IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 88 OF 2017

BETWEEN

CATHERINE C. KITTONY..... APPELLANT

AND

JONATHAN MUINDI DOME ..... 1ST RESPONDENT

THE CHAIRMAN KAPSARET

DIVISION LAND DISPUTES TRIBUNAL ..... 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

*(An appeal from the Judgment of the Environment & Land Court at Eldoret **(N. A. Matheka, J.)** dated 24th May, 2017*

in

ELC Cause No. 120 of 2012)

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the Environment & Land Court at Eldoret ***(N. A. Matheka, J.)*** hereinafter "the ELC" delivered on 24th May, 2017 in which the appellant's suit was dismissed with costs and the 1st respondent's counter-claim allowed.

The brief background of the case leading to this appeal is that in the year 1998, the appellant made a successful bid for the purchase of land parcel **Karuna/Sosiani Block 2 (Progressive)/157** hereinafter, *"the suit land"* measuring 11.6Ha for a consideration of Kshs. 450,000. It was sold by the National Bank of Kenya hereinafter, *"the bank"* in the exercise of its statutory power of sale after the chargee**, James Thogo Mwai** hereinafter, *"Mwai" h*ad failed to service the loan advanced to him by the bank. For reasons that are not clear from the record the purchase price was later enhanced to Kshs.600, 000/=. The suit land was sold through **Windmark Enterprises Ltd** hereinafter, *"the auctioneers"*. A title deed was subsequently processed and issued to the appellant in January, 1999. On taking possession, the appellant found the 1st respondent in occupation of five acres of the suit land. The appellant issued several notices to the 1st respondent to vacate to no avail. Instead, the 1st respondent lodged a claim with the Kapsaret Divisional Land Disputes Tribunal *"the 2nd respondent"* being Land Case No. 5 of 2002 claiming that the appellant had encroached on his portion of the suit land. The appellant countered the 1st respondent's claim by stating that she had bought the entire suit land at a public auction. The 2nd respondent having heard the appellant, the 1st respondent and their witnesses determined the dispute in favour of the 1st respondent and awarded him 5 acres out of the suit land. The decision of the tribunal was subsequently adopted as the judgment of the court in Eldoret CMCC No. 108 of 2002 on 7th January, 2003 and a decree issued to that effect. That provoked the appellant to file suit in the ELC by a plaint dated 4th May, 2005, which was subsequently amended and amended further on 22nd November, 2006 whose judgment and decree is the subject of this appeal. The appellant's case was as follows:-

The appellant sought *inter alia;* a declaration that she was the absolute registered owner of the suit land; a declaration that the decision of the 2nd respondent and its adoption by the Chief Magistrate's court was illegal, null and void; a permanent injunction to restrain the 1st respondent from occupying, trespassing onto or interfering with the appellant's quiet possession of the whole or any part of the suit land; eviction of the 1st respondent from the suit land; mesne profits accrued by the 1st respondent over the 5 acres wrongfully occupied by him

since 1999 until such time as the wrongful occupation shall cease; costs and interest. In the plaint she reiterated what we have already set out above briefly save to add that she averred that the 2nd respondent lacked jurisdiction to arbitrate a dispute of title involving registered land including the suit land. That in any event the 1st respondent never obtained a consent to the transaction from the relevant land control board. That being the case, the transaction was void under the Land Control Act in so far as the 1st respondent had not obtained the consent of the Land Control Board to sub-divide or transfer part or whole of the suit land. She averred further that the 2nd respondent lacked the legal capacity to enforce a contract of sale of part of the suit land encumbered by a charge in favour of the bank. She faulted the 2nd respondent's decision against her on the basis that there was no privity of contract between her and the 1st respondent and that she was not served with the claim as envisaged by the Land Disputes Tribunal Act. She maintained that the award was outside the purview of matters governed by Section 3 (1) of the said Act. She further averred that the 1st respondent's claim was time barred in any event.

In response, the 1st respondent filed an amended defence and counter-claim dated 6th November, 2006 in which he prayed for a declaration that he was the rightful owner of the 5 acres under his occupation in the suit land and permanent injunction restraining the appellant from interfering with his peaceful occupation of the 5 acres of the suit land and costs of the suit. His case was that he had been in occupation of part of the suit land for over 21 years prior to the date when the appellant was registered as the proprietor of the suit land. The suit land was originally known as L.R. No. 871, 872, 309/2 and 9736 and was owned by Progressive Farmers' Co-operative Society Limited, hereinafter *"the society"* in which Mwai was a member. That he purchased 5 acres of suit land from Mwai in 1983 for a consideration of Kshs. 28,000/-. Mwai had been given 25 acres by the society with the new title being the suit land. In 1994, Mwai obtained a consent from Moiben Land Control Board to subdivide the suit land into two portions measuring 9.16 and 2.2 Ha respectively. Approval was given for the sub-division which was followed by mutation forms that were duly approved, signed and executed by a surveyor and confirmed by the Provincial Surveyor. That the issue of the title being charged to the bank was not well founded, as no consent could have been issued by Moiben Land Control Board on the absence of the original title of the land sought to be subdivided being availed. He further contended that if the land was charged to the bank then, the board would not have consented to his sub-division scheme proposed by Mr. Mwai. He stated further that at the time the appellant obtained her title in 1999 he was already in occupation of 5 acres of the suit land. That all the parties including the auctioneers appeared and participated in the proceedings before the 2nd respondent. The auctioneers were aware that the 1st respondent was in occupation of 5 acres of the suit land but still went ahead with the public auction of the entire suit land.

The 2nd and 3rd respondents wholly relied on the award of the tribunal and stated that it was not in dispute that the 1st respondent bought 5 acres of the suit land from Mwai and that when Mwai charged the suit land without giving notice to the 1st respondent, it was upon the bank to exercise due diligence to establish whether the suit land or a portion thereof was occupied or not. They maintained that the 1st respondent was a purchaser for value. Sections 28 and 159 of the Registered Land Act, now repealed, empowered the 2nd respondent to adjudicate over the matters it was seized of, hence it was right in awarding the 1st respondent the 5 acres.

In its impugned judgment, the trial court having listened to the evidence tendered by the appellant, the 1st respondent and their witnesses observed that the appellant had produced a title deed as evidence of ownership of the suit land. It stated that whereas *"the law is clear that the Certificate of Title issued by the Registrar upon registration is taken by all courts as prima facie evidence that the person named as the proprietor of the land therein is the absolute and indefeasible owner … and the title of that proprietor is not subject to challenge except- on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, procedurally or through a corrupt scheme…"* However proceeded to hold that at the time the 1st respondent bought 5 acres of the suit land in 1983, it had not been charged to the bank as alleged by the appellant otherwise the Moiben Land Control Board would not have given consent for sub-division in 1994, nor had the appellant purchased the suit property. It held that the 1st respondent was a bona fide purchaser of 5 acres of the suit land. It further held that the appellant did not dispute the purchase by the 1st respondent and that at the time she obtained the title in 1999, the 1st appellant was in occupation and possession of 5 acres, and legally so. The trial court also found that the certificate of title for the suit land was obtained through misrepresentation and or unprocedurally and was therefore challeangeable. The trial court went on to hold that the 2nd respondent did not err in law by requesting the Land Registrar to split the title deed of the suit land held by the appellant and issue two separate titles based on the mutation forms in their office as it had jurisdiction to deal with division of land by Section 3 (1) of the Land Disputes Tribunal Act. Subsequently, the appellant's suit was dismissed with costs and the 1st respondent's counter-claim allowed.

Dissatisfied with the judgment, the appellant lodged the present appeal and raised 13 grounds to wit, that the trial court erred in holding that; at all material times the suit land was not charged to the bank; the consent issued by Moiben Land Control Board was within the statutory provisions of the Land Control Board Act; the 2nd respondent had jurisdiction to make the award under Section 3 of the Land Disputes Tribunal Act; failing to interpret and apply express provisions of the law and by so doing split the title deed of the suit land into two parts; misapprehending the evidence on record and the legal principle governing the impeachment of title; that the appellant had acquired the title of the suit land through misrepresentation and unprocedurally; failing to find that the award by the 2nd respondent was void, a nullity and incurably bad in law; holding that the 1st respondent's agreement of 1983 was in compliance with the provisions of Section 6 of the Land Control Board Act; failing to address itself to the status of the lack of sale agreement and Land Board Consent by the 1st respondent; misinterpreting the provisions of Section 3 of the Land Disputes Tribunal Act; failing to take into account relevant factors and as a result arriving at a wrong decision; failing to award mesne profits to the appellant; and misinterpreting the provisions of section 27 and 28 of the Registered Land Act.

During the hearing of the appeal, **Ms. Chesoo,** learned counsel appeared for the appellant, the 1st respondent appeared in person whereas **Mr. Odongo,** learned counsel represented the 2nd and 3rd respondents.

Ms. Chesoo relied on her written submissions and briefly highlighted the same. She condensed the grounds of appeal into three thematic areas; jurisdiction of the 2nd respondent; the need for consent for a transaction involving agricultural land; and indefeasibility of title.

Relying on the celebrated case of **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1, Dominica Wamuyukihu v Johana Ndura Wakaritu (2012) eKLR, M'Marete v Republic & 3 Others (2004) eKLR** and **Joseph Malakwen Lelei & Ano. v Rift**

Valley Land Disputes Appeals Committee & 2 Others (2014) eKLR, counsel faulted the learned Judge for finding that the 2nd respondent did not err in law by directing the land Registrar to subdivide the suit land into two. She contended that Section 3 of the Land Disputes Tribunal Act empowered the 2nd respondent to adjudicate on disputes relating to the division of, or determination of boundaries to land including land held in common, claim to occupy or work land, or trespass to land but lacked jurisdiction to deal with disputes relating to ownership or title. Counsel conceded though that the tribunal had jurisdiction to hear and determine the dispute that was before it but took issue with the final award which she found to be ultra vires the Act. That issues of rectification and cancellation of title fell within the ambit of the court under Section 143 of the Registered Land Act. It was submitted further that since the land in dispute was in the name of the appellant, that registration prohibited the 2nd respondent from arbitrating over the same in light of Section 143 of the Registered Land Act hence the proceedings were a nullity. The proper court which should have heard the dispute was either the magistrate's court or the High Court as the case may be.

As regards consent, counsel submitted that the suit land was agricultural land and that the consent of the Land Control Board was required before any transaction affecting such land could be entertained. Counsel took the view that the 1st respondent failed to procure such consent and the trial court therefore erred in allowing his counter-claim. She contended on the following authorites: **Willy Kimutai Kitilit v Michael Kibet (2018) eKLR, David Sironga Ole Tukai v Francis Arap Muge & 2 Others (2014) eKLR** and **Macfoy v United Africa Co. Ltd (1961) ALL ER 1169** that the sale transaction involving the 1st respondent and Mwai was void to all intentions and purposes for want of consent from the relevant land control board.

Addressing the Court on indefeasibility of title, counsel invoked the provisions of Article 40 of the Constitution and Section 25 of the Land Registration Act on protection of the right to property. She faulted the trial court for making a finding that the suit land was obtained through misrepresentation and unprocedurally and therefore can and could be challenged without considering the evidence on record. That the appellant acquired title to the suit land for valuable consideration with no fraud or misrepresentation on her part. On that basis the entries in the register could not be rectified. She submitted that the appellant was the absolute owner of the suit land the interest therein having been transferred and a title deed issued to her;

Opposing the appeal, the 1st respondent submitted that he was legally in occupation of a portion of the suit land measuring 5 acres after Mwai subdivided it into two portions, 20 acres which he retained and 5 acres which he sold and transferred to him. However, Mwai could not finalize the transaction as he fled the suit land following tribal clashes in the area. The subdivision was in line with the sale agreement entered into between Mwai and the 1st respondent in 1983. The subdivision was undertaken pursuant to the consent obtained from Moiben Land Control Board and as per the mutation form registered in 1997. That he had continued to utilize his portion of the suit land while awaiting transfer. That when he heard of the auction, he conducted a search which revealed that the suit land had a caution by Agricultural Finance Corporation (AFC) registered in 1998 and a charge by the bank registered in 1995 both after the consent to the subdivision had been obtained and sub-division undertaken. He therefore prayed for the dismissal of the appeal.

Mr. Odongo opposed the appeal. He submitted that the 2nd respondent had jurisdiction to entertain the dispute and make the award. The issues before the 2nd respondent were in relation to trespass, claim to work land and division of the suit land. That Section 3 of the Land Disputes Tribunal Act provided the jurisdiction which extended to these areas. That it was the appellant's position before the 2nd respondent that the 1st respondent was a trespasser. In turn the 1st respondent claimed use of the land and that the appellant had encroached on his portion of the suit land thereby raising a boundary dispute. The 2nd respondent made a finding that 5 acres be hived off the suit land in favour of the 1st respondent. It was the submission of counsel that the 2nd respondent had jurisdiction to make the award. Counsel further submitted that it was trite law that where a statute establishes a dispute resolution mechanism, it is proper that the courts cede to that jurisdiction. Counsel submitted that the appellant having conceded that the award by the 2nd respondent had been adopted as a judgment of the court, then upon such adoption and issuance of a decree, the award ceased to exist. Counsel urged that if the appellant was dissatisfied with the decree, he could only appeal or institute judicial review proceedings which options he never pursued. She can no longer challenge the award. Counsel further submitted that the 1st respondent in any event had an overriding interest in the suit land despite there being a charge registered on the suit land by virtue of having bought the same earlier. The respondents all urged us to dismiss the appeal therefor.

This is a first appeal and being so it is our duty to re-evaluate the evidence tendered before the trial court both on points of law and facts and come up with our own findings and conclusions. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** this principle was reiterated by this Court thus:-

> "**This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-**
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> ***"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

We shall bear that mandate as we consider what is raised in this appeal.

We have considered the record, submissions by the parties and the law. The issues for determination are whether the 2nd respondent had jurisdiction to entertain the dispute and make an award; whether the 1st respondent obtained consent of the Land Control Board to his transaction with Mwai and whether the appellant's title was indefeasible and therefore incapable of being impeached.

Section 3 of the Land Disputes Tribunal Act (now repealed) provided as follows:

"Subject to this Act, all cases of a civil nature involving a dispute as to-

(a)The division of or the determination of boundaries to, land including land held in common;

(b) A claim to occupy or work land, or,

(c) Trespass to land

Shall be heard and determined by a Tribunal established under section 4."

In the instant appeal, the appellant conceded that the 2nd respondent had jurisdiction to hear and determine the dispute presented to it by the 1st respondent as it was in relation to encroachment which is really a boundary dispute but hastened to add that the 2nd respondent did not however have jurisdiction to issue an award that had the effect of splitting the suit land into two. It is common ground that the dispute before the tribunal was in relation to trespass, encroachment, which as, already stated was essentially a boundary dispute and claim to work land. Whereas the 1st respondent claimed that he was entitled to his 5 acres of the suit land that he had purchased from Mwai pursuant to which subdivision had been undertaken, the appellant on the other hand disputed the 1st respondent's occupation of 5 acres of the suit land and claimed ownership of the entire suit land. She therefore deemed the 1st respondent a trespasser. The 1st respondent on the other hand laid ownership on the basis that he had purchased the 5 acres from Mwai pursuant to which the suit land was subdivided into eleven and five acres thereof following the consent obtained, signed mutation forms and finally by virtue of his occupation thereof. The 2nd respondent in its determination made a finding that the 1st respondent was not a trespasser on the suit land, was in actual possession thereof and directed the land Registrar to subdivide the suit land into two portions to reflect the situation on the ground. Our view, having carefully and thoroughly considered and reviewed the record is that, what the 2nd respondent did was in conformity with that which was on the ground. It would be an absurdity to reach a finding that the 1st respondent was not a trespasser and then fail to make orders to keep him on the suit land. The 2nd respondent did not order the appellant to subdivide the land in real sense of the word. The subdivision had already been undertaken. The order was really of no consequence, as the subdivision had already been undertaken pursuant to the consent obtained from Moiben Land Control Board and mutation forms executed by a surveyor and duly approved by the Provincial Surveyor. We are therefore unable to agree with the appellant that the 2nd respondent ordered for the subdivision of the suit land and therefore went beyond its jurisdiction. The 2nd respondent merely endorsed what was on the ground. In any event, if the final orders were faulty, that cannot be the basis of declaring the proceedings before the 2nd respondent null and void. As already stated and conceded to by the appellant, the dispute before the 2nd respondent was not about ownership or title to the suit land so as to oust the disposition of the 2nd respondent. Further the Land Dispute Tribunals Act had mechanism to deal with such an outcome which the appellant though a party to the proceedings failed to invoke. She cannot now be heard to challenge the same by way of the suit that is the subject of this suit. We shall revert to this aspect of the matter later in this judgment.

It was the appellant's further contention that she was not served with any claim pursuant to *Section 3(4) of the Land Disputes Tribunal Act* which provided as follows:

"Every claim shall be served on the other party, or, where there are more than one, on each of the parties to the dispute and the provisions of the Civil Procedure Act as regards service of summons shall thereafter apply".

There is no evidence on record that the appellant was not so served. The record shows that the appellant fully participated in the proceedings. We doubt that she would have so participated without knowing what the claim against her was all about. She did not even bother to raise the issue before the 2nd respondent. Given the foregoing, we are satisfied that the appellant was duly served with the claim, and her assertion to the contrary is a mere afterthought.

As regards the consent of the Land Control Board, the appellant contended that by virtue of the Land Control Act, the sale transaction between Mwai and the 1st respondent was void to all intentions and purposes owing to failure by the two to obtain the consent from Moiben Land Control Board, and if they did, it was not within six months of the execution of the sale agreement. On that basis the appellant contended that the 1st respondent's counter claim against her was untenable. On the other hand, the 1st respondent claimed that pursuant to the agreement, a consent from Moiben Land Control Board was obtained which was followed by execution of mutation forms. The 1st respondent attributed the non-finalization of the transaction to tribal clashes that engulfed the area forcing Mwai to flee. The appellant did not challenge or controvert this fact at all. Indeed there is evidence that the suit property had been subdivided by the time the appellant allegedly bought the same. The subdivision involving the 1st respondent could not have been carried out in the absence of a valid consent from the Land Control board. The trial court found the consent and mutation forms obtained in 1994 were genuine. We have no reason to depart from that finding. Further we agree with the 1st respondent's submission that at the time he bought his 5 acres out of the suit land in 1993, it had not been charged to the bank as alleged by the appellant, otherwise the Moiben Land Control Board would not have given consent for the subdivision in 1994. We are thus satisfied, just like the trial court, that pursuant to the sale agreement between the 1st respondent and Mwai, a consent as required from Moiben Land Control Board was obtained, contrary to the submissions of the appellant.

As regards the indefeasibility of the appellant's title, the trial court held that the same was obtained through fraud, misrepresentation and unprocedurally and could therefore be challenged, a position which the appellant contests. From the record however, the bank in a bid to exercise its statutory power of sale procured the services of auctioneers to sell the suit land by public auction. The auctioneers exercised due diligence and visited the suit land whereupon they established that 5 acres of the suit land had been hived off of the suit land and were in possession and occupation of the 1st respondent. That notwithstanding, they proceeded with the auction of the whole suit land ignoring the 1st respondent's claim. Was this not fraudulent and unprocedural?

Initially at the fall of the hammer the price of the highest bidder was Kshs.450, 000 which was subsequently enhanced to Kshs.600, 000. No

reason advanced by either the appellant or the bank why the purchase price was escalated from Kshs.450, 000 to Kshs.600, 000. One would expect that the appellant would have protested at the variation. However, she merely went along. In the absence of evidence to the contrary, this can only be termed an underhand dealing between the bank, the auctioneers and the appellant. Certainly such conduct must raise eye brows whether the sale was indeed above board. It smacks of fraudulent and unprocedural conduct. Further, one would expect that before participating in the auction, the appellant in exercise of due diligence would have visited the suit premises to satisfy herself of its existence, location and state. We doubt very much that the appellant went ahead with the bidding without first ascertaining whether the suit land existed, its location, acreage and state. Certainly, the appellant was aware of the 1st respondent's presence on the suit land. Further, during the proceedings before the 2nd respondent, one **Lucas Kipkosgei** testified that he bid for the suit land at Kshs.800, 000 and paid the sum through his lawyer, Kalya and yet the same was again sold to the appellant at Kshs.450, 000 and later enhanced to Kshs.600, 000. There is no explanation as to what became of that initial sale. Neither the bank, the auctioneer nor the appellant testified to this fact. It is instructive that Kalya advocate seems to have acted for both Lucas Kipkosgei and the appellant. Much as the bank claimed to have sold the suit land in the exercise of its statutory power of sale, no charge was tendered in evidence to demonstrate that indeed there was such a charge. The appellant before us acknowledged that no charge was tendered in evidence, but took refuge in the green card which showed a charge entry. Entries in green card can easily be manipulated and tampered with. It is no proof therefore of the existence of a charge. Then there was the issue of a charge registered on the suit land by AFC. What became of it? All these attest to and point to fraudulent and unprocedural conduct by the appellant, the bank and the auctioneer with regard to the appellant's acquisition of the suit land. Lastly, even if the appellant was entitled to the suit land on account of the auction, the 1st respondent was in situ not illegally, but on the basis of a sale agreement followed by subdivision and he had been in occupation since 1984. Obviously therefore, the 1st respondent had an overriding interest with regard to a portion of the suit land. The totality of the foregoing is that the trial court was right in holding that the appellant's title to the suit land was defeasible as it had been obtained though fraud, misrepresentation and unprocedurally to which the appellant was a party.

The appellant relied on Article 40 of the Constitution in urging this Court to protect her right to property. This Court in the case of **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others (2019) eKLR** stated thus:

> ***"The thrust of Article 40 is to protect proprietary rights which are lawfully acquired. The Supreme Court in Rutongot Farm Ltd vs. Kenya Forest Service & 3 others [2018] eKLR, expressed this position thus: "Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution."***

That was not the case in the present suit. As discussed elsewhere in this judgment, the title to the whole suit land was obtained through fraud misrepresentation and unprocedurally. Since the mode of acquisition of title was unlawful, Article 40 does not kick in hence the title to the suit land held by the appellant was defeasible. In the persuasive dicta in **Milankumar Shah and 2Others v City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05),** it was correctly stated that:

> ***"[21] The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors –v- AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required."***

From the foregoing, and as already stated, we are not satisfied that the appellant obtained ownership of the entire suit land legally.

Was the appellant justified in mounting this suit? Mr. Odongo submitted that it was trite law that where a statute provided a dispute resolution mechanism, it is proper that the courts cede to that jurisdiction. The appellant conceded that the award of the 2nd respondent was adopted as a judgment of the court. Upon adoption of the award and issuance of the decree, the award ceased to exist. That if the appellant was dissatisfied with the decree, she should have exhausted appellate jurisdiction provided for under the Land Disputes Tribunal Act or filed Judicial Review Proceedings. She opted for neither. Instead, she filed a civil suit the precursor to this appeal which was not a proper forum. She justified her decision on the ground that she could not appeal or commence judicial proceedings because either way she was time barred.

We wholly agree with and endorse the submissions by Mr. Odongo on this aspect. 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. (See **Paul Muraya Kaguri v Simon Mbaria Muchuru [2015] eKLR)**. As we have determined elsewhere in this judgment, the jurisdiction of the 2nd respondent in this matter was pursuant to section 3 of the Land Disputes Tribunal Act. The 2nd respondent had jurisdiction to determine the dispute before it. In the persuasive case of **Florence Nyaboke Machani v Matere Amos Ombui [2018] eKLR**, the court dismissed the appeal when it held that the Land Disputes Tribunal was a mechanism established by statute and the appellant was bound by the decision of the tribunal which was adopted by the court.

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. The reason given that she could not pursue the remedies under the said Act because of the timelines and or time constraints are neither here nor there.

In the end, we find no reason to interfere with the judgment of the trial court. The appeal lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Eldoret this 28th day of November, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.