



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI

ELCA NO.17 OF 2014

FRANCIS KIMANI KIRIMIRA.....APPELLANT

VERSUS

CHEGE MACHARIA.....RESPONDENT

JUDGMENT

Introduction

1. This appeal relates to the decision of Hon. A.N Oganda RM in Kigumo Principal Magistrate's Court (PMC) Land Case No. 20 of 2008. In that case, the respondent moved the court under **Order 51** of the Civil Procedure Rules praying that judgment be entered in his favour in terms of an award of the Kigumo Land Disputes Tribunal filed therewith.

2. The appellant opposed the application filed at the lower court on grounds that it was incompetent and an abuse of the court process; that the award could only be entered as a judgment under **Section 7(2)** of the Land Disputes Tribunal's Act, No.18 of 1990 (repealed); that parcel No.Loc.2/Kangari/10 (hereinafter the suit property) was subject of Kigumo PMC's Succession Cause No.184 of 1991 and that being the case, any interested party should have filed any application for revocation of the grant or applied for review of the confirmation of the grant obtained in the succession cause. Further, that the Tribunal had no jurisdiction to handle a claim involving title to land; that the Tribunal's award was subject of an appeal in the Provincial Appeal's Tribunal. The appellant also contended that the suit property had been subdivided and allocated to persons who were not parties to the dispute at the Tribunal and that since some of the beneficiaries of the property were not parties to the suit, they were condemned unheard.

3. Upon considering the issues raised before him, the learned Magistrate dismissed the objection by the respondent (now appellant) on the grounds that the award was filed when the Land Disputes Act was still in force; that since the pending appeal had been rendered nugatory by operation of the law, the court had jurisdiction to enter judgment in terms of the award of the defunct Land Disputes Tribunal which had been read to the parties and that under the Land Disputes Tribunal's Act, the adopting court had no mandate to decide the legality or otherwise of the award. Further that the respondent (now appellant) could not rely on the appeal he filed and failed to prosecute it to frustrate the plaintiff (now respondent) from enjoying the fruits of his judgment.

4. With regard to the respondent's contention that other parties were condemned unheard, the trial Magistrate held that the said assertion was baseless as it was not supported by any evidence.

5. Aggrieved by the decision of the lower court, the respondent (now appellant) filed this appeal on

grounds that the learned trial Magistrate failed to rule that the application was incompetent having been brought under the wrong provisions of the law; that the trial Magistrate erred in law and fact by invoking an administrative order when there was no provision in the Civil Procedure Rules allowing him to do so and that the trial Magistrate failed to peruse the award and as a result entered judgment which is incapable of being implemented.

6. The appellant contends that the property which was the subject of the award and the judgment of the lower court, was none existent. The trial magistrate is faulted for having failed to hold that the suit property had already been sub-divided and the new titles issued incapable of being cancelled through the application or award of the Tribunal. The trial magistrate is also faulted for having failed to accept that an appeal had been filed in the Provincial Land Disputes Appeals Tribunal and for having failed to order for maintenance of status quo which obtained pending the hearing and determination of the appeal and that the trial magistrate invested himself with jurisdiction to hear the application when he had none.

7. The appeal was disposed of by way of written submissions.

Submissions for the Appellant

8. In the submissions filed on behalf of the appellant, it is submitted that despite the trial Magistrate having been addressed on the competency of the application filed before him, he failed to address that issue in his ruling rendering the ruling incomplete. By failing to make a finding on the competency or otherwise of the impugned application, the trial Magistrate is said to have impliedly admitted that the application was incompetent.

9. It is reiterated that the trial Magistrate had no power under the Civil Procedure Rules to entertain the application brought before him. The trial Magistrate is faulted for having relied on an administrative order to get seized of the application. It is reiterated that the suit property had been dealt with through the Succession cause herein and sub-divided and that the only way the property could be dealt with, is through an application for revocation of the grant through which the property was administered. Counsel for the appellant argues that through the succession cause herein, the suit property was sub-divided and allocated to beneficiaries hence was incapable of forming the basis of the judgment of the lower court.

10. The trial Magistrate is also faulted for having failed to hold that the Provincial Land Disputes Appeals Tribunal, had given the parties an order for maintenance of status quo, pending the hearing and determination of the appeal. The trial Magistrate is also said to have failed to advise the parties on the course to take in respect of the pending appeal.

11. As the statute which vested the trial Magistrate with jurisdiction to enter judgment in accordance with the award of the Tribunal had been repealed, it is submitted that the trial Magistrate had no jurisdiction to hear and determine the application brought before him.

Submissions for the Respondent

12. On behalf of the respondent, it is pointed out that the award which is the subject of this appeal was given before the Environment and Land Court Act, which repealed the Land Disputes Tribunals Act, was enacted. The appellant is faulted for having failed to challenge the award by way of judicial review or in any other form.

13. It is explained that after the Provincial Land Disputes Appeals Tribunals were abolished by the Land and Environment Court Act, 2011, the respondent was left with no option but to apply for entry of judgment as per the award of the Tribunal.

14. It is submitted that the adopting court had no jurisdiction to look at the legality of the award. Its mandate is said to have been limited to entering the judgment as per the award of the Tribunal and the execution of the judgment.

15. Reference is made to the directions issued by the Chief Justice under the Land and Environment Court Act and submitted that the trial Magistrate had power to try the matter and enter judgment in terms of the award of the tribunal.

16. Concerning the appeal filed at the Provincial Appeals Tribunal, it is submitted that the appeal was rendered nugatory by the repeal of the Land Disputes Tribunal Act. The appellant is faulted for not having been vigilant in prosecution of the appeal and as such unworthy of an equitable remedy.

17. The appeal is also said to be incompetent for being based on the ruling of the lower court as opposed to the award.

18. With regard to the contention that the respondent should have applied for revocation of the grant issued in the succession herein, it is submitted that that contention, has no basis because the respondent's claim is not against the appellant's deceased father.

Analysis and determination

19. It is not in dispute that the lower court was seized of an award from the Kigumo Land Disputes Tribunal. It is also noted that the award had been appealed from the District Land Dispute Tribunal to the Provincial Appeals Tribunal in accordance with the Land Disputes Tribunals Act.

20. Before the appeal preferred at the Provincial Land Disputes Appeals Tribunal was heard and determined, the Law changed in that the statute under which the Appeals Tribunals were hinged was repealed. The repealing statute, the Land and Environment Court Act, 2011 at **Section 30**, donated power to the Chief Justice to make practice directions on how matters pending in courts and tribunals would be handled.

21. Pursuant to the power donated to the Chief justice under the aforementioned section of the law, the Chief Justice issued several practice directions culminating with practice direction issued on 17th July, 2014 vide Gazette Notice No.5178 which in the relevant parts provide as follows:-

“6. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. All proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to heard and determined by the same courts.

13. Appeals from the Magistrates Courts and Tribunals in the foregoing paragraphs 6 to 12 shall lie in the Environment and Land Court pursuant to section 13 (4) of the Environment and Land Court Act.”

22. It will be seen from the above practice directions, which at the time of this judgment are the prevailing practice directions, provide for matters touching on Environment and Land, pending before or transferred to the Magistrates Courts to continue to be heard and determined in those courts so long as the courts have the requisite pecuniary jurisdiction.

23. The subject herein is a suit that was pending before the Provincial Land Disputes Appeals Tribunal or which subject to its monetary value, ought to have been transferred to the Magistrates Courts from the defunct Provincial Land Disputes Tribunal when the Environment and Land Court Act, and the Environment and Land Court, came into operation.

24. Whilst the Environment and Land Court Act provides for transfer of cases pending under the repealed Land Disputes Tribunals Act to the Magistrate's court or the Environment and Land Court, it does not provide for the procedure of doing so.

25. In this appeal, the respondent moved the Magistrate court under **Order 51** of the Civil Procedure Rules for entry of judgment in terms of award of the Kigumo Land Disputes tribunal dated 3rd October, 2008. The procedure used by the respondent is challenged on the ground that it had no basis in law. It is the appellant's case that the award which the respondent sought to be admitted could only have been entered as a judgment of the lower court under **Section 7(2)** of the Land Disputes Tribunal's Act which has since been repealed by the Environment & Land Court Act.

26. Having read the Environment and Land Court Act, I agree with the appellant that it does not contemplate a situation where the awards entered by the defunct Land Disputes Tribunals, which had not been entered as judgment of the lower courts, would be entered as such. In this regard **Section 30** of the Environment and Land Court Act as read with practice direction 6 (*supra*), give the jurisdiction of the Magistrate courts as to hear and determine the cases transferred thereto. Nowhere does the new law allow for entry of judgment entered by the tribunal but not adopted as the judgment of the court, to be entered as the judgment of the court to which the case, whether pending or concluded, be entered as the judgment of the court to which the cases are transferred. The obligation imposed on the court to which the cases are transferred, is to hear and determine the cases, a completely different regime to that which obtained under **Section 7(2)** of the repealed Land Disputes Tribunal's Act.

27. In the circumstances of this appeal, since there was a pending appeal, a reading of **Section 30** of the Environment & Land Court Act together with the aforementioned practice directions, reveals that the right procedure would have been to transfer the appeal pending at the Provincial Land Disputes Tribunal to the court with jurisdiction for purposes of hearing and determination. The court to which the case would be transferred would not be seized of the dispute as an appellate court but a court of first instance. This is so because, under the Act (Environment & Land Court Act) appeals from the lower court and the tribunals which were not repealed, lie with the Environment & Land Court in its status as a High Court.

28. The above determination settles the question as to whether the right procedure was used to approach the lower court. It also settles the question of the lower court's jurisdiction to enter judgment in favour of the respondent in accordance with the decision of the award of the Tribunal.

29. The foregoing determination renders the other issues raised in this appeal nugatory. Consequently the appeal has merit and is allowed as prayed.

Dated, Signed and Delivered at Nyeri this 22nd day of April, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Karweru holding brief for Mr. T.M. Njoroge for the respondent

Francis Kimani Kirimira - Appellant

Lydia - Court Assistant