REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT MISC. CIVIL APP. NO. 105 OF 2011 (JR)

IN THE MATTER OF: BY JOSEPH SENJA FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: LAND DISPUTES TRIBUNAL ACT, NO. 18 OF 1990, NOW REPEALED

AND

IN THE MATTER OF: KEYIAN LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF: SENIOR RESIDENT MAGISTRATE'S COURT AT KILGORIS

BETWEEN

REPUBLIC …….. APPLICANT

VERSUS

KEYIAN LAND DISPUTES TRIBUNAL ……..….. 1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILGORIS …….. 2ND RESPONDENT

THE ATTORNEY GENERAL ……..... 3RD RESPONDENT

AND

JOSEPH OLE RANKAS ……..…….. INTERESTED PARTY

AND

JOSEPH SENJA …….. EX PARTE APPLICANT

J U D G M E N T

1. The ex parte applicant was on 18th November 2011 granted leave to file a judicial review application and on 21st November 2011 filed the substantive notice of motion for judicial review seeking the following orders:-

1. The honourable court be pleased to issue a writ and/or order of judicial review in the nature of certiorari to remove into the High Court and quash the proceedings and decision of the Keyian Land Disputes Tribunal dated the 31st August 2011, whereby the 1st respondent irregularly and illegally awarded the ex parte applicant's land LR No. Transmara/Enosean/217 measuring 2 acres, to the interested party herein, one, Joseph Ole Rankas, a stranger.

2. The Honourable Court be pleased to issue a writ and/or order of Judicial Review in the nature of prohibition, against the Senior Resident Magistrate's Court, Kilgoris, prohibiting the said court and/or any other court of co-ordinate and competent jurisdiction from enforcing and/or dealing or further dealing with the said decision of Keyian Land Dispute; Tribunal dated the 31st August, 2011 as lodged vide Kilgoris SRMC Land Case No. 4 of 2011 or other cause.

3. That the leave so granted by this honourable court, do operate as an order of stay of the proceedings and decision of the 1st respondent dated the 31st August 2011 and the decree issued by the 2nd respondent dated the 14th November 2011, vide Kilgoris SRMCC Land Case No. 4 of 2011 wherein the 2nd respondent intends to enforce the said unlawful decision as if it were its judgment and/or decree.

4. The applicant be at liberty to apply to the honourable court for all necessary and/or consequential orders that the honourable court may deem fit to grant.

5. Costs of the application do abide the substantive application for judicial review.

2. The ex parte applicant's judicial review application is based on the grounds set out on the face of the application and on the annexed affidavit sworn by Joseph Senja in support of the application. Inter alia the ex parte applicant states that:-

(a) That Keyian Land Disputes Tribunal exceeded its jurisdiction when it dealt with an issue concerning ownership of LR No. Transmara/ Keyian/217 and/or a portion thereof.

(b) That the Keyian Land Disputes Tribunal acted ultra vires its statutory limits when it exceeded the jurisdiction donated to it pursuant to Section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990.

(c) That the conduct and proceedings of the Tribunal violated the ex parte applicant's right to property and Sections 27, 28, 29 and 143 of the Registered Land Act (now repealed) and Article 40 of the Constitution 2010.

(d) That the proceedings and decision of the Tribunal dated 31st August 2011 was/is null and void.

(e) That the Resident Magistrate's Court, Kilgoris has no jurisdiction to adopt and/or enter judgment in terms of the Tribunal's decision which was made without jurisdiction and was consequently a nullity and hence incapable of being given effect to through adoption by the court.

3. The sworn affidavit by the ex parte applicant in support of the application substantially reiterates the grounds set out on the body of the application, and the gist of the same is that the decision by the Tribunal was null and void for want of jurisdiction on the part of the Tribunal. The ex parte applicant asserts that the Magistrates Court Kilgoris cannot properly adopt and enforce the Tribunal's decision which was a nullity and hence the instant judicial review application.

4. The Interested Party, Joseph Ole Rankas filed a replying affidavit sworn on 16th February 2012 in

opposition to the ex parte applicant's judicial review application. The Interested Party in his replying affidavit sets out in considerable detail how he acquired a portion of **LR No. Transmara/ Enosaen/74** purportedly from one Naimadu Rongoe. The ex parte applicant however asserted that the portion the Interested Party claimed to have purchased extended 2 acres onto the ex parte applicants land parcel **LR No. Transmara/Enosaen/217**. When the 1st respondent heard the dispute it awarded the 2 acres that formed part of land parcel **Transmara /Enosaen/217** to the Interested Party which would mean the same was to be excised from the ex parte applicant's parcel and ceded to the Interested Party. The Interested Party has annexed a copy of the Tribunal proceedings and decision as **"J0R2"**. The decision of the Tribunal was in the following terms:-

> **(a) Ole Rankas to receive his portion of land (2 acres) bought from Naimadu Rongoe and the remaining portion to Ole Sencha Joseph.**
>
> **(b) Lands officer to visit the ground for fair land demarcation.**

5. The Interested Party further in opposition to the ex parte applicant's application averred that the ex parte applicant participated in the proceedings before the Tribunal without raising any objection to either the composition of the Tribunal and/or its jurisdiction to handle the matter and would therefore be estopped from raising the same now before this court. The Interested Party further avers that the dispute before the Tribunal related to the boundary location between parcel **Transmara/Enosaen/217** and the portion of land parcel **Transmara/Enosaen/74** which the Interested Party had bought from Naimadu Rongoe which dispute the Interested party contends the Tribunal had jurisdiction to determine. The Interested Party further avers the decision of the tribunal having been adopted by the court the Tribunal's award ceased to exist as an independent decision that could be quashed. Further the Tribunal's award having been adopted by the court in exercise of its statutory mandate, the court is under an obligation to execute the same.

6. The parties argued the ex parte applicant's judicial review application by way of written submissions. The ex parte applicants submissions dated 4th July 2012 were filed on 5th July 2012. The Interested Party's submissions dated 16th July 2012 were filed on the same date. The ex parte applicant filed further submissions on 24th January 2013. I have reviewed and considered the judicial review application, the affidavit in support and in opposition and the submissions filed by the parties and the issues that arise for determination are as follows:-

> **(i) Whether the ex parte applicant was the registered owner of land parcel Transmara/Keyian/217.**
>
> **(ii) Whether the Keyian Disputes Tribunal entertained a dispute relating to ownership of land parcel Transmara/Enosaen/217 and if so whether they had jurisdiction to do so.**
>
> **(iii) Whether the decision of the tribunal was ultravires its statutory mandate and hence null and void.**
>
> **(iv) Whether the adoption by the Kilgoris Magistrates Court of the Tribunal's award/decision was effectual.**
>
> **(v) Which orders should the court make?**

7. On the 1st issue there is no dispute that the ex parte applicant, Joseph Senja was the registered owner of land parcel **Transmara/Enosaen/217**. The ex parte applicant annexed a copy of the title deed as **"JS1(a)"** and a copy of the certificate of search issued on 28th October 2011 marked **"JS1(b)"** to the supporting affidavit in support of the application for leave dated 18th November. The copy of the title and search show that Joseph Siamo Senja is the registered owner of land parcel **Transmara/Enosaen/217** and that a title was issued to him on 6th April 2010. From the copy of the proceedings annexed to the application as **"JS3"** it is clear that the tribunal was aware that the ex parte applicant held title to the suit

property. The ex parte applicant states that he was awarded the suit land **Transmara/Enosaen/217** following objection proceedings during the adjudication process as evidenced by annextures **"JS2(a)-(c)"** attached to the affidavit in support of the application. I therefore have no hesitation in answering the 1st issue in the affirmative that indeed the ex parte applicant was the registered owner of land parcel **Transmara/Enosaen/217** and that he was so registered during the time the tribunal purported to hear the dispute between the ex parte applicant and the Interested Party.

8. On the 2nd issue whether the Tribunal entertained a dispute in respect whereof it lacked jurisdiction, it is necessary to review the proceedings before the Tribunal and its verdict. The Interested Party's complaint before the Tribunal as discerned from the proceedings was that the ex parte applicant's land parcel **Transmara/Enosaen/217** had appropriated about 2 acres which the Interested Party had purchased from Naimadu Rongoe which include about 1.5acres that the Interested Party had been ploughing for about 11 years as his land. The Interested Party claimed that he had purchased a portion of 6 acres out of land parcel **Transmara/Enosaen/74** which he took possession of and started cultivating the same. The Interested Party claimed that based on the title that the ex parte applicant had, the ex parte applicant had laid claim to a portion of 2 acres out ot land parcel **Transmara/Enosaen/74** which included a portion of 1.5acres that the Interested Party had been cultivating. The decision by the Tribunal was to the effect that the ex parte applicant's title ought to be for 2 acres and not 4 acres as the title shows and it is on that basis they ruled that the Interested Party was to get his portion of 2 acres that he bought from Naimandu Rongoe and the remaining portion to remain with the ex parte applicant. The Tribunal further directed the lands office to visit the land for fair land demarcation.

9. While the decision by the Tribunal no doubt lacks clarity it is clear it envisaged the subdivision of the ex parte applicant's land parcel **Transmara/Enosaen/217** to hive off 2 acres in favour of the Interested Party and that explains why the lands office were to visit the ground for demarcation. To the extent that the Tribunal concerned themselves with the ex parte applicant's title to land parcel **Transmara/Enosaen/217** thereby determining the title which the record shows comprised 1.88hectares was larger than it should have been, my view is that the Tribunal went beyond its mandate as conferred under Section 3 (1) of the Land Disputes Tribunal Act (now repealed). Section 3 (1) provides as follows:-

> **3(1) 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, including land held in common;**
>
> **(b) A claim to occupy or work land; or**
>
> **(c) Trespass to land,**
>
> **Shall be heard and determined by a Tribunal established under Section 4.**

10. Quite clearly the Tribunal's established under the Land Disputes Tribunals Act had limited jurisdiction as set out under Section 3(1) above. Their jurisdiction did not extend to hearing disputes affecting title to land. In the instant matter the dispute before the Tribunal was basically challenging the ex parte applicant's title and the decision rendered by the Tribunal affected the title of the ex parte applicant to the extent that the decision by the Tribunal was to the effect that the ex parte applicant's title comprised an excess acreage of about 2 acres which belonged to the Interested Party which required to be excised off by demarcation.

11. The Interested Party has argued and submitted that the issue before the Tribunal was one of a boundary dispute and therefore the Tribunal had jurisdiction. That argument is not correct since what was in issue was whether the ex parte applicant was entitled to the 1.88hectares comprised in his title or less. The Tribunal's ruling was that he was not and hence the decision in effect affected title of land parcel **Transmara/Enosaen/217** owned by the ex parte applicant. In my view therefore the Tribunal went ahead to determine an issue they had no jurisdiction to deal with under Section 3(1) of the Land Disputes Tribunal Act and that rendered their proceedings and decision null and void for want of jurisdiction.

12. Respecting issue number (3) whether or not the decision of the Tribunal was ultra vires its mandate under the statute and hence null and void, I would having held that the Tribunal acted without jurisdiction answer the same in affirmative. There are numerous judicial pronouncements that where an act is done without jurisdiction, such act is null and void. In the case of **Republic –vs- The Chairman, Awendo Division Land Disputes Tribunal & 4 Others (Kisii HC J/R No. 4 of 2007) Musinga, J.** (as he then was) while considering the jurisdiction of the Tribunal in relation to Section 3 (1) of the Land Dispute Tribunals Act stated thus:-

> **"Jurisdiction of a court or a Tribunal is a creature of statute and a court or Tribunal is not permitted to act outside its jurisdiction; even by consent or acquiescence of the parties who appear before it. Where a claim regarding ownership of registered land is filed before a land dispute tribunal and both parties participate in the proceedings, even without raising any issue about the jurisdiction of the Tribunal, that does not in any way validate the decision of the Tribunal. Such decision is a nullity in law and ought to be quashed by an order of certiorari."**

13. In the case of **Macfoy –vs- United Africa Company Limited [1961] 3 ALL ER 1169** at page **1172** Lord Denning succinctly stated thus:-

> **"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 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."**

14. In the further case of **Sarah Wambui Mugo –v- Land Disputes Tribunal Maragwa & 2 Others [2007] eKLR** where the Tribunal like in the instant case acted without jurisdiction, **Wendoh J.** in a consequent judicial review application seeking to quash the Tribunal's award and the subsequent adoption of the same by the court stated as follows:-

> **"The Land Disputes Tribunal Thika did not have jurisdiction to determine questions of ownership of land as it purported to do. It exceeded its jurisdiction by subdividing the applicants land disposing it to the Interested Party besides this being registered land, the only recourse that the Interested party had was to file a suit in the civil courts for redress. Though the award was made by the Tribunal on 10th January 2006, the award was adopted by the court on 28th February 2006. The application for judicial review has been sought within time. This court finds that the order of the Land Disputes Tribunal was made without jurisdiction, and therefore null and void and cannot be allowed to stand. The award by the Land Disputes Tribunal Maragwa having been declared null and void it follows that the orders of the court adopting the award are likewise null and void and are hereby quashed by order of certiorari and the Chief Magistrate's Court is prohibited from hearing or undertaking any further proceedings in case No. 6/06".**

15. In the present case the Interested Party has submitted and argued that the Tribunal's award having been adopted by the court there is nothing to prohibit since the decision has already been adopted as judgment of the court. I have determined that the decision of the Tribunal was null and void since it was rendered or made without jurisdiction. Was there therefore a decision that could be adopted by the Magistrate's Court? I do not think so. Section 7(2) of the Land Disputes Tribunals Act could only have envisaged valid decisions of the Tribunal made in conformity with Act having regard to the mandate of the Tribunals under Section 3(1) of the Act. If the Tribunal had acted in excess of the mandate given to it under the Act then its decision could not be a valid decision. Such decision would be null and void. As observed by **Lord Denning** in the case of **Macfoy –vs- United Africa Co. Ltd** (Supra) **"…If an act is void it is in law a nullity…… 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."**

16. Essentially therefore there was nothing for the Magistrate's Court at Kilgoris to adopt as it could not

give effect to a null and void decision of the Tribunal. It is therefore my decision and holding that the adoption by the Magistrate's Court of the decision of the Tribunal was ineffectual and of no consequence. There was nothing to adopt.

17. I accordingly find merit in the ex parte applicant's judicial review application dated 21st November 2011 and I grant orders of certiorari and prohibition in terms of prayers (1) and (2) of the Notice of Motion. The costs of the application are awarded to the ex parte applicant.

Judgment dated, signed and **delivered** at **Kisii** this **24th day** of **February, 2017**.

J. M. MUTUNGI

JUDGE

In the presence of:

…… for the ex parte applicant

…… for the 1st respondent

…… for the 2nd respondent

…… for the 3rd respondent

…… for the interested party

…….. Court assistant

J. M. MUTUNGI

JUDGE