



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC APPEAL NO. 71 OF 2014

PAUL MURAYA KAGURI APPELLANT

VERSUS

SIMON MBARIA MUCHUNU RESPONDENT

JUDGMENT

Introduction

1. This appeal is in respect of the ruling and order of **A Too** RM, delivered on 15th August, 2012 in Kangema PMC's Land Dispute case No.29 of 2007. In that ruling, the trial magistrate (hereinafter TM) dismissed the appellant's application dated 16th July, 2012 in which the appellant prayed that the orders/decree of the lower court dated 14th December, 2007 and 11th April, 2012 and any subsequent orders be reviewed, set aside and vacated. The appellant also sought stay of execution of those orders and any subsequent orders pending the hearing and determination of the application or further orders of the court.

2. In dismissing the application the TM observed:-

"...I note that even though the land in question was obtained by the original defendant by virtue of inheritance, this court has already adopted the tribunal award and thus lacks jurisdiction to hear and determine any further issues that may arise. It is also worth noting that now there is an Environment and Land Court with exclusive jurisdiction to hear and determine disputes on land. The only other recourse left is to appeal to the above mentioned."

3. Aggrieved by the aforementioned decision of the lower court, the appellant brought the current appeal on the grounds that the learned TM erred by:-

1. fettering her discretion;
2. failing to find that the execution was illegal and premature;
3. dwelling on the merits of the suit and failing to address herself to fundamental issues raised in the application thereby misdirecting herself;
4. failing to resolve the issue whether the deceased was given a hearing before being condemned.
5. failing to resolve the issue whether the rules of natural justice were complied with;
6. failing to find that there was an error on the face of the record;
7. failing to find that the deceased defendant had no capacity to be sued or judgment entered while he was dead;

8. failing to find that the orders issued cannot bind the appellant;
9. arriving at a decision against the weight of the evidence and all the surrounding circumstances;
10. arriving at a decision that was not in compliance with the Civil Procedure Rules.

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

5. On behalf of the appellant, it is submitted that the TM ran into error by declining jurisdiction to review or set aside the orders she had issued concerning the award of Kangema Land Disputes Tribunal. In this regard, it is submitted that immediately an award comes before a Magistrate's court, the court has jurisdiction over any further court proceedings and that such proceedings are guided by the Civil Procedure Act and Rules and that any party aggrieved while the matter is before the Magistrate's court has a right to invoke the Civil Procedure Rules for redress. In this regard reference is made to **Section 1(2)** of the Civil Procedure Act which provides as follows:-

“This Act applies to proceedings in the High Court and, subject to the Magistrate's Court Act (Cap 10) to proceedings in sub-ordinate courts.”

6. It is submitted that **Section 15** of the Magistrate's Court Act Chapter 10 Laws of Kenya, applies Rules of Civil Procedure as provided by the Civil Procedure Act and the Rules made there under.

7. Based on the provisions of **Section 80** of the Civil Procedure Act which allows any party aggrieved by a decree or order from which an appeal is allowed by the Act, but from which no appeal has been preferred, or by a decree or order from which no appeal is allowed by the Act, to 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; it is submitted that the TM erred by holding that she had no jurisdiction to entertain an application for review when there were clear and merited grounds for review.

8. Pointing out that the TM had entertained and allowed an application for substitution and provision of security, counsel for the appellant asserts that the TM had jurisdiction to review her order adopting the award of the Kangema Land Disputes Tribunal on the ground that it was read and the judgment and decree in respect thereof issued, while one of the parties had passed on and had not been substituted as by law required.

9. On behalf of the respondent, reference is made to **Section 7** of the Land Disputes Tribunals Act (now repealed) and submitted that the Section gave no option for the TM to do anything else other than to merely adopt the award placed before her.

10. It is submitted that the TM lacked jurisdiction to consider any other issues and that her role was purely to adopt the award. It is contended that if the appellant was aggrieved by the award of the Land Disputes Tribunal, his recourse was to lodge an appeal to the Provincial Appeals Tribunal or to the High Court.

