IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 16 OF 2014

BETWEEN

JOSPHAT KAMAU GATIMU ……..APPELLANT

AND

PETER GATIMU KANYONYO ……..... RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Kerugoya*

(Olao, J.)dated 17th February, 2014 in J. R. Appl. No. 24 of 2013)

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JUDGEMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court dated 17th February, 2014, wherein the respondent successfully applied for an order of certiorari quashing the award by the Nyeri Provincial Land Disputes Appeals Tribunal. In a first appeal, it is always a duty of the appellate court to re-evaluate and analyze the evidence before the trial court and make independent conclusions. This Court in ***Sumaria & Another –vs- Allied Industries Ltd., (2007) KLR 1***, expressed itself as follows:

> ***"Being a first appeal, the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did".***

[2] The appellant, Josphat Kamau Gatimu, *(Josphat),* is a son of the respondent, Peter Gatimu Kanyonyo, *(Peter).* Peter is also the father to Esther Wanjiru Mutugi, *(Esther),* Eunice Muthoni *(Eunice),* Agnes Wanjiku *(Agnes),* James Gathara Gatimu, *(James)* and Jesee Murithi Gatimu, *(Jesee).* This explains the nature of the relationship subsisting between the parties to this appeal and it is basically father, son and grandchildren. The genesis of the present appeal can be traced to a dispute over a parcel of land which was originally known as ***Mutira / Kiaga / 76 (suit land)*** which was registered in the name of Peter. The suit land was subsequently subdivided into several portions namely: - ***Mutira / Kiaga / 1672***, ***Mutira / Kiaga / 1673*** and ***Mutira / Kiaga / 1677*** all registered in Peter's name. The record shows that there existed a dispute regarding the sub-division of land parcel Mutira / Kiaga / *76 (hereinafter referred to as the original suit land)* between Eunice and Peter which was first referred to the Kirinyaga South

District Land Disputes Tribunal (as then constituted).

[3] The dispute was assigned case number: ***Arbitration Case No. D26D/ VOL.V/ 387 MUTIRA KIAGA /76.*** We have not had the benefit of perusing the proceedings at the Tribunal as the same do not form part of the record. However, we are able to decipher from the record of the magistrate's court at Wang'uru in ***Arbitration Case No. 9 of 2009,*** that the Land Disputes Tribunal ruled in favour of Eunice as confirmed by the subsequent filing of an appeal by Peter at the Nyeri Provincial Land Disputes Appeals Tribunal vide case ***No. 14 of 2009***. It is necessary to mention that in the said award, the Land Disputes Tribunal ordered that that entire parcel known as Mutira / Kiaga / 76 be sub- divided as follows: Peter (1acre), Eunice (1/3 acre), Agnes (1/3 acre) and Esther (1/3 acre).

[4] On 3rd December, 2010 the Nyeri Provincial Land Disputes Appeals Tribunal rendered its award. The said award was subsequently adopted by the Magistrate's court as its judgment on 6th January, 2011. The parties appear to have also entered into a consent judgment on 6th June 2011. The tenor of the consent judgment was that Peter was to excise and transfer three portions measuring 1/3 of an acre each from his land parcel number ***Mutira / Kiaga / 76***; and that the portions were to be excised from the portion of the original parcel bordering ***Land Parcel Mutira /Kiara / 78***. The resulting parcel of land was then to be divided into nine portions. Finally, Peter was to sign all the necessary documents to facilitate transfer. Thereafter, the parties to the consent judgment were unable to agree on the modalities of its execution. Strangely, (we say so because once a consent order is recorded in court it becomes an order of the court) the leaned magistrate ruled that the court could not supervise the implementation of a consent order which had been voluntarily recorded. It further ruled that in the event that any party to the consent failed to honour its obligations then the aggrieved party could move the court for relief by way of an application.

[5] We are also able to gather from the record the filing and hearing of an application dated 13th October, 2011, whose exact prayers remain unknown save that the same was unopposed, and was allowed by the consent of the parties. The application dated 16th October, 2012,was next in line with its main prayer being that the Court's Executive Officer signs documents for the transfer of land parcels ***Mutira / Kiaga / 1669/ 1672 / 1673, 1676*** and ***1677***. The application in question was filed by third parties, (Jessee, Josphat, James& Esther), who were not party to the proceedings at the Land Disputes Tribunal or the Provincial Land Disputes Appeals Tribunal. The same was dismissed as the leaned trial magistrate was of the opinion that the applicants should have filed a substantive application to be enjoined to the proceedings as judgment had been rendered.

[6] By an application dated 14th December, 2012, Jessee, Josphat, James& Esther successfully applied to be formally enjoined to Arbitration Case No 9 of 2009 wherein the court had formally adopted the award of the Nyeri Provincial Land Disputes Tribunal. Aggrieved by the said ruling, Peter filed Judicial Review proceedings at the High Court seeking an order of certiorari to remove into the High Court and quash inter alia:-

- ***The award of the Provincial Land Disputes Appeals Tribunal;***
- ***The order of the Wang'uru Senior Resident Magistrate's Court issued on 6th January, 2011; and***
- ***An order for the Executive Officer to sign documents given on 21st February, 2013 to facilitate sub-division and transfer of land parcel No Mutira/ Kiaga / 1672, 1673, (sic) and 1677 to the respondents.***

[7] Leave was granted for Peter to commence judicial review proceedings with the same operating as a stay of the order against the Executive Officer signing documents to facilitate the sub-division and transfer of land parcel No ***Mutira/ Kiaga/ 1672, 1673, and 1677***. Subsequently, Peter filed and served the substantive Notice of Motion dated 18th March, 2013, which Jessee, Josphat, James and Esther responded to by way of oral submissions. Upon considering the said application, the leaned Judge of the High Court issued an order of certiorari as prayed. It is that decision that has provoked this appeal based on the

following grounds:-

- ***The honourable Judge misdirected himself in law and fact in quashing the award of the Provincial Appeals Committee yet there was no application before the court for such relief.***

- ***The honourable Judge erred in law in failing to appreciate that the relief sought before him was limited to the order of the Principal Magistrate dated 21/2/2013 in Wang'uru PMCC No 9 of 2009.***

- ***The trial Judge erred in law in granting orders not sought for in the Notice of Motion dated 18/3/2013.***

- ***The trial Judge erred in law in failing to appreciate that no leave was granted to the respondent to apply for orders of certiorari against the award of the Provincial Appeals Committee dated 27/10/10 and that in any event, time for doing so had long passed.***

- ***The trial Judge erred in law and in fact in failing to appreciate that it was indeed the respondent who offered to sub-divide and share out his land to his sons including the appellant herein and therefore quashing the award was against the express wish of the respondent.***

[8] **Mr. Gori**, learned counsel for the appellant, submitted that there was no application to quash the decision of the Provincial Land Disputes Appeals Tribunal. He argued that all parties participated in the proceedings before the Land Disputes Tribunal hence there was nothing to quash. Further the High Court could only grant the order that was asked for; what was quashed was the decision of the magistrate's court adopting the order of the Provincial Land Disputes Appeal Tribunal. It was also submitted that six months had lapsed from the time the impugned decision was made, thereby disentitling the applicant an order of certiorari. According to Mr. Gori, the superior court failed to take into account the time factor; moreover there was a consent on record regarding the sub-division of the land namely: - ***Mutira / Kiaga/ 1676, 1679*** and ***1677;*** that the appellant lives on ***Mutira / Kiaga / 1673***, from the time he was born. Mr. Gori concluded by submitting that in the event that the appellant was evicted from the land in question he would be rendered destitute.

[9] Mr. Omenya, learned counsel for the respondent, in opposing the appeal submitted that the appellant and the respondent are father and son, and that the appellant's claim was to be given a parcel of land while the respondent was still alive; he wondered whether the magistrate's court had jurisdiction to adopt the proceedings and award of the Provincial Land Disputes Appeal Tribunal; in any case the tribunal had exceeded its jurisdiction by arriving at a defective decision that touched on title to land. As regards a consent order, counsel argued that it was entered into between the respondent and the 3rd Respondent in the Judicial Review proceedings namely: - ***J. R. Application 24/2013-Republic Vs Provincial Appeals Committee & 4 Others, Ex-parte Peter Gatimu Kanyonyo***. However, the consent was not between the appellant and the respondent; also when the consent was entered into, the appellant was not on record and that the same is not binding on him in any way. According to Mr. Omenya, by a replying affidavit sworn on 8th April, 2013, the appellant was seeking adoption of the tribunal's order dated 21st October, 2010; thus he could not come to court seeking orders he did not seek for before the High Court.

[10] Having considered the facts, the proceedings, the law and the decision of the High Court we have formulated this issue for our determination:-

- ***Whether a Court of Law can grant a party a relief which was not pleaded for?***

In order to answer the aforesaid question, it is imperative to revisit the orders that were sought by way of the Notice of Motion dated 18th March, 2013, namely:-

a. ***"THAT the ex-parte applicant herein be granted an order of certiorari to remove into the High***

Court and quash the decision of the 2nd respondent(Wang'uru Senior Resident Magistrate) made on 21st February, 2013 in Wang'uru Senior Resident Magistrate's court Arbitration case No. 9 of 2009".

b. ***"THAT the costs of this application be provided for".***

We are also inclined to delve albeit briefly, into the order of the superior court issued on the 14th day of March, 2013, which granted leave to the respondent to commence judicial review proceedings against the Land Disputes Tribunal and the Magistrate's Court. The first and second limbs thereof are instructive:-

1. ***"THAT the(sic) leave be and is hereby granted to the applicant to apply for an order of certiorari to quash the decision of the 2nd respondent (Wang'uru Senior Resident Magistrate) made on 21st February, 2013".***

2. ***"THAT the leave granted to operate as stay of the orders issued by the 2nd respondent (Wang'uru Senior Resident Magistrate) on 21st February, 2013, till the hearing and determination of the substantive motion".***

It is manifestly clear that the only decision which was to be quashed was that of the Wang'uru Senior Resident Magistrate which was made on 21st February, 2013. However, the order issued by the court quashed the decision by the Nyeri Provincial Land Disputes Appeals Tribunal which was not sought before the said court.

[11] In ***Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others, [2014] eKLR-Civil Appeal No 219 of 2013,*** this court cited with approval a decision of the Malawi Supreme Court of Appeal- ***Malawi Railways Ltd –vs- Nyasulu, [1998] MWSC 3*** wherein the court quoted with approval from an article by **Sir Jack Jacob** entitled "**The present importance of pleadings**" published in [1960] Current Legal Problems at p.174 where the Author states:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation".

[12] ***Order 2, Rule 10 (1)*** of the ***Civil Procedure Rules*** makes it mandatory for every pleading to contain the necessary particulars of any claim, defence or other matter pleaded. ***Order 2, Rule 6*** on the other hand forbids in no uncertain terms the making of an allegation of fact or the raising of any new ground of claim inconsistent with a previous pleading; save for an instance where a party amends his pleading or applies for leave to amend his pleading. In view of the foregoing analysis we find and hold that the parties who appeared before the High Court for the Judicial Review proceedings were bound by their pleadings. Neither party was at liberty to deviate from the pleadings. We respectfully find it was improper for the learned Judge of the High Court to grant orders which were not sought.

[13] Before we pen off from this judgment, we note in the leaned Judge's closing remarks the parties were encouraged to pursue an amicable settlement owing to their family ties. This is indeed as elucidated very clearly by the values enshrined in Article ***159 (c)*** of the ***Constitution*** of Kenya which provides:

"In exercising Judicial authority, the courts and tribunals shall be guided by the following

principles:

a.
b.
c. ***Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional disputes resolution mechanisms shall be promoted, subject to clause (3)".***

We are of a similar persuasion and accordingly urge the parties to the present appeal to pursue a path that brings unity and harmony in the family. Having said that, and for the reasons aforestated we find this appeal has merit, we set aside the judgment and decree of the High Court and substitute it with an order dismissing the Notice of Motion dated 18th March, 2013. This being a family matter, we do not wish to set them any more against each other, we order each party to bear their own costs of this appeal.

Dated and delivered at Nyeri this 17th day of March, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

J. OTIENO - ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR