Mathenge v Gatua & another (Civil Appeal 94 of 2018)
[2024] KECA 341 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KECA 341 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 94 OF 2018

FA OCHIENG, PM GACHOKA & WK KORIR, JJA

MARCH 22, 2024

BETWEEN

CHARLES MWANGI MATHENGE ..... APPELLANT

AND

JOSEPH CHEGE GATUA ..... 1ST RESPONDENT

ZAKARIA KARIMI GATUA ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Nyahururu (L.N. Waithaka, J.) dated 16{{^th}} February 2015 in ELC Cause No. 92 of 2017)

JUDGMENT

1. The respondents filed a suit in the Environment and Land Court (ELC), Nakuru against the appellant seeking orders for inter alia:

> " a) A declaration that the Ngarua Division Land Dispute Tribunal's decision and award in Tribunal case No. 9 of 2006, and the adoption of the award in Nanyuki SPMC No. 37 of 2006 are null and void ab initio.
>
> b. A declaration that the respondents were the joint owners and the registered proprietors of land parcel No. Laikipia/Kinamba Mwenje Block 1/1235 hereinafter, "the suit land" to the exclusion of all others.
>
> c. Costs of the suit together with interest at court rates."

2. A brief background of the facts is that the appellant was a shareholder at Laikipia Farmers Company Limited. The appellant sold his share comprising Plot No. B 132 Mwenje to the respondents for a consideration of Kshs. 2,000/-. The appellant signed a transfer agreement in favour of the respondents on 2nd May 1989. The signing was witnessed by the District Officer Rumuruti Division. Before the

transfer, the respondents were in actual occupation of the suit land and they have since developed the land.

3. The respondents were registered as shareholders of the company on 6th June 2006. They were subsequently issued with a clearance certificate which they took to the lands registry and the suit land was transferred to them by the government.

4. At the trial before the Environment and Land Court, the respondents claimed that the issues raised in the suit had never been conclusively adjudicated upon and determined. The previous applications had been dismissed for being filed out of time. They were of the view that the fact that they had moved the court to accept the award of the Tribunal did not preclude their right to appeal against the said award.

5. The respondents claimed that the Tribunal did not have the power to distribute the suit land, order cancellation of title, or deal with issues touching on the title of the suit land because, by the time it became seized of the matter, the respondents were already the registered owners of the suit land. The respondents alleged that the Tribunal had acted beyond its legal mandate under Section 3(1) of the repealed Land Disputes Tribunals Act.

6. The respondents claimed that they had been in occupation of the suit land since 1979 and the appellant had failed to prove his entitlement to the suit land. They alleged that they had given the appellant money to purchase the suit land on their behalf.

7. The respondents also claimed that they had been in quiet possession of the suit land for over 12 years hence the appellant's right thereto had been extinguished.

8. In response, the appellant claimed that the suit by the respondents was res judicata as the issue had been determined by the Laikipia Land Disputes Tribunal, Nanyuki SRM's court, and Nyeri High Court; and the court had no jurisdiction to re- open issues raised therein.

9. The appellant also alleged that the registration of the respondents as proprietors of the suit land was fraudulent as there was no valid contract of sale executed between the parties. The appellant also claimed that the respondents had not applied for or obtained consent from the Land Control Board.

10. The appellant alleged that he had never received any consideration from the respondents or any other person concerning the purchase of the suit land. He claimed that he had only allowed the respondents to cultivate on the suit land as they had nowhere else to settle. The appellant claimed that the respondents had always occupied the suit land through his license and they had never acquired a legal interest therein.

11. The appellant stated that his relationship with the respondents had been cordial until 2006 when he realized that they had fraudulently registered themselves as the proprietors of the suit land.

12. The appellant was of the view that the decision of the Tribunal and the subsequent adoption of the award by the court was final and could not be challenged through the proceedings before the court.

