



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC MISC. APPL. 15 OF 2015

THOMAS MUTHEE

APPELLANTS

MICHAEL NGARI APPELLANTS

-VERSUS-

NYAGUTHII KAGUTHU.....RESPONDENT

RULING

Introduction

1. The appellants herein lodged a claim before the Mathira Land Dispute Tribunal claiming a share of the parcel of land known as Konyu/Ichuga/699 which was at the material time registered in the name of the respondent.
2. Upon hearing the case presented before it, the tribunal held:-

“The land Konyu/Ichuga/699 belongs to the objector, Nyaguthii Kaguthu who is the registered owner.....Each party to pay its own cost.”
3. Aggrieved by the decision of the Tribunal, the appellants preferred an appeal to the Nyeri Provincial Appeals Committee. Before the appeal was heard and determined, the Tribunals established under the Land Dispute Tribunals Act were disbanded.
4. Desirous of having the appeal preferred at the defunct Land Disputes Appeals Committee heard and determined, the appellants have moved this court under **Section 1A** and **3A** of the Civil Procedure Act vide the notice of motion dated **29th May, 2015** praying that the appeal be transferred to this court for hearing and determination.
5. The application is premised on the ground that the Provincial Appeals Tribunal having been disbanded, it is only this court which has jurisdiction to hear and determine the appeal.
6. Even though served with the application, as attested by the affidavit of service of the process server, James Mwangi, the respondent did not file any response to the application.

Analysis and determination

7. The application herein raises a simple question to wit, whether or not the appeal preferred to the defunct provincial appeals tribunal should be transferred to this court for hearing and determination. The issue of how courts should handle appeals pending in the defunct Provincial Land Dispute Appeals Committees has been considered in numerous cases as demonstrated hereunder.

8. In the case of Dominic Njagi Karong'o v. Mathi Kairaria M'ranu (2014) e KLR P.M Njoroge J., stated:-

“1. Section 8 of the Land Dispute Tribunals Act deals with Appeals to the Appeals Committee and to the High Court.

1. Section 8(8) states:

“The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.”

3. Section 8(9) States:

“Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of Law within sixty days from the date of the decision complained:

Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary Law) is involved.”

4. Section 8 (10) states:

“A question of Customary Law shall for all purposes under this Act be deemed to be a question of fact”

2. It is clear that this court can only take appeals from the defunct Provincial Appeals Committees on issues of law alone. Where the Provincial Appeals Committees had not concluded Appeals from District Tribunals, such matters involve both issues of fact and law.

3. Jurisdiction as stated in the case of “The MV SS Lilian” [1989] KLR 1 is everything. I quote the Hon. Justice Nyarangi, J., as opining. “Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

4. The Supreme Court, in application No. 2 of 2011, Samuel Kamau Macharia & Another Vs Kenya Commercial Bank, at paragraph 68 eruditely and laconically stated:

“A Court's Jurisdiction follows from either the Constitution or Legislation or both. Thus, a Court of Law can only exercise Jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by law.”

5. The ELC hears appeals from concluded appeals of Provincial Appeals Committees on issues of law only. Unconcluded appeals spawn both issues of fact and law. Furthermore, section 8 (9) of the defunct Land Disputes Tribunal Act makes it clear that appeals from Provincial Appeals Committees are against decisions of the Appeals Committee. Obviously, this provision does not countenance hearing matters in which decisions have not been made.

6. In the circumstances, I find that the ELC has no jurisdiction to hear appeals which had not been concluded by the defunct Provincial Appeals Committees. Such cases should not be referred to this court. I reiterate that this court cannot arrogate unto itself jurisdiction which

has not been anchored upon constitutional or statutory provisions.

7. This court has jurisdiction to hear appeals against decisions in matters which had been concluded by the defunct Provincial Appeals Committees before they were abolished...” (Emphasis supplied).

9. In the case of **Munga Mbodi Mwenda v Muguza Jangwata Jindwa & another**

[2014] eKLR Angote J., had a slightly different view over the matter. He held thus:-

“Upon the repeal of the Act, all the appeals which were pending before the Appeals Committee should be transferred to the Environment and Land Court and dealt with in that court in its appellate jurisdiction. In situations where fresh matters are filed in this court, if a party shows that the same issues had been dealt with and decided by the Land Disputes Tribunal and the subordinate court, then this court can only deal with those issues as an appellate court and not otherwise.”

10. Obaga J., in the case of **Annah Kwamboka Ogaro v. Nakuru Provincial Land Disputes Appeals Committee (2013) e KLR** had his own view of the matter. He stated:-

“Once the Land Disputes Tribunal Act of 1990 was repealed, the Tribunals established under the Act were supposed to administratively forward all pending proceedings before them to the respective Subordinate Courts within their jurisdictions. Once the proceedings are before the Subordinate Courts, it was then the duty of the Subordinate Courts to give directions on the best way to dispose of the matters. This is why the Chief Justice issued the practice directions contained in Gazette Notice No. 16268 of 09/11/2012 in anticipation that all the proceedings of the defunct tribunals would have been returned to the respective Subordinate Courts. It is not difficult for the defunct tribunals to send the files pending before them to the Subordinate Courts. Any appeal to the Provincial Land Disputes Appeals Committee must have passed through a particular Subordinate Court where the Land Disputes Tribunal verdict was adopted as judgment pursuant to Section 7(2) of the Land Disputes Tribunal Act. It will therefore not be a big task for the officials in those offices to sort out the pending files and forward them to the respective Courts.”

11. In the case of **Francis Kimani Kirimira v. Chege Macharia (2015) e KLR** this court observed:-

“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.

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.”

12. It is clear from the foregoing decisions of the various judges of the Environment and Land Court, that the law is not settled on how courts should handle appeals that were pending at the defunct Provincial Land Disputes Committees. While some judges hold the view that those appeals should be transferred to the lower court's subject to their pecuniary jurisdiction and heard afresh, other judges, Like Angote J., are of the view that the Appeals should be transferred to this court in exercise of its Appellate jurisdiction. The position taken by Njoroge J., about the matter is that if the appeal raises both a question of law and fact this court has no jurisdiction to hear and determine the matter.

13. Concerning the decision of this court in Francis Kimani Kirimira v. Chege Macharia (*supra*), which was appealed from, the Court of Appeal stated:-

“With respect, the learned judge misdirected herself on the question. The latter part of Clause 6 of the practice direction is a repetition of Clause 7 and relates to matters transferred from the Tribunals and which were to be heard and determined by Magistrates’ Courts.

It seems clear to us that the direction had in mind those cases that were pending before the Tribunals but which, by reason of the demise of the Tribunals, had to continue before a different forum, in this case the Magistrates’ courts. It is noteworthy that the pecuniary jurisdiction, which applies to other cases pending or record filed before the Magistrates’ courts, did not apply to the matters transferred from the defunct tribunals. They were all, without exception, to be heard and determined by the Magistrates’ Courts.

There appears to us to be no indication express or implied, that cases already determined before the Tribunal and awards issued, but yet to be adopted by the Magistrates’ Courts, were to be re-heard by those courts. Once the tribunal heard a dispute and made adetermination, that was the end of the matter on the merits and all that remained was adoption by the Magistrates’ Court. That much is clear from a plain reading of Section 7(2) of the repealed Act. It has also been the subject of many judicial pronouncements to the effect that a magistrate is under a statutory compulsion to enter judgment in terms of the award once he receives it from the chairman of the tribunal. It not being open to him to alter, amend, question or set it aside, See, MUTEMI MWASYA –VS- MUTUA KASUVA MACHOKOS HC.C.A. 140 of 2001; CHRISPUS MICHI GAKU –VS- KARANJA WAINAINA [2006] e KLR and PETER OUMA MITAI –VS- JOHN NYARARA KISII HCCCA 297 of 2005. So long as the court was satisfied that an award was on the face of it issued by a proper Tribunal and not a nullity, it was under duty to adopt it.

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. Moreover, the effect of the repealing of a written law on proceedings, is provided for under the Interpretation and General Provisions Act, Cap 2, at Section 23 as follows;

“(3) where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, penalty, forfeiture, or punishment aforesaid, and any such investigation, legal

proceeding or remedy may be instituted, construed or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

With that general provision in mind, we come to the conclusion that the learned Magistrate acted correctly in entering judgment in accordance with the award. The award had been filed by the Chairman of the Tribunal properly under Section 7 of the repealed Act....The final observation we would make in this appeal is that neither before the learned Judge nor before us did the respondent contend that on the merits the determination of the Tribunal was unfair or prejudicial. He was content to attempt to raise procedural niceties which cannot avail him much in the face of an eminently just and well considered award...”

14. In the circumstances of this case, the applicant had preferred an appeal before the defunct Land disputes Appeals Tribunal. Before the appeal was heard and determined, the appeals tribunals were disbanded, through repeal of the statute that established them.

15. What recourse does the applicant have in such circumstances? The decision of the Court of Appeal in the cases of **Chege Macharia v. Francis Kimani Kirimira (2015)eKLR** supra suggests that the only option available is for the applicant to move the lower court for adoption of the award, and thereafter file an appeal to this Court against the judgment of the lower court, if need be. The foregoing notwithstanding, given the special circumstances of this case, where it is the appellant who has moved this court and noting that the repealed law does not require that there be a judgment of the lower court before a matter can lie to this court, on a matter of law; and bearing in mind that the appeal lodged at the defunct Land Disputes Appeals Tribunal raises a pure question of law to wit, whether the repealed Land Disputes Tribunal had jurisdiction to entertain claims concerning registered land, I hold the view that for expeditious, fair and cost effective determination of the issues raised in the appeal pending at the Defunct Appeals Tribunal, the appeal should be transferred to this Court for hearing and determination.

16. For the above reasons, the application is found to have merit and is allowed in terms of prayer 1.

Dated, signed and delivered at Nyeri this 29th day of October, 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Thomas Muthee 1st applicant

Michael Ngare 2nd appellant

Julius Weru Nyaguthie on behalf of Nyaguthie Keguthu – respondent

Court assistant - Lydia