



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

MISCELLANEOUS APPLICATION NO. 60 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN,

NDANAI LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE, KERICHO.....2ND RESPONDENT

WILLIAM KIPRUTO MAINA.....3RD RESPONDENT

EX-PARTE

JOSEPH MARITIM.....OBJECT

JUDGMENT

1. What is before me is the ex- parte applicant's Notice of Motion dates 18th February 2011. The said application was filed pursuant to the leave granted by this Honourable Court on 16th February 2011 in accordance with the provisions of Order 53 (3) of the Civil Procedure Rules. The applicants seek the following prayers:

a) That the Honourable Court be pleased to issue an order of certiorari removing unto this Honourable Court for purposes of being quashed forthwith the 2nd Respondent's order dated 31st January 2011 together with the entire proceedings arising therefrom and or connected therewith pursuant to the 1st Respondent's award dated 4th November 2010 which was read and adopted as a Judgment of the Court in Kericho Chief Magistrate's Court Miscellaneous Application No. 102 of 2010.

b) That the cost of the application be provided for.

Applicant's case

2. A brief background of the facts giving rise to this application are as follows: The 3rd Respondent herein, who is the interested party in this application, filed a case against the ex-parte Applicants with the 1st Respondent herein pursuant to the provisions of the Land Disputes Tribunal Act No. 18 of 1990 (now repealed).

3. The dispute was heard and the 1st Respondent reached a finding contained in the award dated 4th November 2010 which was subsequently filed with the 2nd Respondent as required under S. 7 (1) of the Land Disputes Tribunal Act No. 18 of 1990. The 2nd Respondent read and adopted the award as the Judgment of the Court on 31st January 2011 in accordance with section 7 (2) of the said Act.

4. The application was canvassed by way of written submissions and counsel for the ex-parte applicant filed his submissions while the counsel for the Respondents indicated that she did not intend to file any.

5. Mr. Orina , learned counsel for the Applicant submits that S. 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 gives the 1st Respondent the jurisdiction to hear and determine a dispute in accordance with recognized customary law. It is his submission that this provision does not allow the 1st Respondent to hear a dispute which falls outside the purview of customary law.

6. The said section provides 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 held in common;

(b). A claim to occupy or work land; or

(c). Trespass to land.

Shall be heard and determined by tribunal established under section 4. Rule 7 of the above section provides as follows;

“The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law”

7. S.3 (2) of the Judicature Act, Cap 8 laws of Kenya provides circumstances under which customary law is applicable. African customary law is applicable in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and the court shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

Issue for determination

8. The main issue for determination is therefore whether the 1st and 2nd Respondents had the requisite Jurisdiction to hear and determine the matter.

Analysis and determination

9. It is common ground that the land which is the subject of the dispute herein is registered land having been registered under the provisions of the Registered Land Act, Cap 300 laws of Kenya (now repealed). This registration gave the registered proprietor absolute proprietorship which cannot be defeated except in accordance with said the Act.

10. I agree with counsel’s submissions that both the 1st and the 2nd Respondent had no Jurisdiction to hear and determine the matter on two main grounds;

11. Firstly, the land is registered under the provisions of the Registered Land Act, Cap 300 laws of Kenya (now repealed) which cannot be defeated other than in accordance with the law.

12. Secondly, the Land Disputes Tribunal Act No. 18 of 1990 gave the 1st Respondent jurisdiction to hear Land Disputes falling under the purview of customary law and where the customary law is not inconsistent with any written law.

13. Accordingly, I find merit in the ex-parte applicant’s application and I grant it and make the following final orders:

a) An order of certiorari is hereby issued quashing the 2nd Respondent’s order dated 31st January 2011 together with all the proceedings arising therefrom and or connected therewith pursuant to the 1st Respondent’s award dated 4th November 2010 which was read and adopted as a Judgment of the Court in Kericho Chief Magistrate’s Court Misc. Application No. 102 of 2010.

b) The costs of this application shall be borne by the Respondents.

Dated, signed and delivered at Kericho this 28th day of August, 2018.

.....

J.M ONYANGO

JUDGE

In the presence of:

1. Miss Sitati for the exparte applicant

2. N/A for the Respondent

3. Court assistant - Rotich