



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW NO. 92 OF 2011

REPUBLICAPPLICANT

VERSUS

THE CHAIRMAN IMENTI NORTH DISTRICT

LAND DISPUTES TRIBUNAL.....RESPONDENT

DAVID MUTHENGI MURIUNGIINTERESTED PARTY

J U D G M E N T

1. This application is dated 16th January, 2012 and seeks orders:-

1. ***That this Honourable Court be pleased to issue an order of certiorari to call and quash the decision of the Chairman of Imenti North District Land disputes tribunal case No. L.D.T NO. 30 of 2011 now Meru C.M. LD.T. NO. 42 of 2011 in respect of land parcel No. Nyaki/Thuura/2999.***

2. ***That costs be provided for.***

2. The application is supported by the affidavit of MARY MUTHONI M'MBUI, the applicant and has the following grounds:-

1. ***The Respondent had no mandate to award the Interested party any part of applicant's land thus the award is null and void.***

2. ***The District Land Disputes tribunal had no Jurisdiction to hear and determine this case.***

3. ***That an illegality has been committed and the same should be stopped by this Court.***

4. ***The interested party is blatantly continuing to cause malicious damage on the subject matter.***

3. The Exparte applicant had vide a Chamber Summons application sought leave to file Judicial Review Proceedings to apply for an order in the nature of certiorari to call and quash the decision of the Chairman, Imenti North Land Disputes Tribunal in LDT Case No. 30 of 2011 now Meru LDT NO 42 of 2011, concerning Land Parcel No. NYAKI/KITHOKA/ 2999. Leave was granted on 19th December, 2011 and it was ordered that the leave would operate as a stay of the implementation of the award which the ex-parte applicant was challenging.

4. To put issues apposite to these proceedings into perspective, I find it necessary to reproduce in full

the ex parte applicant's Supporting Affidavit sworn on 16th January, 2013 and filed on 17th January, 2012 and the Interested Party's Replying Affidavit sworn on 17th December, 2012 and filed on 9th January, 2013.

5. The ex-parte applicants supporting affidavit dated 16th January, 2013 states as follows:-

“ I, MARY MUTHONI M'MBUI of Box 1304 Meru do make oath and state as follows:-

1. ***THAT I am the applicant herein thus competent to make and swear this affidavit.***
2. ***That I am the Registered Owner OF Land parcel No. NYAKI/KITHOKA/2999 which is the subject matter herein.***
3. ***That the Interested Party is a trespasser on to my land and I have all along prevailed upon him to leave but he has refused and to justify his illegal occupation he went ahead to lodge a dispute before the District Land disputes tribunal claiming my land and the tribunal proceeded to award him occupation of the land without any factual or any legal basis; thus leaving the whole issue in limbo, annexed hereto are copies of proceedings marked M.M.M.I.***
4. ***That the tribunal erred because the Interested party should instead have been ordered to move out of my land being a trespasser thereto.***
5. ***That the tribunal lacked the jurisdiction to award my land to the interested party registered (sic) under the registered land act as my title is indefeasible.***
6. ***That the Interested party on the strength of the decision issued by the respondent is now spitefully causing damage on the land and interfering with my occupation and utility of the same.***
7. ***That the respondent was not sized (sic) with the mandate to issue the decision herein and same was not supported by fact or any law.***
8. ***That it's therefore in the interested (sic) of justice that the decision issued by the respondent be quashed by this Court to stop continuity of an illegality.***
9. ***That what is deponed herein above is true to the best of my knowledge, belief and understanding.***

6. The Interested Party's Replying affidavit dated 17th December, 2012 says as follows:

“ I, DAVID MUTHENGI MURIUNGI C/O OF P.O BOX 1924 MERU in the Republic of Kenya do hereby make oath and state as follows:-

1. ***THAT I am the Interested Party herein well versed with the issues in these Proceedings and hence competent to swear this Affidavit.***
2. ***THAT the Exparte Applicant herein MARY MUTHONI M'MBUI is my Mother.***
3. ***THAT the Exparte Applicant later got married to one GERALD MBUI MBWIRIA who has engineered all the problems relating to the suit Land herein.***
4. ***THAT the suit Lnad originally belonged to my Grand father one JOSHUA M'NCHENE KIGUNDA and was initially registered as NYAKI/KITHOKA/80 before subdivision.***

5. **THAT Land Parcel No. NYAKI/KITHOKA/80 was subdivided into 5 portions being LR. No. NYAKI/KITHOKA/2351 to 2355 with LR NO. 2353 being registered in the name of ISAAC M'ARIMI M'NCHENE who was my Uncle.**
6. **THAT on 14th September, 2007 the said ISAAC M'ARIMI N'NCHENE subdivided LR. NO. NYAKI/KITHOKA/2353 into 4 Land Parcels including the current suit land LR. NO. NYAKI/KITHOKA/2999 which was registered in the name of my mother MARY MUTHONI M'MBUI who held the same in trust for the Family Members as the same was Family Land which held the principles of inter and intra-generational equity for benefit of all family members.**
7. **THAT although the Ex-parte Applicant who is my mother became the registered owner on 13th December, 2007 I had long before that time constructed a permanent House on the Land with her permission .**
8. **THAT in the year 2011 the Exparte Applicant was incited by her present husband Gerald Mbui to chase me away from the Land where I had grown up and occupied and even built a permanent buildings (sic) and that is when I insisted (sic) the Land Disputes Tribunals case to protect my occupation of the suit land.**
9. **THAT contrary to the misguided contentions of the Ex-parte Applicant the District Land Tribunal in LDT Case No. 30 of 2011 which was read in Court as Meru CM'LDT Case No. 42 of 2011 I (sic) never exceeded their jurisdiction as the Tribunals award only dealt with he issue of occupation and not partition or change of legal Title to Land. Indeed paragraph 3 of the so called Supporting Affidavit by the Applicant sworn on 16th January, 2012 supports the fact that the tribunal only awarded me occupation of the Land as it states:-**

“ That the Interested Party is a trespasser on my Land and I have all along prevailed upon him to leave but he had refused and to justify his illegal occupation he went ahead to lodge a dispute before the District Land Disputes Tribunal claiming my Land and the Tribunal proceed (sic) to award him occupation of the land without any factual or any legal basis, thus leaving the whole issue in limbo , annexed hereto are copies of the proceedings marked “MMM 1”.

10. **THAT the award as can be seen in the decision of the Tribunal under headings (a) and (b) is clear that the Tribunal was alive to its powers under Section 3 (1) of the former Land Disputes Tribunals Act as it only ordered the Objectors and her (sic) Family to remain on their Land while 1 and my Family was to remain (in occupation) of the suit land.**
11. **THAT I am advised by my Advocates on record M/S MBAABU M'INOTI & CO Advocates that the Tribunals Award in so far as it only dealt with the issues of alleged trespass and claim to occupy or work on the Land than (sic) the Tribunal acted within its mandate and since the tribunal never dealt with change of ownership, or subdivision and transfer of the Title to the Land then the Award was proper.**
12. **THAT what is deponed herein is true to the best of my knowledge, information and belief.**

7. The parties filed Written Submission.

8. In her submissions the exparte applicant, gave a conspectus of the history that spawned this dispute. She has told the Court that the Interested Party used to live on Land Parcel No. NYAKI/KITHIKA/134 and later on moved to land parcel No. NYAKI/KITHOKA/2999. She says that this parcel of land was transferred to the applicant by her brother and states that the Interested Party could not lay a claim over this parcel of land.

9. The Exparte applicant has submitted that the tribunal had no jurisdiction to hear and determine the case before it and that it acted in excess of its jurisdiction in awarding the Interested Party her land. The exparte applicant submitted that Section 3 of the defunct Land Disputes Tribunal Act No. 18 of 1990 limited the powers of claims that tribunals could handle to:-
 - a. ***The division or determination of boundaries.***
 - b. ***A claim to occupy or work on land.***
 - c. ***Trespass to land.***
10. It is the ex-parte applicant's Submission that the case dealt with by the District Tribunal and the Provincial Appeals Committee never belonged to any of the categories intended by Section 3 of the defunct Land Disputes Tribunals Act. She stressed that in her opinion, the Interested Party's Claim was not to occupy or work on the suit land. She submits that the mandate of the respondent did not include distribution of the applicant's land. The exparte applicant further submits that since the Land Disputes Tribunals no longer exist, it would be improper for this Court to uphold their decisions.
11. In support of the application the exparte applicant proffered the following authorities:-
 - a. ***HCA No. 91 of 2011 -MERU***
 - b. ***CIVIL APPEAL NO 259 /00 -NYERI***
12. The Respondent takes issue with the evidence proffered by the exparte applicant in these proceedings. He points out that the Court has not been shown any proceedings which were handled or conducted at the level of the Provincial Appeals Committee at Embu. He says that what the exparte applicant has produced are only the proceedings of the Imenti North District Land Disputes Tribunal. He opines that the exparte applicant assumes that this Court would proceed on the assumption that when she was aggrieved at the District Level, she automatically appealed to the Provincial Appeal Committee without tendering evidence to confirm that there was indeed an appeal at the Provincial Appeals Committee Level.
13. The Respondent says that although the exparte applicant claims to be the sole registered owner of land parcel No 2999 registered under the Registered Land Act, the exparte applicant had proffered no title deed or any single document to confirm that claim. As the tribunal could not work on a presumption of registered ownership, the Court can only find that the Tribunal had the Power to hear and determine the dispute and treat the suit land as unregistered land or land without a title.
14. The respondent submitted that the proceedings of the tribunal and the award given showed that the claim was to occupy and work on the land, and, therefore, it had the mandate to arbitrate over it in accordance with Section 3 (1) of the defunct Land Disputes Tribunals Act. He concludes that the Tribunal was seized of the apposite jurisdiction.
15. The Interested Party has submitted that the ex-parte applicants submissions are not only misleading, muddled up and confused as the exparte applicant is not clear regarding which decision should be called up and brought to this Court for quashing by an Order of Certiorari.
16. The Interested Party says that there was an award of the Meru District Land Disputes Tribunal and another award made by the Provincial Appeals Committee at Embu which upheld the decision of the District Tribunal and which award was read in Chief Magistrates LDT NO. 42 of 2011.
17. The Interested Party takes issue with the fact that the application challenges the decision of the District Tribunal instead of the decision of the Provincial Appeals Committee. The Interested Party reiterates that the Respondent in this suit is the Chairman, Imenti North District Land Disputes Tribunal and not the Embu Provincial Tribunal.
18. The Interested Party submits that the mere fact that the disputed land L.R. No

NYAKI/KITHOKA/2999 is registered under the defunct Registered Land Act does not make an Award or decision of the Land Disputes Tribunal illegal or unlawful and meriting the quashing of such a decision. He urges the Court to look at the decision of the tribunal at page 6 of the proceedings as well as the award, the evidence of the parties and the findings of the tribunal and find that the Tribunal acted within its mandate Under Section 3(1) (b) and find that the claim was to occupy or work Land and under Section 3 (1) (c) trespass to land. He points out that the tribunal's decision was

“ To avoid any further disputes and problems

- a. ***The Family of the Objector's present husband Gerald M' Mbui to remain in their land.***
- b. ***The Claimant AND HIS FAMILY TO REMAIN IN THE SUIT LAND NYAKI/KITHEKA/2999 because they were settled there by their mother and grandfather”.***

The Interested Party says that the Tribunals decision shows that it was not distributing land but determining where each of the Parties should occupy land or remain in occupation .

19.The Interested Party has submitted that this application is fatally defective for not having conformed with the requirements of Order 53 of the Civil Procedure Rules. Having carefully considered the issues raised and having perused the apposite portion of the proceedings, I outrightly dismiss this submission. I find that this application is properly before this Court. I wish to point out that there are no two applications as alleged by the Interested Party. In the Chambers Summons dated 19th December, 2011 the exparte applicant was seeking leave to initiate Judicial Review Proceedings. Once leave was granted he commenced this suit.

20.The Interested Party finally submits that since the exparte applicant seeks to quash the decision of the Tribunal in respect of Land Parcel No. NYAKI/THUURA/2999 whilst the decision annexed relates to land parcel NO. NYAKI/KITHOKA/2999, then as per the provisions of Order 53 Rule 7 of the Civil Procedures Rules, the order of Certiorari sought in this suit is untenable.

21.The Interested Party proffered the following cases in support of his assertions:-

1. ***Misc Application 478 of 2008 Nicholas Mugambi Versus Minister for local Government & 6 Others, Nairobi 2008 [e KLR].***
2. ***Farmers Bus Versus Transport Licensing Appeal Tribunal-Civil Appeal No. 63 of 1979.***

22.I have carefully considered the pleadings filed by the Parties, their Submissions and the authorities they have tendered to buttress their assertions. I opine that the authorities they have proffered are good law in their circumstances and in the right context. However, invariably cases have distinct particularities and no one shoe-size can fit all.

23.I do note that after the existence of the exparte applicant's title was challenged by the Respondent, she filed further submissions and annexed a copy of the title to parcel of land NO. NYAKI/KITHOKA/2999 . She also raised other issues whose veracity can only be ascertained by way of viva voce evidence. I opine that Judicial Review Proceedings are not the correct forum for such matters

24.The Interested Party filed further Submissions in response to the exparte applicant's further Submissions. As I have already said, disputed facts can not ideally be handled in Judicial Review Proceedings. In the case of matters apposite to the Land Disputes Tribunal's Act, all matters concerning disputed facts are concluded at the Provincial Appeals Committee Level. This situation is made pellucidly clear by Section 8(9) and 8(10) of the Land Disputes Tribunal Act.

25.In both Meru HCA No 91 of 2007 and Civil Appeal No. 259 of 2000, the Courts had found that the Tribunal lacked jurisdiction. In this case, I do find that the ex-parte applicant had

constructively conceded that the Tribunal had Jurisdiction. In Paragraph 3 of her affidavit sworn on 16th January, 2012, she stated:-

“ That the Interested Party is a trespasser on to my land and I have all along prevailed upon him to leave but he has refused and to justify his illegal occupation he went a head to lodge a dispute before the District Land Disputes Tribunal claiming my land and the Tribunal proceeded to award him occupation of the land without any factual or any legal basis: thus leaving the whole issue in limbo, annexed hereto are copies of proceedings marked the M.M.M.1.”

26. The ex parte applicant frames the issues as occupation and trespass. This falls squarely within the ambit of section 159 of the defunct Registered Land Act which states as follows:

“ Section 159 :

Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act”.

27. The quotation quoted by the Interested Party and ascribed to Justice Aganyanya, as he then was, in Beatrice M'Marete versus Republic ex parte No. 259 of 2000 (Nyeri), is a true restatement of the power of the Court in Civil Proceedings. The authority of Farmer's Bus Service and others Versus the Transport licensing Appeal Tribunal is good law. However in this matter, I have already found that this application is properly before this Court.

28. The main ground canvassed by the ex parte application is that the apposite Tribunal lacked jurisdiction. I have already found that the tribunal had jurisdiction to arbitrate over the subject matter before it. On this ground alone, this application merits dismissal. I will shortly dismiss it.

29. The Land Disputes Tribunals Act at Section 8(9)(10) decrees how appeals should be handled. It states:-

“8(9)Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:

provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary) is involved.

8 (10) A question of customary law shall for all purpose under this Act be deemed to be a question of fact”.

30. In this appeal the respondent was the Chairman, Imenti North District Land Disputes Tribunal. Unequivocally, I state that this was wrong. The Respondent should have been the Provincial Appeals Committee. Should it be the fact that there had been no appeal to the Provincial Appeals Committee, then this appeal was incompetent and merited dismissal. On the other hand should it be that an appeal had been heard by the Provincial Appeals Committee but the ex parte applicant opted to appeal against the decision of the District Land Disputes Tribunal, this would amount to a veritably egregious mutilation and savaging of the correct procedure. Here again, the application would merit dismissal.

31. My conclusion is that this suit deserves dismissal. It is, accordingly, dismissed.

32 I will now turn to the question of costs. This dispute concerns a mother and a son. I will award no costs. Parties will bear own costs.

It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 27TH DAY OF APRIL, 2016 IN THE PRESENCE OF:-

CC : Lilian/Daniel

Nyauchi present for the Interested Party

Kirima for Exparte Applicant

P.M. NJOROGE

JUDGE