



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NYERI**  
**(CORAM:WAKI, NAMBUYE & KIAGEJ.J.A.)**  
**CIVIL APPEAL NO. 20 OF 2015**

**BETWEEN**

**CHEGE MACHARIA.....APPELLANT**

**AND**

**FRANCIS KIMANI KIRIMIRA.....RESPONDENT**

*(An appeal from the judgment of the Environment and Land Court of Kenya at Nyeri (Justice L. N. Waithaka J) dated 22nd April 2015)*

*In*

*E.L.C. No. 17 of 2014)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

On 10<sup>th</sup> October 2013, **Chege Macharia** the appellant herein, filed a Notice of Motion before the Senior Principal Magistrate's Court at Kigumo seeking an order that the award of the **Kigumo Land Disputes Tribunal** dated 3<sup>rd</sup> October 2008 be adopted as a judgment of that court. That application was said to be brought under "**Order 51(1)**" (sic!) of the **Civil Procedure Rules** and 'all enabling provisions of the laws'. The grounds upon which the same was premised appeared on its face as;

- a. Pursuant to the directions given, by the Honourable Chief Justice on 9<sup>th</sup> February 2012 all matters pending before the Land Disputes Tribunals as at the date of enactment of environment and Land Court Act 2011 should be moved to the nearest Resident Magistrate for hearing and determination.
- b. The award contains the evidence adduced by the parties at the tribunal and the award herein was filed before the enactment of Environment and Land Court Act 2011.
- c. The award should therefore be adopted as a judgment of this court.

That application was opposed by **Francis Kimani Karimira** (the respondent) who filed grounds of

opposition thereto. After full argument, the learned resident Magistrate (**A.N. Ogonde RM**) delivered a ruling on 28<sup>th</sup> March 2014 allowing the application as prayed.

The respondent was dissatisfied with that decision and filed an appeal before the Environment and Land Court at Nyeri. The gist of that appeal was that the learned Magistrate had erred by entertaining an application brought under the merely “**administrative**” **Order 51 Rule 1** and therefore incompetent; entering judgment that would not be implemented as it relates to a non-existent parcel of land and for vesting herself with a jurisdiction she did not have.

The respondent’s said appeal was argued before L.N. Waithaka, J who, by a Judgment delivered on 22<sup>nd</sup> April, 2015, found it meritorious and granted it as prayed. That effectively meant that the appellant’s application aforesaid stood dismissed with costs.

Aggrieved, the appellant has now filed before this Court a memorandum of appeal in which he complains that the learned Judge erred in law by;

- **Finding that no judgment had been entered by the lower court.**
- **Misinterpreting the Chief Justice’s directions vide Gazette Notice 5178 to mean a dispute concluded by a Tribunal required to be re-opened and re-heard.**
- **Failing to find that the lower court was obligated to adopt the Tribunal’s award rendered before the enactment of the Environment and Land Court Act.**
- **Failing to find that the respondent’s appeal challenging the entry of judgment per the award, and not the award itself, was unmeritorious.**

At the hearing of the appeal, **Mr Njoroge** the appellant’s learned counsel first submitted that the learned Judge misinterpreted the practice directions given by the **Hon. Chief Justice** on 14<sup>th</sup> July 2014 in holding that Magistrates courts had no power to enter judgment per awards filed with them but had to re-open and re-hear the disputes already determined by the Tribunals. He pointed out that the judgment in the instant case was applied for on 10<sup>th</sup> October 2013 and was properly entered by the Magistrate’s court on 28<sup>th</sup> March, 2014. Counsel submitted that the learned Judge did not properly appreciate and interpret clause No. 6 in the said Directions which she quoted as follows;

**“6. Magistrates courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. All proceedings which were pending before the magistrates courts, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to be heard and determined by the courts”.**

(Emphasis hers)

To counsel, the matter having been heard and determined by the Tribunal, all that remained for the Magistrate was to adopt the award as that court’s judgment.

**Mr. Gacheru**, the respondent’s learned counsel took the view that the learned Judge properly understood and applied the applicable law. He asserted that **Order 51 Rule 1** was merely procedural and could not be used as a basis for entering judgment. He contended that under **Section 30** of the **Land and Environment Court Act** the **Chief Justice** has power to make practice directions and opined that the learned Judge properly construed **clause 6** of the said directions.

This being a second appeal our jurisdiction is limited by dint of **Section 72(1)** of the **Civil Procedure Act**, to a consideration of matters of law or usage having the force of law or of matters relating to substantial errors or defects in procedure. No doubt the issue of whether or not the learned Judge was

right in holding that the learned Magistrate could not adopt the award of the Tribunal is a matter properly before us.

It is not in dispute that under the repealed **Land Disputes Tribunal Act**, tribunals were established under **Section 4** whose jurisdiction under **Section 3** was over;

*“All cases of a civil nature including disputes 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.”*

There is also no contest that the Murang’a South District Tribunal did hear and determine **Dispute No. 92 of 2005** filed at Kigumo by the appellant as claimant against the respondent as objector. At the end of an impressively detailed and comprehensive award containing the evidence of the parties and of the witnesses called by the appellant and cross-examined by the respondent, the Tribunal determined as follows;

*“Having heard the evidence from both parties and their witnesses, and having perused documents presented to us by the respondents, we are convinced beyond doubt that land parcel No. LOC.2/KANGARI/10 is ANCESTRAL land and should be shared equally between CHEGE MACHARIA and FRANCIS KIMANI KARIMIRA. Francis Chege Karimira shortchanged claimant’s father MACHARIA KABUURU. The Objector sub-divided the land to HIMSELF into 7 parcels comprised in LOC.2/KANGARI/3496-3502. We order that:*

- 1. FRANCIS KIMANI KARIMIRA ID. 0620277 should transfer 2.5 acres to CHEGE MACHARIA ID. NO. 0875558 from LOC.2/KANGARI/3502 which measures 1.64 Hac. (4.1 acres) and which the objector registered jointly with his wife LUCY WANJIRU KIMANI.*
- 2. The court’s Executive Officer to sign transfer documents.*
- 3. Francis Kimani Karimira to pay costs to the claimant.”*

The award was duly dated and signed by the three members of that Tribunal.

It is this award that the Magistrates’ Court adopted as a judgment under **Section 7(2)** of the repealed Act which provided that;

*“The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner pronounced for under the Civil Procedure Act.”*

According to the learned Judge, it was not open to the learned magistrate to adopt the award as the mandate of that lower court was to hear and determine disputes that were pending before the defunct Tribunal, but not to adopt their awards as judgments. The learned judge reasoned thus;

*“Having read the Environment and Land Court Act, I agree with the appellant that it does not contemplate a situation where the awards entered by the defunct Land Disputes Tribunals, which had not been entered as judgment of the lower courts, would be entered as such. In this regard, Section 30 of the Environment and Land Court Act as read with practice direction 6 (supra), gives the Magistrate Courts jurisdiction to hear and determine the cases transferred thereto. Nowhere does the new law allow for entry of judgment entered by the tribunal but not adopted as the judgment of the court, to be entered as judgment of the court in a case which has been transferred to that court whether pending or concluded. The obligation imposed on the court to which the cases are transferred, is to hear and determine*

*the cases, a completely different regime to that which obtained under Section 7(2) of the repealed Land Disputes Tribunal's Act."*

With respect, the learned judge misdirected herself on the question. The latter part of **Clause 6** of the practice direction is a repetition of **Clause 7** and relates to matters transferred from the Tribunals and which were to be heard and determined by Magistrates' Courts.

It seems clear to us that the direction had in mind those cases that were **pending** before the Tribunals but which, by reason of the demise of the Tribunals, had to continue before a different forum, in this case the Magistrates' courts. It is noteworthy that the pecuniary jurisdiction, which applies to other cases pending or record filed before the Magistrates' courts, did not apply to the matters transferred from the defunct tribunals. They were all, without exception, to be heard and determined by the Magistrates' Courts.

There appears to us to be no indication express or implied, that cases already **determined** before the Tribunal and awards issued, but yet to be adopted by the Magistrates' Courts, were to be re-heard by those courts. Once the tribunal heard a dispute and made a determination, that was the end of the matter on the merits and all that remained was adoption by the Magistrates' Court. That much is clear from a plain reading of **Section 7(2)** of the **repealed Act**. It has also been the subject of many judicial pronouncements to the effect that a magistrate is under a statutory compulsion to enter judgment in terms of the award once he receives it from the chairman of the tribunal. It not being open to him to alter, amend, question or set it aside, See, MUTEMI MWASYA -VS- MUTUA KASUVA MACHOKOS HC.C.A. 140 of 2001; CHRISPUS MICHI GAKU -VS- KARANJA WAINAINA [2006] e KLR and PETER OUMA MITAI -VS- JOHN NYARARA KISII HCCCA 297 of 2005. So long as the court was satisfied that an award was on the face of it issued by a proper Tribunal and not a nullity, it was under duty to adopt it.

We are of the considered view that where, as in this case an award had been properly forwarded by the Chairman of the Tribunal but was not yet read when the Act was repealed, the proper course would have been for the magistrate to adopt the award and read it as a judgment of the court to be followed by the usual process of decree and execution and appeal where parties so desire. Such appeals would be to the High Court by dint of **clause 13** of the practice direction, the Provincial Appeals Committee also having met their quietus with the repeal of the Act.

Such a course of action is inescapable from a proper reading of the Practice Direction as framed and also accords with the doing of justice in a timely, efficient and cost effective manner as commanded by **Article 159** of the **Constitution** and the Practice Direction itself. Moreover, the effect of the repealing of a written law on proceedings, is provided for under the **Interpretation and General Provisions Act, Cap 2**, at **Section 23** as follows;

*"(3) where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -*

*(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, penalty, forfeiture, or punishment aforesaid, and any such investigation, legal proceeding or remedy may be instituted, construed or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.*

With that general provision in mind, we come to the conclusion that the learned Magistrate acted correctly in entering judgment in accordance with the award. The award had been filed by the Chairman of the Tribunal properly under **Section 7** of the **repealed Act**. There was no procedural error in the appellant's predicating the application for judgment on the general **Order 51** which simply, provides that applications to the court would be by way of Motion on Notice. It amounts to sophistic hair-splitting for the respondent to have argued that the procedure was wrong. This is a case where the substance must override the procedure which was not flouted in any event.

The final observation we would make in this appeal is that neither before the learned Judge nor before us did the respondent contend that on the merits the determination of the Tribunal was unfair or prejudicial. He was content to attempt to raise procedural niceties which cannot avail him much in the face of an eminently just and well considered award.

We are satisfied that the learned Judge ought not to have interfered with the judgment entered by the learned Magistrate. She erred in so doing and is accordingly reversed. The judgment dated 22<sup>nd</sup> April 2015 is set aside. We substitute it with an order that the respondent's appeal No. ELCA 17 of 2014 be and is hereby dismissed.

The appellant shall have the costs of this appeal and of the Land and Environment Court.

***Dated and delivered at Nyeri this 14<sup>th</sup> day of October, 2015.***

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**