



REPUBLIC OF KENYA



**Njihia v Mwangi (Environment and Land Appeal E012 of 2021)
[2024] KEELC 3303 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E012 OF 2021
LN GACHERU, J
APRIL 11, 2024**

BETWEEN

DICKSON KAMAU NJIHIA APPELLANT

AND

JERUSHA WANGARI MWANGI RESPONDENT

*(Being an Appeal from the Ruling of Hon. K. Sambu (SPM) in Kigumo
SPMC LDT NO. 21 OF 2002, Delivered on 1st July 2021 at Kigumo)*

JUDGMENT

1. The Appellant herein was aggrieved by the decision of Hon. K. Sambu (SPM), in Kigumo SPM LDT Case No. 21 of 2002, which was delivered on 1st July 2021, wherein the trial court dismissed his Chamber Summons Application dated 4th October 2002. In the said Chamber Summons, the Appellant as the Applicant had sought for adoption of an LDT Award as the Order of the court. The trial court declined the Application and the Appellant appealed against that decision.
2. Consequently, vide a Memorandum of Appeal dated 23rd July 2023, the Appellant sought for the following Orders:
 - a. That the ruling of the Kigumo Principal Magistrate's Court L.D.T. Case No. 21 of 2002, delivered on 1st July 2021, be set aside.
 - b. That the costs of this appeal be awarded to the appellant.
3. The brief facts are; - Land parcel No. LOC.2/Gacharage/13, (the suit property) is registered in the name of Respondent herein Jerusha Wangari Mwangi, under the Registered *Land Act*, CAP 300 (repealed). The Appellant presented before the Kigumo Land Disputes Tribunal (LDT), a dispute against the Respondent herein concerning ownership of the suit property. The said Kigumo Land Disputes Tribunal, entertained the dispute and rendered an Award dated 8th August 2002, which



- Award was read in Court on 30th August 2002. The Respondent lodged an Appeal dated 27th September 2002, before the Provincial Land Disputes Appeals Committee in Nyeri, against the aforesaid Award. The said Appeal might still be pending as there is no evidence that the same was ever concluded.
4. After the reading of the Award, the Appellant filed the impugned Chamber Summons Application dated 4th October 2002, wherein he sought for the Judgement to be entered in terms of the Award filed by the Kigumo LDT, together with costs.
 5. In response to the said Chamber Summons, the Respondent filed a Replying Affidavit through her advocate Reuben Muiruri Kimani, who averred that though the Award was read to the parties on 30th August 2002, the Respondent Jerusha Wangari Mwangi, had filed an Appeal at the Provincial Appeals Land Disputes Committee at Nyeri, being Appeal No. 36 of 2002.
 6. The Respondent urged the court to await the outcome of the said Appeal before hearing the Application for adoption of the Award of the Tribunal as Judgement of the court.
 7. From the court record, there was no stay of execution, apart from that Chamber Summons and the Replying Affidavit. The court never stayed the matter until the determination of the Appeal. Further, there is no evidence that the Appeal was ever heard, since this court has not seen any determination from the Provincial Appeals Committee or any communication from the said Appeals committee to the Parties herein.
 8. However, from the court record, the next action in this matter was on 29th April 2019, which was more than 17 years since 2002. On this particular day, the Chamber Summons Application dated 4th October 2002, was fixed for hearing on 7th June 2019.
 9. The Respondent herein, Jerusha Wangari Mwangi, filed grounds of opposition on 30th May 2019, and opposed the said Chamber Summons Application on the grounds that the claim thereon could not be sustained and maintained in law as the Award of the LDT, that was sought to be adopted was made in 2002, and has been caught by Limitation of actions, and thus, it was stale. The Respondent had urged the court to dismiss the said Chamber Summons Application.
 10. The Appellant as the Applicant in the said Chamber Summons Application had contended that the LDT's Award dated 8th August 2002, is lawful and the only reason that prevented the same from being adopted by the Court as its Judgement was that the Respondent had lodged an Appeal dated 27th September 2002, at the Provincial Land Disputes Appeals Committee, against the aforesaid award, which Appeal has not been prosecuted to date.
 11. The said Chamber Summons Application dated 4th October 2002, was canvassed by way of written submissions and on 1st July 2021, the trial Magistrate delivered the impugned Ruling, wherein he held that the court lacked jurisdiction to adopt the said Award. Further, the trial court found and held that the subject Award was statutorily time-barred pursuant to the provisions of the [Limitation of Actions Act](#).
 12. After the Memo of Appeal, and later the Record of Appeal had been filed, the instant Appeal was admitted under Section 79B of the [Civil Procedure Act](#), and the Parties were directed to canvass the said Appeal by way of written submissions. The parties complied as directed. The Appellant filed his written submissions on 31st August 2023, through Keli & Mwaura Associates Advocates, and urged the court to allow the Appeal. The Respondent filed her submissions on 19th September 2023, through Kirubi, Mwangi Ben & Co Advocates, and urged the court to dismiss the appeal entirely



Appellant's Submissions

13. The Appellant submitted that the instant Chamber Summons Application for adoption of the Award of the Kigumo Land Disputes Tribunal as the Order of the Court was lodged before the Court timeously in year 2002; therefore, it is not subject to the provisions of the *Limitation of Actions Act*.
14. Relying on Practice Directions issued by the Hon. Chief Justice vide Kenya Gazette Notice No.1617 dated 9th February 2011, the Appellant further submitted that the said Award of the Kigumo Land Disputes Tribunal, was filed in Court timeously and thereby, transforming into proceedings of the Court and therefore, the matter ceased to be an LDT matter at that point.
15. It was the further submissions of the appellant that the trial court erred both in law and fact in making a finding that it had no jurisdiction to adopt the Award of the Land Disputes Tribunal (LDT), whereas, the aforesaid Award was filed in court pursuant to the Land Disputes Tribunal Act (repealed), and the mandate of the Court was limited to adopting the award.
16. The Appellant also submitted that pursuant to Section 7 of the Land Disputes Tribunal Act, as read together with Section 30 of the *Environment and Land Court Act*, and as read together with the Kenya Gazette Notice No.1617 (Number 19 of 2011), issued by the Hon. Chief Justice on 9th February 2011, the Magistrates' Courts were precluded from hearing and determining the cases referred to them by the Land Disputes tribunals, which had been adopted as Judgments of the Court.
17. Relying on the provisions of Section 8(1) and (9) of the Land Disputes Tribunal Act, the Appellant submitted that the mechanism for appeal against a decision of the tribunal set out thereunder excludes any role by the Magistrates Courts. Accordingly, he submitted that the trial Magistrate had no mandate or jurisdiction to vary or review the award filed by the tribunal.
18. Further, it was his submissions that the trial Magistrate erred in law and in fact by holding that the Award was time-barred, yet the Chamber Summons Application for adoption of the aforesaid Award was filed well within the stipulated period.
19. The Appellant maintained that the trial Magistrate erred in both law and fact in considering irrelevant matters and disregarded the weight of evidence in arriving at a decision in favour of the Respondent herein as against the Appellant.
20. Consequently, the Appellant submitted that the trial Magistrate erred in law and fact in failing to consider, adopt and appreciate the Appellant's written submissions on record including the authorities annexed thereto.
21. It was the Appellant contention that the Respondent herein did make use of the Section 8(1) and (9) of the Land Disputes Tribunal Act by preferring an Appeal to the Appeals Committee at Nyeri through Appeal Number 36 of 2002, wherein, the Respondent's previous Advocate R.M. KIMANI filed a Replying Affidavit dated on 6th November 2002, and filed before the Court on 12th November 2002, wherein he sought for a stay of execution of the tribunal decision pending the hearing and determination of the Respondent's appeal.
22. It was the Appellant's submissions that the Respondent never bothered to prosecute the foresaid Appeal, thus putting the adoption of the tribunal award in abeyance since year 2002.
23. Reliance was placed in the following cases: Chege Macharia Vs Francis Kimani Kirimira [2015] eKLR; Mutemi Mwasya V Mutua Kasuva (Machakos HCCA No. 140 of 2001); Chrispus Michi Gaku V Karanja Wainaina [2006]eKLR; Peter Ouma Mitai V John Nyarara (Kisii HCCA No.297 of 2005);



Respondent's Submissions

24. The Respondent in opposing the instant Appeal filed her written submissions and stated that the suit herein relates to land parcel number LOC.2/GACHARAGE/13, which is registered in her name. It is her submissions that she has been residing on the suit land since 1965, and holds a valid title to the suit land.
25. In her aforesaid Submissions dated 18th September 2023, the Respondent further submitted that the present Appeal erroneously challenges the Ruling of the Hon. E.S. Agade, Senior Resident Magistrate, whereas it ought to be framed as an Appeal against the Ruling of the Hon. K. Sambu (SPM), delivered on 1st July 2021.
26. The Respondent also submitted that as the instant Appeal is against a Ruling and thus, subject to Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules, the appellant ought to have sought for leave to Appeal. It was her submissions that the Appellant herein has not sought or obtained leave of Court before filing the subject Appeal thereby, making the instant Appeal incompetent. She further submitted that the Court lacks jurisdiction to hear and determine the present Appeal as no leave was sought or obtained by the Appellant.
27. Further, the Respondent maintained that the award of the tribunal was issued in 8th August, 2022, while the Appellant's application at the trial Court was scheduled for hearing in July 2021, which is about 20 years, from the date of delivery of the impugned Award, which makes the aforesaid Award time-barred under the provisions of the *Limitation of Actions Act*.
28. The Respondent reiterated that the trial Court acted within the law in declining to enter the aforesaid Award as a Judgment of the Court as the originator of the aforesaid award, the Land Disputes Tribunal (LDT), had no jurisdiction to hear and determines issues related to registered land. The Respondent also submitted that a Court of law could not be expected to validate an Award that was rendered by a tribunal acting ultra-vires.
29. The Respondent relied on the following cases: Republic V Suneka Land Disputes Tribunal & 2 Others ex-parte Ombeta Ombeta & Another (2013)eKLR; Republic V Chairman Meru District Land Disputes Tribunal & 3 Others ex-parte Daniel Kamakia Kiangura; Republic V Eastern Provincial Land Disputes Appeals Tribunal ex-parte Nyaga Mbiti & 3 Others (2013)eKLR.
30. The above is the background of this Appeal. There is no doubt that the Chamber Summons Application dated 4th October 2002, for adoption of the Award of the Kigumo Land Disputes Tribunal, was heard and determined in the year 2021. It is also evident that the said Application was vehemently opposed by the Respondent herein. Further, it is clear that ultimately after considering the written submissions in favour of and against the said Application, the trial Magistrate dismissed the said Chamber Summons Application.
31. In his findings, the trial magistrate held as follows;all matters which were pending before the Land Disputes Tribunals pursuant to the repealed Land Disputes Tribunal Act, were to be transferred to the Land and Environment Court for hearing and final disposal vide Gazette Notice No. 1617 of 2012... the Magistrate court's jurisdiction , to adopt awards as the judgement of the court emanating from the Land Disputes Tribunal pursuant to section 3 of the Land Disputes Tribunal Act(now repealed), in my view was ousted by the operation of law. This court therefore lacks jurisdiction to entertain the Applicant's Chamber Summons as sought”



32. Further, the trial Magistrate went on to find and hold that;secondly, even if it were to be argued that the court still has some residual jurisdiction to entertain matters which were initiated through the defunct Land Disputes Tribunals, the subject Award obtained close to twenty years ago , from the face of record , is statutorily time barred as it has been caught by the limitation of time envisaged under the Limitation of Actions Act.... The court as it were cannot be called upon to sanction an illegality, which in itself was null and void ab initio”
33. It is the above findings of the trial court that aggrieved the Appellant herein, and thus this Appeal.
34. This court as an Appellate court has considered the instant Memo of Appeal, the Record of Appeal, which contains the available evidence before the trial court, the rival written submissions, cited authorities and the relevant provisions of law and finds the issues for determination are;
- I. Whether the Appellant needed leave of the court to file the instant Appeal/whether court has jurisdiction to entertain the Appeal.
 - II. Whether the Appeal is merited.
 - III . Who should bear costs of this Appeal.

i) Whether the Appellant needed leave of the court to file the instant Appeal and or Whether the Court has jurisdiction to entertain the instant Appeal.?

35. The Appeal was admitted by the court pursuant to the provisions of Section 79(B), of the Civil Procedure Act, wherein the court found no reasons to reject the Appeal summarily.
36. This is a first Appeal, and as provided by section 65 of the Civil Procedure Act, this court as an Appellate court, will determine both the facts and the law. See section 65 of the Civil Procedure Act.

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—

.....

(b) from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of the third class, on a question of law or fact;

(c) from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.

37. Further, as provided by section 78 of the Civil Procedure Act, the court is obligated to consider the evidence adduced before the trial court, which evidence is contained in the Record of the Appeal, and Original lower court file, then re-evaluate, re-assess and re-analyze the said available evidence and come up with its own independent decision. See the case of *Selle vs Associated Motor Limited Company*(1968) E.A 123, where the court held that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make



due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif _vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

38. This is an Appeal from the Ruling of the trial court, and therefore, section 75 of the [Civil Procedure Act](#), comes into play. The Respondent submitted that the Appellant flouted Section 75(1)b, of the [Civil Procedure Act](#), which states as follows:

- “(1) An appeal shall be as of right from the following orders and shall also lie from any other order with leave of the Court making such Order of the Court to which an appeal would lie if leave were granted:
- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the Court.
 - (b) An order on an award stated in the form of a special case.”

39. It is not in dispute that the instant Appeal challenges a Ruling of the trial Court which was issued on 1st July 2023, by Hon. K. Sambu (SPM) in Kigumo LDT CASE NO 21 OF 2002. Clearly, the Lower Court's decision does not fall within those orders set out under Section 75 of the [Civil Procedure Act](#) or pursuant to the provisions of Order 43 of the Civil Procedure Rules for which Appeals lie as of right.

40. The Respondent has submitted that since the orders issued by the trial court does not fall under the orders stated in Order 43 of the Civil Procedure Rules, wherein Appeals from the said orders lies as a matter of right, then the Appellant needed leave from the court appealed from, to file the instant Appeal. The appellant submitted that he did not need such leave.

41. It is trite that if the order of the court that is appealed from does not fall under the orders stipulated in Order 43 of Civil Procedure Rules, then leave of the court is mandatory. Courts in this country have had occasions to deal with issue of leave to appeal from orders of the court falling out of Order 43 of Civil Procedure Rules.

42. The Court in the case of Mbaya v Kamau & another (Civil Appeal E012 of 2023) [2023] KEHC 24945 (KLR) held as follows:

“There is no automatic right of appeal of the order sought to be appealed from by the Applicant in the instant matter. There can therefore be no competent Appeal that would clothe this court with jurisdiction to entertain an application for stay of execution or for stay of proceedings pending Appeal. In essence, this court has no jurisdiction to hear the intended appeal unless leave of the court from which the order was made is sought and obtained.”

43. The Court of Appeal in CA Nairobi 86 of 2015 Peter Nyaga Murake v Joseph Mutunga, held as follows:

“without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the [Civil Procedure Act](#) and Order 43 of the Civil Procedure Rules, the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal and without a valid Notice of Appeal, the jurisdiction of this court is not properly



invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water”.

44. The Court in the case of *Nyutu Agrovet Ltd vs Airtel Networks Ltd* [2015] eKLR, held that a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of Court:

“where a right of appeal does not lie automatically, a party can only invoke the provisions of section 75 of the *Civil Procedure Act* and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”

Further, the Court stated that the right of appeal is conferred by statute and cannot be inferred.

45. However, the Ruling herein emanated from a Chamber Summons Application, which was filed in accordance to section 7(2) of the Land Disputes Tribunal Act, which provides that ; the court shall enter judgement in accordance with the decision of the tribunal and upon being entered a decree shall issue and shall be enforced in the manner provided for under the *Civil Procedure Act*.
46. The Appellant herein is dissatisfied with the trial court’s decision of not adopting the Award of the Tribunal as a judgement of the court. Though the said Chamber Summons Application that brought about the impugned ruling was not brought under any of the orders that Appeals from the said orders lie as of right, and from the face of it, leave was needed for this instant Appeal, the court will take refuge in Order 43 rule 3, which provides that; nothing in the order shall apply to any adjudication which as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.
47. Since by adjudicating and holding that the trial Court had no jurisdiction to adopt the said Award of LDT, as judgement of the court, the said decision conclusively determined the rights of the parties herein, then this court finds and holds that it was not necessary for the Appellant to seek and obtain leave of Court as a pre-condition for lodging the instant Appeal.
48. For the avoidance of doubt, though the Appellant filed the Appeal without leave of court, that absence did not render this Appeal incompetent or take away this court’s jurisdiction to deal with the instant Appeal. This Appeal is properly before this court. The Appellant did not need to obtain the trial Court’s leave prior to commencing the instant appeal. The Court holds and finds that the instant Appeal is properly filed and the jurisdiction of this Court has been properly invoked by the Appellant herein.

ii) Whether the appeal is merited.

49. The Appellant submitted that the role of the Magistrate’s Courts pursuant to Section 7 of the Land Disputes Tribunal Act (repealed) precluded any review or variation of awards and was limited to adoption of the same by the Court.
50. The Respondent submitted that the Court would abdicate its judicial responsibility by adopting as its Judgment an award rendered by a tribunal acting in excess of its mandate or ultra-vires.
51. Section 7 of the Land Disputes Tribunal Act (repealed) states as follows:

“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*.”

52. Section 3(1) of the Land Disputes Tribunal Act set out the disputes over which the LDT had the jurisdiction to hear and determine as follows:

“ 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”.

53. A look at the decision of the Kigumo Land Disputes Tribunal’s Award clearly shows that the tribunal went outside its mandate when it dealt with a case that fell under the Registered *Land Act* (repealed). Indeed, the LDT, acted ultra vires. However, the Application that was before the court was filed in October 2002, immediately after the award of the tribunal was read to the Parties.

54. Before the LDT ACT, was repealed, the role of the Magistrate in regard to the award coming from LDT, was set out on section 7 of the said Act, which role was only to read the award and later enter it as a judgement of the court.

55. The trial Magistrate had no jurisdiction to review the said Award made by the tribunal. Clearly section 7(2) of the LDT Act(repealed), is couched in mandatory terms, that the court shall enter judgement in accordance with the decision of the tribunal.

56. If any of the Party was aggrieved by the decision of the tribunal may, within thirty days of the decision Appeal to the Committee for the province in which is the land in dispute is situate. Indeed, the Respondent herein Appealed before the Provincial Appeals Committee in Nyeri, but there is no evidence of what became of the said Appeal.

57. The suit before the Kigumo Law court, was filed by the Appellant herein. He had a duty to ensure that the said matter was concluded expeditiously. He filed the Chamber Summons Application for adoption of the Award on 4th October 2002. There was no action until 2019, when the said Chamber Summons Application was set down for hearing. There was no evidence that the said Award of the tribunal was set Aside.

58. If the said Award was not set aside, and without evidence of what became of the Appeal No. 36 of 2002, before the Provincial Land Disputes Committee, then this court finds and holds that the said Award is now stale, and the Appellant is time barred from adopting it as an award of the tribunal.

59. This court will be persuaded by the decision of Munyao J, in ELC CASE NO(HCC NO 763 OF 1992, Moses Kipkurui Bor vs John Chirchir , where it was held;

“ In as much as the application herein was for execution of the decree and was filed before 12 years from the date of judgment lapsed, does it mean that the mere fact that it has been filed, without any step taken to prosecute it, would conclude that it is alive? Does it mean that such application can be left for an indefinite duration of time? I do not think so. My view of the matter is that if one files an application for vacant possession of land in execution of a decree, he must take steps to prosecute such application at the latest within 12 years of filing such application, or at least within this period of time, take steps towards prosecution of that



application so that even if a decision is made outside the 12 years, this would not be because the application has remained unprosecuted for that duration of time. If such decree holder does not take steps to prosecute such application within 12 years of filing it, my view of the matter is that the application will be caught up by Section 4 (4) of the *Limitation of Actions Act*, and would be statute barred. It certainly could not be the intention of the law to have a party simply file an application for vacant possession and fail to prosecute it for an indefinite period of time, then at whatever time in the future, seek to now prosecute it. In matters of land, it should be appreciated that time starts running in favour of the occupant, who can claim adverse possession if 12 years lapse when his occupation is undisturbed. To me, failure to prosecute such application would be akin to allowing the possessor quiet occupation of the suit land, and after 12 years, any action which attempts to reclaim the suit land would be time barred. This reasoning appears to be backed up by the Court of Appeal decision in the *M'Ikiara M'Rikinkany & Another vs Gilbert Kabeere M'Mbijiwe (2007) eKLR.*”

60. There is a similarity with this case; the Appellant filed a Chamber Summons Application for adoption of the award of the tribunal as a judgement of the court. He does not come back to court until 2019, wherein he sought to prosecute an Application that was filed 20 years ago. The Appellant did not bother to inform the court what became of the Appeal that had been filed before the Provincial Appeals Committee. Was the Appeal prosecuted to the end? With the repeal of LDT Act, was the Appeal transferred to Environment and Land Court as provided by Practice Directions No 1617 of 2012?
61. In any event, the award of the Kigumo Land Disputes Tribunal was a nullity, given that the tribunal dealt with a matter that it had no jurisdiction to deal with. The suit property is registered under the Registered *Land Act* (repealed). Pursuant to Section 159 of the Registered *Land Act* (repealed), the jurisdiction to determine disputes concerning title to or possession of land registered under the aforesaid Act was vested upon the High Court and Magistrates' Courts.
62. In the case of *Macfoy Vs United Africa Co. Ltd (1961)- 3 ALL E.R. 1169* the Court stated as follows:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.
63. In the case of *Republic V Suneka Land Disputes Tribunal & 2 Others ex-parte Ombeta Ombeta & Another (2013)e KLR* the Court held that any Judgment entered in respect of an award which the Court has declared a nullity amounts to “putting something on nothing”.
64. Further, in the same case of *Republic V Suneka Land Disputes Tribunal & 2 Others ex-parte Ombeta Ombeta(supra)*, the court held that it was within the judicial function of a Lower Court to enquire as to the lawfulness or validity of any award seeking to be entered as a Judgment of the Court and further that, such enquiry was not to be directed on the merits of the award, but on whether the aforesaid award was made in accordance with the law.
65. This court acting on its Appellate function and as provided by section 78 of the *Civil Procedure Act* has re-considered, re-evaluated, re-analyzed the availed evidence before the trial court and has formed its own independent decision to the effect that the Kigumo Land Disputes Tribunal acted outside of its statutory mandate by entertaining the Appellant's claim over the suit land and entering a determination on the same.



66. Consequently, this court finds and holds that the award rendered by the said Kigumo LDT dated 8th August 2002, in respect of the suit land is a legal nullity for purporting to adjudicate on matters outside the tribunal's purview.
67. For the above reasons, this Court finds and holds that the trial Court did not misdirect itself on a matter of law or fact in declining to adopt as its Judgment the Award of Kigumo LDT dated 8th August 2002, as it was a nullity.
68. 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”.
69. It is evident that the Award of Kigumo LDT dated 8th August 2002, was not adopted as a Judgment of the Court at any point in time. Consequently, the afore-mentioned Award, being a nullity having not been adopted by the trial Court as its Judgment, is not subject to protection pursuant to the provisions of Section 23(3) (e) of the *Interpretation and General Provisions Act*. The said Award, being a legal nullity, could not be cured through adoption by the Court.
70. Having considered the available evidence as having analyzed the said evidence as above, this court finds and holds that this Appeal is not merited and consequently, the instant Appeal is dismissed entirely.

(iii). Who should bear costs of this Appeal.

71. On the issue of who should bear costs of the Appeal, it is evident that costs is awarded at the discretion of the court, and is awarded to the successful party unless there are circumstances that would dictate otherwise. See the case of *Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

Section 27 of the *Civil Procedure Act* which states;

“Costs

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction



to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”.

72. The Respondent is the successful litigant and this court finds no reasons not to award her costs of this Appeal and costs before the trial court. Ultimately, the Appeal herein is dismissed entirely with costs to the Respondents, for this Appeal and at the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 11TH DAY OF APRIL, 2024

L. GACHERU

JUDGE

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Absent – Appellant though served with notices

Absent - Respondent

L. GACHERU

JUDGE

