



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT JUDICIAL REVIEW NO. 23 OF 2014

**IN THE MATTER OF APPLICATION BY NICHOLAS MORUME MAUTIA FOR A JUDICIAL
REVIEW ORDER IN THE NATURE OF PROHIBITION**

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (REPEALED)

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF
KENYA**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC APPLICANT

VERSUS

KEUMBU LAND DISPUTES TRIBUNAL 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT AT KISII 2ND RESPONDENT

AND

WILLIAM MOGAKA MAUTIA INTERESTED PARTY

AND

NICHOLAS MORUME MAUTIA EX PARTE APPLICANT

JUDGMENT

1. The court on 4th December 2014 granted leave to the applicant to apply for judicial review order of prohibition to prohibit the 2nd respondent, the Chief Magistrate's Court, from reading and

adopting as judgment of the court, the award/decision of the 1st respondent, Keumbu Land Disputes Tribunal filed in court as Misc. Land Dispute Tribunal No. 140 of 2011. The leave granted was to operate as a stay of any proceedings in Misc. Land Dispute Tribunal No. 140 of 2011 pending the hearing and determination of the Judicial Review Application.

2. The interested party was the claimant before the Keumbu Land Dispute Tribunal Case No. 6 of 2011. Both the interested party and the applicant are brothers. The interested party is the registered owner of land parcel Nyaribari Chache/Keumbu/703 while the applicant is the registered owner of land parcel Nyaribari Chache/Keumbu/705. The interested party's claim before the dispute's tribunal as per his evidence/statement before the tribunal was that his parcel of land 703 was small while the applicant's parcel 705 was big. His claim was that his share of land needed to be equal to the applicant's share. In effect the interested party was challenging the applicant's title in respect of land parcel Nyaribari Chache/Keumbu/705.
3. In a rather unclear verdict the tribunal made an award in the following terms:-
 - a. **After all discussion the panel members and the crowd agreed together that there was a boundary put.**
 - b. **The panel members said that the case be taken to court of law so that Mogaka can be also given his share and the executive officer to sign the transfer forms on behalf of the respondent if he refuses to sign.**
 - c. **Land surveyor to be involved to demarcate the boundary.**
 - d. **There should be a path in the parcel No. 703 from the road from Gesere School to Onchiri's home.**
4. The record shows that the interested party moved the Chief Magistrate's court for the adoption of the tribunal's award dated 7th July 2011. The Chief Magistrate's court on 27th July 2012 adopted the Tribunal's award and entered judgment in terms thereof but following an application by the applicant dated 5th September 2013, the magistrate set aside the order of 27th July 2012 adopting the award and entering judgment in terms thereof. Although the magistrate observed in the ruling delivered on 4th June 2014 that the award by the Tribunal did not in any way touch on land parcel No. 705 the record shows that the executive officer of the court executed land control board's application forms for consent for subdivision of land parcel **Nyaribari Chache/Keumbu/705** in purported execution of the court order given in Misc. Land Dispute Tribunal Application No. 140 of 2011 and further executed the mutation forms in respect of land parcel **Nyaribari Chache/Keumbu/705** on behalf of the applicant.
5. Following the setting aside of the court order adopting the award the applicant filed the instant application for judicial review. The application is supported by the statutory statement and verifying affidavit of Nicholas Morume Mautia accompanying the chamber summons application for leave. The application is grounded on the following grounds.
 1. **That the 1st respondent lacked jurisdiction to entertain a claim by the interested party as it was barred by section 13 (3) of the Land Disputes Tribunal Act, No. 18 of 1990 as read together with Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.**
 2. **That the 1st respondent lacked jurisdiction to entertain and determine a dispute relating to title to land or ownership of land, registered under the Registered Land Act Chapter 300 Laws of Kenya (now repealed).**
 3. **That the 2nd respondent lacks jurisdiction under Section 7 of the (repealed) Land Dispute Tribunal Act, to adopt the 1st respondent's decision/award as judgment of the court since the decision is null and void ab initio.**
6. The applicant in the verifying affidavit depones that he is the registered absolute proprietor of land parcel **Nyaribari Chache/Keumbu/705** and annexes a copy of certificate of search dated 18th August 2014 marked "NMM1" which shows he was so registered on 16th March 1965 and issued a certificate of title on 2nd March 1972 and a copy of the title is annexed and marked "NMM2". A certified copy of the abstract of title dated 19th August 2014 confirms the entries against the

register. The applicant depones further that the interested party has had a long standing dispute with him and that the interested party in 1984 filed SRMCC No. 469 at Kisii seeking recovery of land out of the applicant's land parcel **Nyaribari Chache/Keumbu/705**. The suit was later transferred to the High Court and re-numbered HCCC No. 45 of 1985 (Kisii). The copy of the proceedings in the High Court is annexed and marked "NMM5". The record of the proceedings shows that on 9th December 1988 the dispute was by consent referred for arbitration by the D. O Keumbu Division. The district officer returned an award indicating there was no unanimous decision but the District Officer observed that:

"Since the parcel of land involved in dispute owns a title deed which was acquired in March, 1972, I forward this to the honourable court to give rulings on lands with title deeds."

7. The District Officer was alive to the fact that elders had no jurisdiction to hear and determine disputes that affected title ownership. As the matter was not determined by the elders it remained alive and pending before the High Court. The record of the proceedings before the High Court shows that the suit was fixed for hearing on diverse occasions between 1990 and 1999 but for various reasons never proceeded for hearing. It is unclear what happened in the High Court between 1999 and 25th March 2011 when the interested party filed a notice to act in person and on the same date filed a notice of withdrawal of the suit against the defendant who is the applicant in the present application. What however is evident is that the interested party did soon thereafter institute the proceedings before the Keumbu Land Disputes Tribunal who rendered the award the subject of the instant judicial review application.
8. The interested party filed a replying affidavit sworn on 23rd February 2015 in opposition to the applicant's application for judicial review. The interested party principally opposes the applicant's application on the ground that the applicant had not obtained leave of the court under Order 53 Rule (1) of the Civil Procedure Rules to bring the application. The interested party further avers that under section 7 (1) and (2) of the **Land Disputes Act No. 18 of 1990** the Magistrates Court is duty bound to adopt the award decision of the Land Disputes Tribunal and that the interested party was acting lawfully in making the application for the adoption of the award as judgment of the court. The interested party further avers that the Land Disputes Tribunal had made an award in his favour which the court had adopted as judgment and that the applicant had not appealed against the decision of the tribunal. The interested party argues that the applicant ought to have appealed the decision of the tribunal to the provincial appeals committee as provided under the act if he was aggrieved by the decision which he did not do.
9. I have perused the record and it is evident that the interested party has premised his objection to the applicant's application primarily on the ground that no leave was obtained by the applicant as required under Order 53 of the Civil Procedure Rules before the Notice of Motion was filed. The record shows that the application for leave was filed in court on 3rd December 2014 and presented before Hon. Justice Okong'o in chambers on 4th December 2014. The judge granted the application on the following terms:-
 1. **That the applicant, Nicholas Morume Mautia be granted leave by this honourable court to apply for a judicial review order of prohibition to prohibit the 2nd respondent from reading and adopting as a judgment of the court the award/decision of the 1st respondent filed in court as Misc. Land Dispute Tribunal No. 140 of 2011.**
 2. **That leave granted to operate as stay of any proceedings in Misc. Land Dispute No. 140 of 2011 pending the hearing and determination of the judicial review application.**
 3. **Costs of the application to abide the result of the judicial review application.**
10. The interested party's further ground that the tribunal's award had been adopted as judgment of the court and that the applicant had not appealed the same equally is untenable as the court set aside the judgment given on 27th July 2012 in favour of the interested party on the basis that the applicant had not been served with the application seeking to adopt the decision of tribunal as judgment of the court. The judgment of the court having been set aside on 4th June 2014, what

remained was the decision by the Land Dispute Tribunal made on 7th July 2011 which is the subject of challenge in the instant application for judicial review.

11. Having reviewed the application for judicial review by the ex parte applicant and the response by the interested party the issue that stands out for determination is whether the Tribunal had jurisdiction and/or exceeded its jurisdiction in making a decision that touched on title to land parcel Nyaribari/keumbu/705 registered in the name of the applicant. The applicant has contended the tribunal lacked the jurisdiction to deal with the dispute relating to title and has urged the court to quash the Tribunal's decision. Section 3 (1) of the repealed Land Disputes Tribunals Act provides thus:-

“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.”**

12. A review and perusal of the proceedings before the disputes tribunal as recorded in regard to Tribunal Case No. 6 of 2011 shows that the interested party, William Mogaka Mautia, who was the claimant before the Tribunal was claiming to be entitled to a portion of land parcel **Keumbu/705** registered in the name of the applicant. In his evidence before the Tribunal the Interested party stated:-

“My brother was working with prisons. He bought survey and gave me a Nyaribari Chache/Keumbu/703 and he took a big share 705 bordering 704 Stephen Onchiri Mautia. I need my share to be equal.”

13. As observed earlier in this judgment although the decision by the tribunal did not specifically make any reference to land parcel **Nyaribari Chache/Keumbu/705** it is evident that the award filed in CM Misc. Application No. 140 of 2011 is the Tribunal's decision in Tribunal Case No. 6 of 2011. The magistrate's court issued a decree that the interested party sought to execute and it is in the execution process that land parcel **Nyaribari Chache/Keumbu/ 705** was made the subject of the execution as is evident from the copies of the land board application forms and the copy of the mutation form which are shown to have been executed in execution of the court order in CM Misc. Application No. 140 of 2011 following the adoption of the decision of the land tribunal's decision as a judgment of the court. The decision by the tribunal was unclear in its terms and in my view the magistrate's court misconstrued its terms when it purported to give effect to the decision of the tribunal. The Tribunal lacked the jurisdiction to deal with a dispute relating to registered land so as to affect the title to such land.
14. The evidence availed by the applicant shows that the applicant was registered as owner of land parcel number **Nyaribari Chache/Keumbu/705** in March 1965 and issued with a title on 2nd March 1972 and consequently the land disputes tribunal could not have had the jurisdiction to deal with such land as it purported to do. The land the subject matter having been registered way back in 1965 the issue of limitation under the Limitation of Actions act would arise whether or not the interested party would be able to bring an action against the applicant by reason of limitation. That would not be an issue that the Land Disputes Tribunal would have had jurisdiction to deal with. See the cases of **Wilson Wokabi Magundu –vs- Josephine Gatheru Njanya [2007] eKLR** and **Msambweni Land Disputes Tribunal & Antoher –vs- Bakari Ali Mwakumanya [2014] eKLR**.
15. As I have come to the conclusion that the Land Disputes Tribunal could not have had the jurisdiction to hear and determine a dispute involving and/or affecting title of a registered parcel of land it follows that any decision they may have reached affecting land parcel **Nyaribari Chache/Keumbu/705** was null and void *ab initio* for want of jurisdiction. Consequently there

was no valid decision that the magistrate's court could have adopted leave alone to effect the execution of the same. See case of **Republic –vs- Chairman Land Dispute Tribunal Nambale, ex parte John Okiiru Agwata [2010] eKLR.**

16. In the present matter the Tribunal's decision went beyond what is contemplated under section 3 (1) of the Land Disputes Tribunal Act. The decision as demonstrated by the attempts to execute the same affected title to land parcel 705 owned by the applicant. It was not merely the issue of a boundary dispute as it entailed the actual sub-division of the land parcel as exemplified by the copy of the mutation form which indicates the parcel was to be divided into two portions and would thus entail the transfer of a portion of the land that definitely would affect the title to parcel 705. This is exactly what the Tribunal lacks the jurisdiction to do pursuant to section 3 (1) of the **Land Disputes Tribunal Act.** The decision that emanated from the Land Disputes Tribunal was of no consequence and was a nullity. The magistrate's court could not give effect to a decision that was a nullity and the purported adoption, judgment and decree were of no legal effect. In the case of **Republic –vs- Chairman Borabu Land Disputes Tribunal & 2 Others ex parte Florence Nyaboke Machani [2014] eKLR, Okong'o J.** considering an application similar to the one before me observed thus:-

“Now the decision of the 1st respondent was null and void, was there anything that the 2nd respondent could adopt as a judgment of the court? In the case of Macfoy –vs- United African Co. Ltd [1961] 3 ALL ER 1169, Lord Denning stated as follows concerning an act which is a nullity at page 1172;

“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 to declare it to be so. And every proceeding which is founded on it is also bad incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

I am of the view that since the decision of the 1st respondent was a nullity, there was nothing in law that could be filed before the 2nd respondent for adoption as a judgment of the court. Such judgment would equally be a nullity. I am of the view that section 7 of the Land Disputes Tribunal Act pursuant to which the decision of the 1st respondent was lodged with the 2nd respondent for adoption envisaged a lawful decision by the 1st respondent. Since the decision of the 1st respondent was a nullity for want of jurisdiction, there was nothing on the basis of which the 2nd respondent could enter judgment and issue a decree.”

17. I am in full agreement with the observations of the learned judge and I am satisfied the same apply in equal measure to the circumstances of the present case. The 1st respondent in the instant case acted without jurisdiction and its decision was thus null and void. Equally the 2nd respondent cannot properly adopt a decision of the 1st respondent that is a nullity for want of jurisdiction. I accordingly find the application by the applicant meritorious. I hereby quash the decision by the 1st respondent dated 7th July 2011 and prohibit the 2nd respondent from adopting the same as a judgment of the court and/or giving effect to the award/decision of the 1st respondent filed in court as Misc. Land Dispute Tribunal No. 140 of 2011.

18. The court has taken note that the applicant and the interested party are brothers and on that account orders that each party bears its own costs.

Judgment dated, signed and delivered at Kisii this 26th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the applicant

..... for the 1st respondent

..... for the 2nd respondent

..... for the interested party

..... for the ex parte applicant

J. M. MUTUNGI

JUDGE