11. On the authority of **Zedekiah M. Mwale v. Bikeke Farm Directors & Another**, Kitale High Court Civil Appeal No.25 of 1998 and **Harrison Ndungu Kungu v. Nakuru Chief Magistrate's Court & Another Nakuru High Court Misc. Application No.47 of 2007** it is asserted that the TM did not have power and/or discretion to:-

- a. Set aside the award;
- b. Find that the execution was illegal and premature;
- c. Address any issues raised in the application;
- d. Make any other or further findings and/or orders and
- e. Evaluate evidence.

12. In the case of **Zedekiah M. Mwale v. Bikeke Farm Directors & another** (*supra*) it was held:-

“The duty of the sub-ordinate court is a purely functional one. The magistrate's duty is merely to

adopt the award as it is and enter it as judgment of the court. Whichever party is aggrieved can pursue an appeal as provided under Section 8(2) of the Land Disputes Tribunals Act.

Very simply and tacitly put the magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a tribunal's award filed in court. Section 7(2) only compels the magistrate to adopt it. It matters not how repugnant or unjust the magistrate may deem the award to be. He/she has no jurisdiction to interfere with it! In my view therefore, there is no lacuna here. The law is explicit. Where the law is explicit, even the superior court cannot interfere and purport to make the law. The law on this issue is very clear. The learned trial magistrate interpreted the same very aptly and correctly. She arrived at the right decision in dismissing the application for review. She was right in saying she had no jurisdiction to interfere with the Tribunal's award. The appellant's only option was to go on appeal as provided for under Section 8(1) of the Land disputes Tribunals Act or to come to the superior court by way of Judicial Review if he thought that the decision of the Tribunal was illegal or arrived at in excess of jurisdiction on the part of the panel of Elders. Having failed to pursue any of those options that were open to him, the appellant cannot now come to this court and ask that a third avenue be created for him where none exists."

13. In the case of Harrison Ndungu Kungu v. Nakuru Chief Magistrate's Court & Another (*supra*) it was similarly held:-

"As provided by Section 7(2) the magistrate is bound to adopt the award presented to him by the chairman of the tribunal. The subordinate court cannot make inquiries to establish whether or not the said award was arrived at after the provisions of the Land Disputes Tribunal Act were complied with. The court will also not question the composition of the tribunal neither will it make inquiries to establish whether or not rules of natural justice were followed when the said award was arrived at. The sub-ordinate court's role as it were is procedural and clerical in nature. The said court is legally bound to adopt an award of the tribunal and enter judgment in accordance with the said award without making any inquiry as to the legality or otherwise of the said award. When so acting, the sub-ordinate court is not conducting proceedings in a legal sense where parties to the award are required to be heard. Rules of natural justice cannot therefore be said to be breached when a magistrate is adopting an award made by the Land Disputes tribunal.....As the matters stand now, this court lacks jurisdiction to consider whether the decision arrived at by the Bahati Land Disputes Tribunal was legally arrived at or not. This is due to the fact that the avenue for the applicant to make an appropriate application for Judicial Review was closed when six months expired from the date the said decision was made, Much as this court may sympathise with the legitimate complaints raised by the applicant, this court lacks jurisdiction to consider the same as the said complaints have been raised in the wrong forum. In my considered view, the applicant was trying to impeach the decision of the Bahati Land Tribunal by challenging it at the stage when the interested party sought to have adopted by the sub-ordinate court. Unfortunately for the applicant, by that time, he was attempting to close the doors of the stable after the horse had already bolted."

Analysis and determination

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 judgment 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 judgment. 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 the 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 now 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.

18. In the circumstances of this case, despite the issues raised being germane, this court cannot fault the decision of the lower court because it is sound in law. The TM's duty under the law was merely to adopt the award of the Land Disputes Tribunal; she had no mandate to enquire into the legality or otherwise of the judgment.

19. The upshot of the foregoing is that the appeal has no merit and is dismissed with costs to the respondent.

Dated, signed and delivered at Nyeri this 22nd day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Macharia Waweru for the appellant

Susan Njeri Muchunu (Sister) on behalf of respondent

Court clerk - Lydia