13. The appellant, in his counterclaim, requested for orders inter alia:

> " a) A declaration that the registration of the respondents as the proprietors of the suit land was illegal ab initio.
>
> b. An order for the cancellation of the title issued to the respondents.
>
> c. A declaration that the appellant is the lawful owner of the suit land.

d. An order for the registration of the appellant as the owner of the suit land.

e. An order directing the respondents to unconditionally deliver vacant possession of the suit land to the appellant, and in default, the respondents be evicted from the suit land at their own cost.

f. In the alternative, a declaration that the award by the Tribunal as was adopted by the court is valid and should be effected."

14. The learned Judge held that the issue before the tribunal was whether the appellant willingly and knowingly transferred the suit land to the respondents; the issue before the magistrates' court was merely the adoption of the award by the tribunal; while the issue before the High Court was whether the respondents were entitled to an order of certiorari and prohibition. The learned Judge held that the application before the High Court was not determined on merit since the learned Judge upheld the appellant's preliminary objection that the application for leave was filed out of time.

15. The learned Judge held that in as much as the issue in dispute before both the tribunal and the court related to the parties' ownership of the suit land, the tribunal had no jurisdiction to determine the propriety or otherwise of the respondents' registration as the absolute owners of the suit property, and the cancellation of the title.

16. The learned Judge consequently held that the issues raised in the suit before her were not res judicata. The learned Judge further held that the decision of the tribunal was a nullity and it could not confer any rights to any of the parties to the dispute. The learned Judge went on to hold that nothing prevented the respondents from moving the court for a declaration that the award by the tribunal was a nullity in law.

17. However, the learned Judge found the respondents' conduct of moving the court to adopt the award as an order of the court, and their belated decision to challenge an order they embraced and ratified by deed to be an abuse of the court process.

18. The learned Judge also held that the appellant's claim that the respondents had obtained title to the suit property fraudulently was not sufficiently proved because all the appellant did was raise some omissions and non-compliance with the law in the process leading to the registration. The learned Judge found that the failure of the appellant to enjoin the company that transferred his shares to the respondents meant that it would be difficult to establish the alleged fraud.

19. The learned Judge held that the respondents had produced a transfer agreement executed between the parties and receipt in respect of the transfer of the appellant's shares. Subsequently, the respondents' case was allowed and the appellant's counter- claim was dismissed with costs.

20. Aggrieved by the decision of the court, the appellant lodged this appeal based on the grounds that the learned Judge erred by:

e. "a) Failing to appreciate that the respondents' suit was res judicata.

b. Finding that the court had jurisdiction to entertain the suit in the manner in which it was brought before the court.

c. Failing to appreciate that since the applications before the High Court had been struck out, the correct procedure would have been to appeal against the said decisions as opposed to filing a declaratory suit.

d. Finding that the applications before the High Court were dismissed on mere technicalities, whereas they were determined substantively according to the applicable law.

Finding that the orders issued by the magistrates' court on 27th April 2007 were a nullity. QUOTE

f. Failing to appreciate that the award of the tribunal having been adopted by the court became an effective order of the court.

g. Failing to appreciate that the judgment in the magistrates' court was entered into by consent of the parties [and] was not open to challenge by the respondents as all the parties were bound by the terms of the consent.

e. Disregarding the appellant's application dated 23rd February 2015.

f. Failing to accord the appellant a fair opportunity to file written submissions, thereby violating his constitutional right to a fair trial.

g. Finding that the respondents are joint owners and absolute proprietors of the suit land to the exclusion of all others, thereby improperly dispossessing the appellant of his lawfully acquired land.

h. Placing the burden of proving ownership of the suit land on the appellant without due regard to the laid down principles of law.

i. Finding that the registration of the respondents as proprietors of the suit land was properly done while there was overwhelming evidence to the contrary.

j. Failing to find that the respondents had taken advantage of the cordial and fiduciary relationship between them, and converted ownership of the suit land into their names."

21. When the appeal came up for hearing on 21st November 2023, Mr. Wahome, learned counsel appeared for the appellant, whereas Mr. Sigilai learned counsel was present for the respondents. Counsel relied on their respective written submissions which they briefly highlighted.

22. Mr. Wahome limited his prayers to the issue of jurisdiction, res judicata, and the merits of the case. Counsel relied on the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others [2014] eKLR in submitting that when Parliament lays down an infrastructure, it should be respected. The respondents applied for the adoption of the tribunal's award and later filed a suit before the High Court to have the magistrates' court's order nullified.

23. Counsel was of the view that since the window for judicial review had been closed, the court should not have determined the declaratory suit. In any event, there was no sale agreement or consent from the Land Control Board authorizing the transfer of the suit land.

24. The appellant pointed out that the award of the tribunal having been adopted by the magistrates' court became the judgment of the court, that is yet to be set aside, varied, or appealed against. Therefore, since the judgment of the magistrates' court was not challenged, the suit before the High Court was res judicata, and the decision remained a proper judgment of the court capable of enforcement against the respondents.

25. Citing the case of McFoy v United Africa Co. Limited [1961] 3 All E.R, the appellant pointed out that an award of the tribunal once adopted by the court, the judgment and decree therefrom become enforceable in the manner provided for under the *Civil Procedure Act*.

26. Opposing the appeal, Mr. Sigilai submitted that the decision of the tribunal was a nullity as the tribunal had no jurisdiction to order cancellation of title, or to subdivide the suit land.

27. Counsel pointed out that the issue of jurisdiction ought to have been raised at the superior court and not on appeal. Counsel was of the view that res judicata cannot apply to a nullity.

28. In his rejoinder, Mr. Wahome submitted that the judgment adopting the award of the tribunal was by consent, and the respondents' attempt to challenge the consent failed.

29. This being a first appeal, we are mandated to re-evaluate the evidence that was placed before the learned Judge and draw our own conclusions on matters of fact. However, in doing so, we are obliged to bear in mind that we did not have the advantage of seeing and hearing the witnesses and therefore, we must give allowance for the same. In the case of Peters v Sunday Post Ltd [1958] EA 424, at P 429 O'Connor P. stated thus:

> " An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand."

30. We have carefully considered the appeal, submissions by counsel, the authorities cited, and the law. The issues for determination are; whether the decision of the tribunal was a nullity in law for want of jurisdiction, whether the resulting judgment and decree adopting the award of the tribunal was a nullity, whether the court was justified in granting the declaratory orders sought, and whether the appellant is the owner of the suit land.

31. It is common ground that no appeal was preferred against the judgment adopting the award of the tribunal. In any event, the respondents moved the magistrates' court to have the award adopted by the court. The parties agreed by consent to have the award of the tribunal adopted as an order of the court. The consent was adopted as the judgment of the court and a decree dated 27th April 2007 was issued in the following terms:

> "
>
> " 1. Title No. LAIKIPIA/KINAMBA MWENJE BLOCK 1/1235 be cancelled and issued as follows;
>
> a. Joseph Chege Gatua - 2 ½ acres
>
> b. Zakaria Karimi Gatua - 2 ½ acres
>
> c. Charles Mwangi Mathenge - 5 acres
>
> 2. The costs of the application be paid to the applicant."

32. Thereafter, the respondents sought to set aside the award through judicial review, to quash the award of the tribunal on the ground that the tribunal lacked jurisdiction to cancel titles and subdivide land. However, the respondents' application was time-barred and their application for judicial review was dismissed. This prompted the respondents to file a declaratory suit, the subject of the present appeal.

33. In allowing the respondents' suit, the effect of the order granted was that the decision of the tribunal was a nullity. The learned Judge in allowing the respondent's claim held that the adoption of the award of the tribunal by the court was null and void.

34. It is trite that the jurisdiction of the magistrates' court under Section 7 of the Land Disputes Tribunal Act (repealed) is as follows:

> "(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.
>
> (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the *Civil Procedure Act*."

35. It follows therefore that Section 7 is phrased in mandatory terms and it is our considered view that once the magistrates' court receives the documents referred to, there is no discretion as to whether or not to enter judgment per the tribunal's award. Moreover, Section 3(9) states that the magistrates' court has no jurisdiction or powers in cases involving any issues set out in paragraphs (a) to (c) of sub-section (1). In the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others, (supra), the court stated that:

> "Once the award of Borabu Land Disputes Tribunal was adopted as a judgment of Senior Resident Magistrate's Court at Keroka, it ceased to exist on its own. It cannot be the subject of a declaration. And even if it remained alive of what use will it be to declare it a nullity if the decree ensuing therefrom, by SRM's court at Keroka does not face the same fate. The plaintiff has not invited this court to do so. I am sure that he was aware that that would have been an uphill task. The award having become a judgment of the court of competent jurisdiction can only be varied, vacated, set aside or reviewed either by the same court or by an appellate court in appropriate proceedings. That has not been done by the SRM's court at Keroka nor have I been asked to do so in this suit. In any event I do not think that the SRM's court at Keroka has jurisdiction under the Land Disputes Tribunals Act to review, vary, rescind, vacate and or set aside an award filed. The role of that court is merely to adopt the award as a judgment of the court on application and thereafter issue a decree. It has no jurisdiction to examine the award in order to satisfy itself whether it is bad in law and therefore void ab initio."

36. Therefore, the role of the magistrates' court is limited to what is provided for in Section 7 of the Land Disputes Tribunal Act. At the time when the matter came before the magistrates' court, the respondents who were the objectors before the tribunal had not filed an appeal to the Appeals Committee as provided under Section 8 of the Act. The court was therefore bound to adopt the award and enter judgment in terms of the said award. In any event, the parties consented to the adoption of the award by the court. In this regard, we find no fault with the exercise of jurisdiction by the magistrates' court in entering judgment in terms of the award by the tribunal.

37. On the issue of the declaratory orders, it is well established that the Land Disputes Act provides a comprehensive mechanism for resolving disputes. In this instance, if the respondents felt aggrieved by

the decision of the tribunal, they ought to have followed the due process provided for under the Act. Sections 8 and 9 of the Land Disputes Tribunal Act provided that:

> " 8 (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.
>
> 9 -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 of: 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".

38. It follows therefore that the respondents did not appeal to the Appeals Committee within thirty days of the decision or at all.

Instead, the matter was placed before the Magistrates' court as envisaged under Section 7 of the Act, and the award was adopted as the judgment of the court. The respondents still did not appeal against the judgment. In Catherine C Kittony v Jonathan Muindi Dome & 2 others [2019] eKLR the court held that:

> " The Land Dispute Tribunal had mechanisms to deal with outcomes such as the one rendered by the 2nd respondent. The award by the 2nd respondent ceased to exist upon adoption by the court as its judgment and a decree. The award cannot be challenged by filing a fresh suit as it is trite law that where a statute establishes a dispute resolution mechanism that mechanism must be followed and exhausted, where a party fails to do so he cannot be heard to say that his rights were denied."

39. The court further observed that:

> " In the instant appeal, it is not in dispute that the appellant was aggrieved by the decision of the 2nd respondent. However, instead of lodging an appeal before the Provincial Appeals Committee constituted for the province in which the land which was the subject matter of the dispute was situated and if still dissatisfied to appeal to the High Court on a point of law (see: Section 8(1) and (9) of the Land disputes Tribunal Act) or institute judicial review proceedings to quash the decision by the 2nd respondent as it was alleged that it acted in excess of its jurisdiction in making the award, the appellant opted to file a fresh suit before the ELC which was not in order. See also Speaker of National Assembly v Njenga Karume [2008] 1 KLR. We reiterate that if indeed the appellant did not agree with the decision of the 2nd respondent and wished to challenge it, it behooved her to follow the route prescribed by the Land Disputes Tribunals Act before proceeding anywhere else."

40. Similarly, in Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others, (supra) the court stated thus:

> "It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the

day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree."

41. It follows therefore that had the respondents followed due procedure to resolve the dispute, the issues raised in the declaratory suit would have been determined. If such determination were deemed unsatisfactory by any party, they ought to have taken appropriate action in accordance with the due process as stipulated in the Land Disputes Tribunals Act.

42. When the respondents did not follow due process, and the decision of the Tribunal was adopted by the Magistrates' court, it became a legally binding judgment.

43. Later, when the respondents moved the trial court with a case that challenged the legitimacy of the tribunal's decision, they were utilizing a process that was not provided for by law to try and circumvent the judgment of the magistrates' court.

44. As the learned Judge was persuaded that the tribunal lacked jurisdiction, and she so declared, the result was akin to pulling the rug from underneath the feet of the tribunal, whereas the tribunal had long before that ceased to have anything to do with the matter. The tribunal's decision had already metamorphosed into a judgment of the court, following its adoption.

45. In the circumstances, there remains a judgment that is valid and unchallenged by an appeal, whereas the foundation upon which the said judgment was based was being voided by a parallel legal process. In our considered view, the courts are duty-bound to take heed to deliver substantive justice. We must not be enslaved to procedures and technicalities.

46. Nonetheless, the court cannot be expected to harp on the need to guard against enslavement to technicalities and in the process ignore the real confusion that could arise when we endorse the failure to comply with the written law.

47. Incidentally, in this case it was the parties who informed the tribunal about the particulars of how they had resolved the dispute. Strictly speaking, therefore, the tribunal did not render its own considered decision.

48. Furthermore, the learned Judge noted that it was the respondents who moved the magistrates' court to adopt the decision of the tribunal as a judgment of the court.

49. We are cognizant of the fact that jurisdiction cannot be granted to the court or the tribunal by an agreement between the parties, if no jurisdiction is granted by law. We are not therefore to be understood to be saying that the tribunal had jurisdiction or lacked jurisdiction. The position is that a judgment had been entered, and the same has not been challenged through any process known in law.

50. By invalidating the decision of the tribunal whilst the judgment of the magistrates' court remains in place, the learned Judge has created a situation in which the judgment has been set aside by implication yet the said judgment had been entered properly. We find ourselves unable to uphold the consequential anarchy brought about by the decision in issue herein.

51. According to Section 23(3) of the *Interpretation and General Provisions Act*, the decisions made by the Land Disputes Tribunals established under the repealed Land Disputes Act are legally binding. In the case of Sally Jemeli Korir & Another v William Suter & 2 Others [2020] eKLR, the court held that:

> "Section 23(3) (e) of the *Interpretation and General Provisions Act* preserves and protects decisions and awards made by the defunct Land Disputes Tribunals. Similarly, it preserves and protects judgments adopted and pronounced by Magistrates' Courts within the

framework of the repealed Land Disputes Act. They remain valid judgments of the courts. The resultant decrees remain valid binding instruments capable of execution."

52. On the issue of ownership, the learned Judge in allowing the respondents' claim declared the respondents to be the joint owners of the suit land. In Florence Nyaboke Machani v Mogere Amosi Ombui & 2 Others, (supra), the court held that:

> " It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding."

53. It follows that a valid judgment of the court exists vide Nanyuki SPMC No. 37 of 2006 and a decree issued in terms of the said judgment. The said decree subdivided the suit land among the parties. As the said judgment has not been overturned through the legal process provided by law, we find that the learned Judge erred in holding that the respondents were the absolute joint owners of the suit land.

54. In the result, we find that the appeal before us has merit. We set aside the judgment of the trial court and allow the appeal with costs to the appellant.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF MARCH, 2024.

F. OCHIENG

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR