial magistrate delivered her ruling on 19<sup>th</sup> July 2002, and declined to grant the prayers in the application, which was dismissed with costs. The reason given by the trial magistrate for this decision was that under section 159 read together with section 126 of the repealed Registered Land Act, subordinate courts had no jurisdiction to declare trusts. Further, that the trial court therefore lacked

jurisdiction to determine the issues raised in the application which could only be determined by way of appeal, as the court could not determine issues arising from a matter over which it had no jurisdiction.

### **The Issues and Determination**

Upon examination of the pleadings filed by the Appellant and Respondents in PMCCC No. 10477 of 1994, and the submissions given by the parties on the Appellant's application in the trial Court dated 13<sup>th</sup> May, 2002, I find that there are two main issues that required determination. The first is whether the trial magistrate had jurisdiction to entertain the application dated 13<sup>th</sup> May, 2002. Secondly, if so, whether the decree made on 28<sup>th</sup> June 1999 and issued on 23<sup>rd</sup> February 2001 and all consequential orders made thereafter are amenable to review, varying and/or setting aside.

The parties filed and exchanged submissions on the present appeal which they relied on. The Appellant's Advocate filed submissions dated 8<sup>th</sup> October 2014 while the Respondents' Advocates filed submissions dated 5<sup>th</sup> November 2014. On the first issue as to whether the trial magistrate had jurisdiction to entertain the application dated 13<sup>th</sup> May, 2002 the Appellant submitted that the trial Court fell into error on 21<sup>st</sup> January, 1999 by referring the dispute to the Panel of Elders, and all the subsequent proceedings, awards, decree and orders were all a nullity, since the Elders had no jurisdiction whatsoever to deal with the registered land.

It was further submitted that the trial Magistrate having been in error by referring the dispute before the Court to the Panel of Elders who had no requisite jurisdiction, it was incumbent upon the same Court to undo the error as pointed out by the Judge of the High Court in Civil Appeal No. 491 of 1999, and it was thereof erroneous for the trial Magistrate to claim that she had no jurisdiction to grant the orders sought in the application. Further, that it will be a travesty of justice to allow the illegality herein to be perpetuated, and hence the need to allow the appeal herein so as to correct the anomaly.

The Respondents on the other hand submitted that Section 8 (1) of the repealed Land Disputes Tribunal Act provided that any party to a dispute who was aggrieved by the decision of the Tribunal was within thirty days of the decision required to appeal to the Appeals Committee constituted for the Province in which the subject matter of the dispute was situated. Further, that the Appellant satisfied this requirement by appealing to the Provincial Land Dispute Appeals Tribunal after a finding had been made by the Kiambu District Lands Disputes Tribunal. In addition, that section 8(8) and (9) of the repealed Land Disputes Tribunal Act further provided that the decision of the Appeals Committee was to be final on issues of fact, and an appeal could only be made to the High Court on points of law only.

Therefore that the trial magistrate could only adopt the judgment of the Tribunal to enable the parties to pursue a further appeal with the High Court on a matter of law and not fact, and was thus correct in finding that she had no jurisdiction to review, vary and or set aside the finding of the Kiambu District Land Disputes Tribunal, which finding was upheld by the Provincial Land Disputes Appeals Tribunal.

This Court has considered the arguments made on this issue, and notes that the power of courts to review orders including varying or setting them aside is found in the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. These provisions avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. It is important to reproduce the provisions of section 80 of the Civil Procedure Act for a full appreciation of the jurisdiction of review given to courts. The said section reads as follows:

**“80. Any person who considers himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is allowed by this Act,**

**may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

In the present appeal, the Appellant was seeking a review of the order that was made on the 28<sup>th</sup> June 1999 and issued on the 23<sup>rd</sup> February 2001 by the trial Court adopting the award of the Kiambu Land Disputes Tribunal. The said order having been made by the trial court, and no appeal having been filed therefrom, was therefore one which fell within the ambit of section 80 of the Civil Procedure Act. The section clearly provides that before an appeal is preferred from an order, the Court that grants an order has the power to review it.

It must be pointed out that the intervention that was being sought of the trial court by the Appellants application of dated 13<sup>th</sup> May, 2002 was of review and it has been shown that the trial court had jurisdiction to undertake such a review., It is therefore the finding of this Court that the trial magistrate erred by holding that she had no such jurisdiction of review when it existed, and by finding that the application of 13<sup>th</sup> May, 2002 was a continuation of the determination of the dispute before the trial court in her finding that the matter ought to go to appeal. All that was required of the trial court was to reopen its decision made on 28<sup>th</sup> June 1999 as it were, and which it was allowed by the law to do.

On the second issue as to whether the decree made on 28<sup>th</sup> June 1999 and issued on 23<sup>rd</sup> February 2001 and all consequential orders made thereafter are therefore amenable to review, varying or setting aside, the Appellant submitted that it is trite law that jurisdiction is everything, and no Court or Tribunal can confer jurisdiction upon itself where none exists. Further, that any act done by a Court or Tribunal which has no jurisdiction is a nullity *ab initio*, and any orders and remedies awarded therein, and all consequential orders and actions flowing there from are a nullity. The Appellant relied on the decisions made in **Desai vs Warsama (1967) E.A 351**, **Allarakhia vs Aga Khan, (1969) EA 613** and **Wamalwa Wekesa vs Patrick Muchwenge, Kisumu Civil Appeal No 107 of 1985**.

The Appellant reiterated that the panel of Elders who purported to deal with the issue of registered land, and in effect ordered the subdivision of the same, acted without jurisdiction. Further, that the trial Magistrate fell into error by perpetuating the illegality created by the Court while referring the matter for determination by the Elders, well aware that the Panel of Elders had no jurisdiction *ab initio*, and as everything they did was a nullity, the adoption of their award by the Court was also a nullity.

The Respondents on their part argued that a reading of section 159 with section 126 of the repealed Registered Land Act reveals that 3 courts had jurisdiction relating to land registered under the said Act, which were the High Court, the Senior Resident Magistrate’s Court, and the Land Disputes Tribunals. Further, that the Land Disputes Tribunals had jurisdiction in accordance with section 3 (7) of the repealed Land Disputes Tribunal Act to deal with the question of customary trust, since the section provided that the Tribunal were to adjudicate upon the claim before them and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute.

Order 45 Rule 1 (b) of the Civil Procedure Rules and the then Order XLIV Rule 1 of the Civil Procedure Rules, spells out the conditions that must be met for a decree or an order to be reviewed as follows:

- i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made.
- ii. Mistake or error apparent on the face of the record.
- iii. Any other sufficient reason.
- iv. The application must be made without unreasonable delay.

It was argued by the Appellant that the issue of lack of jurisdiction of the Kiambu Land Dispute Tribunal was a mistake and error apparent on the face of the record. Section 159 of the repealed Registered Land Act provided as follows with regards to jurisdiction of courts in relation to disputes involving land registered under the Act:

**“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.”**

Section 3(1) of the repealed Land Disputes Tribunal Act limited the jurisdiction of Tribunals established under the Act as follows:

**“Subject to this Act, all cases 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.”**

It must be noted that contrary to the position advanced by the Respondents, the application of customary law under section 3(7) of the repealed Act was limited to claims brought in relation to the above mentioned disputes only and was not open ended.

It is not contested that the dispute in PMCCC No. 10477 of 1994 involved property that was registered under the repealed Registered Land Act, and that the Respondents sought a declaration therein that the said property was held in trust for them and a resultant sub-division of the same in their favour. This was a dispute that was clearly not specifically provided for under section 3(1) of the Land Disputes Tribunals Act to be heard by the said Tribunals, and as it involved title to the suit property it could only be heard either by the High Court or Senior Resident Magistrates Court. It is thus the finding of this Court that the referral of the dispute by the trial court to the Kiambu Land Disputes Tribunal, and the adoption of the resultant award of the Tribunal were clear errors on the record of the trial court, and also provide sufficient reason to set aside the said orders.

This Court for the above reasons in addition finds that the trial magistrate erred in her finding that that under section 159 read together with section 126 of the repealed Registered Land Act subordinate courts had no jurisdiction to declare trusts, and that the trial court lacked jurisdiction to determine the issues raised in the application.

This Court accordingly allows the Appellant’s appeal and sets aside the decree made on the 28<sup>th</sup> June 1999 and issued on the 23<sup>rd</sup> February 2001 in **Nairobi PMCCC No. 10477 of 1994 - Peter Kin Kimani Ngera & 3 Others vs Robert Gitau Kimani**, and all the consequential orders made thereafter, and in particular the cancellation of the Appellant’s title to, subdivision of, and registration of the Respondents as owners of the parcel of land known as L.R Limuru/Kamirithu/851 measuring 4.25 acres.

Further, as the original dispute before the parties therefore as a result still remains unresolved, it is hereby further ordered pursuant to the provisions of sections 3A, 17 and 18 of the Civil Procedure Act and section 13 of the Environment and Land Court Act that the suit in **Nairobi PMCCC No. 10477 of 1994 - Peter Kin Kimani Ngera & 3 Others vs Robert Gitau Kimani** be transferred to the Nairobi Environment and Land Court for priority hearing and determination, and to be given a new Environment and Land Court suit number.

Lastly, as the appeal involves close members of the same family, each party shall bear their own costs of the appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MARCH 2015.**

**P. NYAMWEYA**

**JUDGE**