Jilo v Sala (Civil Appeal 308 of 2018) [2025] KECA 1194 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1194 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 308 OF 2018

W KARANJA, LA ACHODE & GV ODUNGA, JJA

JULY 4, 2025

BETWEEN

WARIO JILO ..... APPELLANT

AND

YUSUF ALI SALA ..... RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Garissa, (Cherono J) dated 21st June 2018 in Garissa ELC Appeal No. 7 of 2017)

JUDGMENT

1. A brief background to the second appeal of Wario Jilo the appellant herein, against the judgment dated 21st June 2018 in Garissa Environment and Land Court by Cherono J, is necessary to put it into perspective. It all began when the appellant filed an award dated 8th November 2011 issued by Tana North District Land Dispute Tribunal (Madogo Division Land Disputes Tribunal), in the Chief Magistrate's Court on 30th November 2011. The purpose was for the award to be read and adopted as the order of the court.

2. Through a Notice of Motion dated 19th December 2011, the respondent filed an objection stating that the award and the proceedings filed in court were a nullity and ineligible for reading and adoption by the court. The main ground in support of the motion was that the Land Dispute Tribunal *Act, No. 18 of 1990* had been repealed and there were no such tribunals currently in existence. The magistrate, Hon. Mburu considered the matter and allowed the motion dated 19th December 2011.

3. Dissatisfied by the ruling, the appellant filed an appeal in the superior court on five grounds, alleging that the magistrate misdirected himself by:

    i. Failing to read the award as required by law,

    ii. Declaring the award a nullity,

iii. Failing to observe the requirement and intents of the Gazette Notice Published on 17th February 2012,

iv. Failing to note that transitional provisions required that; "All proceedings relating to the environment and the use and occupation of and title to land then pending before Court of Appeal, High Court, Subordinate Court or Local Tribunals of competent jurisdiction other than Land Disputes Tribunals which existed under the now repealed Land Disputes Tribunals *Act No. 18 of 1990* shall continue to be heard and determined by the same courts or tribunal. Any proceedings which shall not have been concluded by the time the environment and land court is established shall be moved to the court upon its establishment, and

v. Failing to consider the fact that land is a sensitive issue and required to have the award read as presented.

4. The learned Judge considered and dismissed the appeal on the grounds that the decision of the tribunal was ultra vires, the power spelt out in the statute.

5. The appellant was still unhappy with the judgment of the superior court and he filed this second appeal. The grounds in the Memorandum of Appeal dated 14th August 2018 are that the learned Judge erred and misdirected himself in law:

1. By holding that the trial magistrate had no discretion to question the nature and form of the Tribunal's award and his role was limited to reading and adopting the Tribunal's award as judgment of the court, but went ahead to dismiss the appeal on matters which had not been placed before him.

2. By making orders as to the jurisdiction of the Tribunal without giving the parties opportunity to argue the same.

3. By deciding the appeal in a manner as if the matter before him was a Judicial Review application, whereas no such presentations had been made before him.

4. By failing to set aside and substitute the trial magistrate's order for an order adopting the Tribunal's award.

5. By holding that the proceedings before the Tribunal were about ownership of the land without regard to the nature of the appeal before him, and as a result the decision faulted the Tribunal which was not a party to the appeal.

6. The appellant filed written submissions dated 5th March 2019 through the firm of Messrs. B. M. Musyoki & Co. Advocates and urged that the learned Judge found correctly that the magistrate erred in law by declining to make appropriate orders in respect of the said award and declaring it a nullity. However, instead of overturning the magistrate's decision, the learned Judge upheld it despite there being no application before him in the appeal from the Tribunal. The learned Judge therefore, acted outside his jurisdiction when he decided on the award of the Tribunal.

7. It was urged that evaluating whether the Tribunal had power to determine the matter was not for the learned Judge to decide. What was before him was an appeal from the magistrate's ruling and none of the grounds of appeal in the High court touched on the powers of the Tribunal. As such, the learned Judge's jurisdiction was limited to the ruling and orders of the magistrate dated 2nd March 2012.

8. The respondent filed submissions dated 4th March 2019 through the firm of Messr. C.P. Onono & Co.Advocates in rebuttal, and stated that the appointing authority of Madogo Land Dispute Tribunal

(MLDT), was the District Commissioner. Through a letter dated 25th September 2008, the Tana River District Commissioner informed all the District Officers that the term of Land Dispute Tribunals had expired. That, that notwithstanding, the appellant filed the award of MLDT concerning the same land in court twice.

9. The award was first filed on 2nd February 2009, but was sent back for not bearing the signatures of all members of the Tribunal. When it was returned to the court, Chief Magistrate Hon. Gicheru, declined to recognize it on the basis that the mandate of the Tribunal had long lapsed. It was filed a second time on 30th November 2011, when SRM Hon. Mburu rejected it on grounds of nullity.

10. The respondent urged that the learned Judge misdirected himself by failing to address his mind to the legal status of the MLDT. Additionally, that Section 30 of the *Environment and Land Court Act* which he relied on, refers to proceedings before court, or local tribunals of competent jurisdiction. However, the award was not the product of a "tribunal of competent jurisdiction", and as such, was incapable of enjoying the benefit otherwise conferred by the said transitional provisions.

11. The respondent argued that, had the learned Judge fully addressed himself to the record, he would have seen that he did not need to address himself to the transitional provisions. Further, that since the term of the MLDT to act had lapsed or expired, his analysis and re-evaluation of the evidence was a nullity and therefore, the final decision of the learned Judge should be affirmed but not on the basis of his findings.

12. We have considered the record of appeal and the rival submissions. Our duty as the second appellate court is as was stated by this Court in Moses Segite v Kenya Flourspar Limited [2021] KECA 1063 (KLR) that:

> "This being a second appeal, section 72 (1) *Civil Procedure Act* restricts this Court's jurisdiction to matters of law only. Further, in Kenya Breweries Ltd v. Godfrey Odongo, Civil Appeal No. 127 of 2007 and Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, this Court held that, a second Appellate Court ought to confine itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered, or failed to consider matters they should have considered, or looking at the entire decision, it is perverse."

13. Upon considering the rival arguments, the only issue that falls for our consideration is whether the learned Judge considered matters that he should not have and failed to consider matters that he should have.

14. The learned Judge in dismissing the appeal before him rendered himself as follows:

> "The award that had been made and presented to the magistrate court for adoption by the Land Dispute Tribunal, Madogo Division was properly before a competent court to hear and determine the same in accordance with the law. I find that the magistrate erred in law by declining to make the appropriate orders in respect of the said award and declaring the same as nullity. The learned magistrate needed to check the *Environment and Land Court Act* No. 19 of 2011 which gives transitional provisions which resolved the conundrum.
>
> Having said that I am alive to this court's power and obligation sitting as a first Appeal Court to review and re-evaluate the evidence afresh and arrive at my own independent decision. Upon my analysis and re-evaluation of the evidence adduced before the Land Disputes Tribunal Madogo Division which was presented for adoption before the magistrate's court.

> It is apparent that the dispute revolved on the ownership of land as can be demonstrated in the award.....
>
> From the excerpt of that decision, it is clear that the tribunal was making determination over the dispute of land ownership contrary to section 3 of the Repealed Land Disputes Tribunal *Act No. 18 of 1990*.....
>
> In my mind, the decision by the tribunal was ultra vires the powers spelt out in the statute and such decision cannot stand when it is apparent from the proceedings that the tribunal acted beyond their powers."

15. Both parties contended that the superior court failed to address the central issue in the appeal although they differed on what that issue was.

16. The appellant's main umbrage was that, what was before the learned Judge for appeal was the refusal by the trial court to adopt the award. As such, the Judge's jurisdiction should have been limited to the ruling and orders of the magistrate dated 2nd March 2012. Instead, the learned Judge's determination was on whether the Tribunal exceeded its mandate in giving the award.

17. The respondent on the other hand assailed the learned Judge's decision for failing to address the question of the legal status of the MLDT. Additionally, that he relied on Section 30 of the *Environment and Land Court Act* which refers to all proceedings before court, or local tribunals of competent jurisdiction, yet the award was not the product of a "tribunal of competent jurisdiction", and was incapable of enjoying the benefit conferred by the said transitional provisions.

18. We therefore, agree with both parties that the learned Judge failed to consider a matter that he should have. The learned Judge ought to have heard both parties on the jurisdictional question as to whether the term of the Tribunal that gave the award had expired and its jurisdiction extinguished, at the time of making the award, or it was preserved by the transitional provisions.

19. This Court has had occasion to pronounce itself in matters where the court below fails to address the issues placed before it in the case of Mohammed Eltaff & 3 others v Dream Camp Kenya Limited [2005] eKLR where it was stated;

> " We agree with Mr. Gautama that it is indeed a substantial objection to a judgment if it does not dispose of the questions that were presented by the parties for determination by the trial court or that the judgment has left certain issues unresolved."

20. Support for this position is to be found in the holding by the Supreme Court in Geo Chem Middle East v Kenya Bureau of Standards [2020] KESC 1 (KLR) in which it was held that:

> " As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the "mistaken" belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court, directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order would a substantive appeal lie to the Appellate Court."

21. Similar position was adopted by the Supreme Court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch [2019] KESC 11 (KLR).

22. Consequently, the appeal succeeds and is allowed with the following orders;

i. The appeal is hereby returned to Garissa High Court for determination on the issue of jurisdiction.

ii. The matter shall be placed before any Judge of the Environment and Land Court, other than E.C Cherono J for determination.

iii. Costs shall abide the determination of the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JULY, 2025.

W. KARANJA

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

G. V ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR