IN THE COURT OF APPEAL

AT NYERI

(CORAM:WAKI, NAMBUYE & KIAGEJJ.A.)

CIVIL APPEAL NO. 18 OF 2015

BETWEEN

PETERSON NGUCHI KABURI…..……APPELLANT

AND

JOSEPH THUKU KABURI……..……RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Nyeri (Justice L. N. Waithaka) dated 12th March 2015)

In

E.L.C. No. 114 of 2014)

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JUDGMENT OF THE COURT

This appeal raises the single issue of whether a magistrate who is called upon to adopt an award of the **Land Disputes Tribunal** under the repealed **Land Disputes Act** is so precluded from reviewing, amending or altering such an award that he must adopt as a judgment anything at all that purports to be an award.

The parties herein first came into contact with the courts over this matter when the respondent Joseph Thuku Kaburi, then acting in person, filed an application by chamber summons on 28th April 2010 before the Senior Principal Magistrate's Court at Nanyuki seeking orders;

"1. THAT this Honourable Court be pleased to adopt the Tribunal award filed in this Court on 26th February 2007."

It was supported by the respondent's brief affidavit in which he averred that ***"on 26th February 2007 decision in this case was forwarded to this Honourable Court"*** and he asked that the same be adopted as the judgment of that Court. That Affidavit was neither dated nor sworn and, unsurprisingly, it was withdrawn by **Mr. Chweya,** the respondent's advocate, with leave of the court sought and granted on 7th July 2010. It was then followed by a fresh application dated 10th February 2011 which sought the same prayer as the previous one. It was premised on two grounds that appeared on it as follows;

"(a) THAT the case has been heard and determined by the Tribunal in Land Dispute Tribunal case No. 108 of 2007.

b. ***THAT no appeal has been preferred against the award to the Provincial Appeals Committee."***

The respondent's supporting affidavit, expressed as sworn on 10th February 2011 had specifics, which were that;

"***2. …I filed the complaint against the defendant in Laikipia Land Disputes Tribunal and the same was heard and determined and the award filed in court on 28th April 2010."***

Peterson Nguchi Kaburi, the appellant herein opposed that application by way of a replying affidavit sworn by his advocate **Mwangi Kariuki** in which he pointed a number of anomalies with regard to the award;

- **It was undated**
- **Its signatories were strangers who did not disclose their capacity**
- **It did not show itself as emanating from the Laikipia East Land Disputes Tribunal**.

The affidavit had annexed to it an extract of a Gazette Notice showing the members of the Laikipia East District Land Disputes Tribunal. The alleged signatories to the award were not among them. The appellant also filed grounds of opposition dated 19th February 2011 with one ground;

" 1. There is no award or competent award before the Court."

The application was argued before **Nyaga SPM**. who in a ruling delivered on 22nd July 2011, dismissed the appellant's objections in these terms;

"Mr. Kariuki for the respondent cannot challenge the veracity of the award before it is read to the parties. It is the court and not the tribunal which is supposed to read the award to the parties. Mr. Kariuki is not supposed to know the contents of the award before it is read to the parties. His objections are thereby misplaced. He should wait to challenge the veracity or otherwise of the award after it is read to the parties.

The powers of the court under Section 7(2) of the Land Disputes Tribunal are to enter judgment in accordance with the decision of the tribunal. The court cannot refuse to enter judgment even if there are flaws in the award." (Emphasis added)

So stating, the learned Magistrate proceeded to enter judgment in accordance with the 'award' filed in court on 28th April 2010.

The appellant felt aggrieved by that decision and preferred an appeal to the High Court complaining that the learned Magistrate had misdirected himself by entering judgment in accordance with an award that was but 'a piece of paper' from an unauthorized or illegal entity or persons who were not the Laikipia East Land Disputes Tribunal and in concluding that the court had only a mechanical role of entering judgment without enquiring into the legality of any purported award.

That first appeal was considered by **Waithaka J**, on the basis of written submissions and the learned Judge, by a judgment delivered on 12th March 2015, dismissed it. Still aggrieved, the appellant has come to this Court in a second and final appeal. In his memorandum of appeal, he raises four grounds of grievances as follows;

"1. The learned Judge misdirected herself by deeming that there was an award before the court of first instance and therefore concluding that such an "award" could only be challenged by an appeal to the Provincial Appeals Committee.

2. ***The learned Judge misdirected herself by failing to find that there was legally nothing before the court appealed from (sic) which a judgment could ensure.***

3. ***The learned Judge misdirected herself in concluding that the only forum for challenging an award even when it amounted to nothing was either by judicial review or an appeal to the Provincial Appeals Committee.***

4. ***The learned Judge misdirected herself by giving undue regard to technicalities rather than doing substantial justice in view of Article 159 of the Constitution."***

Mr. Mwangi, the appellant's learned counsel argued the appeal before us in precise terms that what was purported to be adopted by the court was never an award. It was a mere piece of paper not disclosing what or who prepared it. Its authors were not members of the Tribunal.

As there was no Tribunal, argued counsel, there could be no decision or award to be adopted by the court. By the same token, the argument accepted by the learned Judge that the appellant should have appealed or filed judicial review proceedings against the award was untenable, in counsel's view, as there was no decision and no award capable of being so challenged. He concluded by stating that the appellant was never summoned before any tribunal and the purported defeat of his title by way of the alleged award was unsustainable.

Opposing the appeal, **Mr. Chweya,** the respondent's learned counsel first submitted that there was no point of law raised in this appeal. He presently conceded, however, that the appeal revolves around the question of whether or not the High Court misconstrued **Section 7(2)** of the **Land Disputes Tribunal Act**, an evidently legal question. Counsel also conceded, as he had to, that the purported award does not show where it is from or what the dispute was about. His exact words were that "***it is undated. The origin of the award is not known".***

That notwithstanding, **Mr Chweya** maintained that all those flaws could only be challenged by way of judicial review or appeal as the powers of the magistrate were limited to adopting the award only. In this he lauded the judgment of the learned judge as sound.

Having perused the record, carefully studied the judgment and considered the submissions made before us, we cannot but conclude that the two courts below wholly misunderstood and misapprehended the nature of the appellant's complaints before them. The learned Judge in particular launched into an examination of authorities which all presupposed the existence of a valid award whereas the appellant's contention was always that there was no award before the first instance court. The distinction is critical.

The learned Judge at the beginning of her analysis and determination noted as follows;

"It is not in dispute that the lower court was seized with what the forwarding letter from the District Land Registrar, Laikipia described as the Award from the Central Division Dispute Tribunal in respect of Land Dispute Tribunal case No. 109 of 2007. It is also noted in the dispute that the said award had no indication as to its source, was not dated and did not indicate the respective capacities of the persons who signed it."

It is the said glaring omissions in the award that made the appellant challenge it before the lower court before it was adopted…"

With respect, it seems to us that the learned judge, like the Magistrate before her, proceeded from a presumption that there was an award before them, albeit one with glaring omissions. It was for this reason that the learned Judge was content to cite the holding of **Musinga J** (as he then was) in **PETER OUMA MITAI –VS- JAIN NYARARA** HCCA NO. 297 of 2005 which was quoted in **REPUBLIC – VS- KAJIADO NORTH DISTRICT NGONG LAND DISPUTES TRIBUNAL & ANOR EX PARTE CAROLINE WAMBUI NGUNJIRI & 2 OTHERS** [2014] e KLR thus;

"The jurisdiction of the Land Disputes Tribunal is clearly set out in Section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, Section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal… The provisions of Section 7(2) of the Act are explicit as to what has to be done by the magistrate's court. That provision of the law does not leave any room for the magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under Section 8(1) of the Act or, if there are reasonable grounds of challenging the decision by way of judicial review application, proceed to institute such proceedings before the High Court and not otherwise."

Musinga J, was of course right in expressing that view. It is also quite clear that he was referring to a valid award, made by a Tribunal properly constituted, regularly forwarded to a magistrates' court as a decision of that tribunal together with any depositions or documents that were taken or proved before such tribunal. **Musinga J**, cannot possibly have been referring to a pseudo award or anything not an award, that was purporting to be one. There are many other decisions of the High Court and the Court of Appeal which speak to a magistrates' limited role in simply adopting the award of a tribunal but they all deal with valid awards even where the correctness on the awards themselves may be questionable. But there has to be an award.

In the case before us, it is the very existence of an award that was called into question. Our reading of the repealed **Land Disputes Tribunal Act,** specifically **Section 3** thereof, shows that for a document presented to a magistrate's court for adoption as a judgment to qualify as an award, it had to contain the following;

a. **The name of the Tribunal, indicating the registration district.**
b. **The number of the claim before the said Tribunal.**
c. **A summary of the issues in the claim.**
d. **The determination or decision on those issues.**
e. **The date of the said determination.**
f. **The signature of each member of the Tribunal.**

The award is then to be filed by the Chairman of the Tribunal accompanied with any dispositions that were before the Tribunal.

Under **Section 4** of the **Act** the Chairman of a tribunal is one to be appointed by the District Commissioner from a panel of elders appointed under **Section 5.**

In the case before us, it is quite clear that what was sent to the magistrate's court did not meet several of these essential and mandatory formal requirements that would have qualified it as an award. It was a document of unknown origin, signed by unknown persons, purporting to be a Tribunal for an unknown and non-existent area. The issues it was dealing with were unknown and the purported determination was a pretense. It is unlikely that the learned Registrar who forwarded the alleged award to the court was the Chairman of a panel of elders and he did not describe himself as such. Indeed, he gave no name and cannot have been among the three persons who purported to sign the alleged award in their unstated capacities.

What all of this boils down to is that the purported award was a sham in every respect and did not meet the bare essential minimum for a valid award that a court of law could act upon. It cannot be countenanced that a court would lend its authority and prestige to a document that is so strange as to amount to a cheap forgery. It cannot be right for a court to shut its eyes to those glaring illegalities and go ahead to adopt a piece of paper that somehow or anyhow lands before it, as a judgment of the court.

The court is duty bound to prevent illegalities and it would be a dereliction of duty for it to adopt a patent nullity as a judgment of itself. We would respectfully endorse the sentiments of **Ombwayo J** in **THEURI NDIRANGU & ANOR –VS- MUTAHI NDIRANGU & ANOR** – Civil Application No. 5

of 2002,

"The learned Magistrate… did not have the power to ratify nullities but had the duty to ensure that the decision of the Tribunal sought to be adopted was arrived at properly by a body that had a mandate to do so. Magistrates adopting the awards of Tribunals had the residual power to reject an award that was illegal. This residual power is recognized by the law as the inherent power to do justice."

Indeed, as this Court has said countless times before, it is public policy that courts should not aid the perpetration of illegalities. (See, **NATIONAL BANK OF KENYA –VS- WILSON NDOLO AYAH** [2009] e KLR.

It is clear from what we have stated that the learned Judge fell into error in allowing to stand a nullity in the name of the purported award. For that reason, we allow the appeal and set aside her judgment and substitute therefor an order that the respondent's application dated 10th February 2011 is dismissed with costs.

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

Dated and delivered at Nyeri this 14th day of October, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR