



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 26 OF 2011**

**IN THE MATTER OF: AN APPLICATION BY CHRISPIN MWANGOLO SANGA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE PROVINCIAL LAND APPEALS COMMITTEE-COAST APPEAL CASE NO. 185 OF 2002**

**CHRISPIN MWANGOLO SANGA VERSUS PATRICK K. DZOMBO**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300**

**AND**

**IN THE MATTER OF TITLE NUMBER KILIFI/BANDARASALAMA/125**

**REPUBLIC.....APPLICANT**

**AND**

**THE PROVINCIAL LAND APPEALS COMMITTEE - COAST.....RESPONDENT**

**EX PARTE .....CRISPIN MWANGOLO SANGA**

**JUDGMENT**

**THE APPLICATION**

[1] Upon Leave granted by Ibrahim J. (as he then was) on the 9<sup>th</sup> March 2011 to file Judicial Review Proceedings for Orders of Certiorari, Prohibition and Mandamus against the Respondent, the Ex Parte applicant herein, CHRISPIN MWANGOLO SANGA filed a Notice of motion dated 14<sup>th</sup> March 2011, seeking the following orders:

- 1. An order of Certiorari do issue removing the High Court for quashing the proceedings and***

**decision dated 23<sup>rd</sup> February 2011 by the Provincial Lands Appeals Committee-Coast in the Land Appeal Case No. 185 of 2002 CRISPIN MWANGOLO VS PATRICK K. DZOMBO.**

**2. An order of prohibition do issue directed to the Provincial Land Appeals Committee-Coast prohibiting them from hearing, determining and/or executing any orders or acting on the decision in Land Appeal Case No. 185 of 2002 CRISPIN MWANGOLO VS PATRICK K. DZOMBO in respect of Title Number Kilifi/Bandara Salama/125 or any other such claim as pertains the ownership of the property comprised in the said title.**

**3. An order of mandamus do issue to compel the District Land Registrar, Kilifi to cancel any entries in respect of Title No. KILIFI/BANDARA SALAMA/125 and cancel any title issued to PATRICK K. DZOMBO JUMAA as the absolute proprietor and to restore to him his title in respect thereof.**

[2] The grounds of the application were set out in the Motion that:

- a. *The land registered as Title No. KILIFI/BANDARA SALAMA/125 belongs to and was properly registered under the name of SANGA DZOMBO JUMAA (Deceased)*
- b. *The applicant is one of the Administrators of the estate of Late SANGA DZOMBO JUMAA*
- c. *The Provincial Land Appeals Committee - Coast acted unlawfully when by a decision dated 23<sup>rd</sup> February 2011 it ordered that the title in respect to the suit property be revoked and that the same be sub-divided amongst the Respondent and his siblings.*
- d. *The tribunal acted in excess of its jurisdiction.*
- e. *The tribunal acted contrary to the law.*
- f. *The effect of the said Judgment and decision is to illegally deprive the deceased's estate of their proprietary interest in the suit property.*

[3] The ex-parte applicants further relied on the Statement and Verifying Affidavit dated 9<sup>th</sup> March 2011 where it was averred that:

- i. *The ex-parte applicant has been authorized by his co-administrators in the estate of the late Sanga Dzombo Jumaa.*
- ii. *The parcel of land in dispute had been purchased by his late father and it measures approximately 12 Hectares and situated at Gandini Area of Chonyi Division in Kilifi County and was registered as the owner.*
- iii. *Sometime in 2001 the Respondent Patrick Kwegha Dzombo filed a complaint before the Chonyi Land Disputes Tribunal claiming that the land in question also belonged to him and his siblings.*
- iv. *On 2<sup>nd</sup> July 2001 the Chonyi Land Disputes Tribunal made a decision that the land belonged to his father and his siblings and ordered for it to be subdivided among his father's siblings.*
- v. *On 13<sup>th</sup> December 2001, the Kilifi Senior Resident Magistrates Court adopted the said order as an order of the Court. He appealed to the Land Disputes Appeals Committee-Coast challenging the decision and in particular the powers of the tribunal to deal with a legally registered piece of land. On 23<sup>rd</sup> February 2011, the appeals tribunal ordered that the land belonged to his late grandfather and should be subdivided.*

vi. At no time did the said Patrick K. Dzombo or any of his siblings challenge the registration of the land during the adjudication and the subsequent registration in his late father's name.

[4] Although Counsel for the ex parte applicant said the respondent had filed Grounds of Opposition, as per the proceedings on 11<sup>th</sup> July 2013 when the court gave directions for parties to file written submissions, the same are not in the court file. A replying affidavit referred to by the Counsel for the Interested party in his submissions was similarly not available in the file but its contents are said to be highlighted in the submissions, and in any event, the judicial review court is concerned with the legality of the process of decision making rather than the correctness of the decision on the merits

## **SUBMISSIONS**

### **Ex-parte Applicant's Submissions**

[5] The ex-parte applicant filed his written submissions dated 23<sup>rd</sup> of August 2013 by Godfrey Mutubia & Co. Advocates where it was contended that the conduct and decisions by the Chonyo Land Disputes Tribunal and Land Disputes Appeals Committee-Coast were prejudicial and the two bodies did not have the powers to deal with the land in the manner in which it was purportedly done.

[6] The ex-parte applicant contended that his right to heard was breached and that the decision by the Tribunal is amenable to Judicial review orders of Certiorari since the same was ultra vires, contrary to the law and improper.

[7] The land in dispute was registered under the Registered Land Act Cap 300(repealed). He submitted that Section 3 of the Land Disputes Tribunal Act No. 18 of 1990(repealed) did not grant the Land Dispute Tribunal and by extension the then Provincial Land Disputes Appeals Committees powers to adjudicate over registered land.

[8] It was their submission that the tribunals acted *ultra vires* and that their decisions were null and void and amenable to an order of certiorari. The tribunals did not have the powers to order cancellation of a title issued under the Registered Land Act Cap 300 of Laws of Kenya or even order distribution of land already registered under the repealed Act which role was solely reserved for the court under section 28 thereof.

[9] The ex-parte applicant relied on the following authorities:

MOMBASA HIGH COURT MISC. CIVIL APPLICATION NO. 887 OF 2005 **REPUBLIC VS MSAMBWENI LAND DIPUTES TRIBUNAL & OTHERS** where Sergon, J. held that the Msambweni Land Disputes Tribunal has no jurisdiction to adjudicate upon the issue of ownership and title relating to registered land and that its decision was a nullity and could not be adopted as an order of any court.

NAKURU HIGH COURT MISC. CIVIL APPLICATION NO. 190 OF 2006 **REPUBLIC VS SOUTH KINANGOP LAND DISPUTES TRIBUNAL & ANOTHER** where Martha Koome, J. (as she then was) in quashing the decision by the Kinangop Land Disputes Tribunal in respect of LR. No. Nyandarua/Jabini/416 held that the Tribunal acted outside the jurisdiction conferred by the Act. The Tribunal had no jurisdiction to order the applicant to transfer his land to the 2nd respondent or to order the payment of costs and to make an assessment and to order the applicant to pay damages. This order is ultra vires; it is made in excess of jurisdiction and renders itself for quashing. Determining the ownership of a land registered under the Registered Lands Act was not within the mandate of the Land Disputes Tribunal.

[10] The applicant urged this court to quash the decision made by the Provincial Appeals Committee and also an order prohibiting them from entertaining any claim regarding the applicant's land or adjudicating the same as the Land Disputes Tribunal act NO. 18 of 1990 had been repealed.

### **Respondent submissions**

[11] The Respondent its their written Submissions dated 31<sup>st</sup> July 2013, by Litigation Counsel, Kiti M. Nimwaka, where they submitted that the petition is misconceived and an abuse of the court process as the procedure followed by the applicant to realize his rights of ownership in the property was un-procedural from the start. The respondent cited the case of *Anarita Karimi Njeru Vs Republic (No.1)* 1979 KLR 184 to support their case.

[12] It was their submission that the disputed property falls under the division of property with title documents where the mandate in determining the dispute lies only the High Court of Kenya. They further submitted that it does not lie under mandate of the Land Dispute Tribunal as its mandate was clearly laid out under section 3 of the Land Dispute Tribunals Act, Cap 303A Laws of Kenya (repealed).

[13] It was their submission that under prayer 3 of the Notice of motion the applicant had not demonstrated the basis and/or ground to warrant an order from this court. The Applicant had not demonstrated to the court how he was entitled to the land as an absolute proprietor of the land and how his constitutional rights has been infringed.

[14] The Respondent submitted that the application is unmerited and the reliefs sought are improper and the applicant is guilty of laches. They aver that the applicant is improperly hiding behind Judicial Review to create a shortcut to obtain ownership of land and that no evidence had been provided to prove the same. They urged the court to dismiss the application.

### **Interested Party's Submissions**

[15] The Interested Party's submissions dated 9<sup>th</sup> October 2013 by Munyithya, Mutugi, Umara & Muzna Co. Advocates urged that the application be dismissed and that the decision of the Provincial Appeals Land Tribunal should not be quashed for the following reason:

- i. The other 6 families shall be rendered destitute without any alternative land for them to reside in.
- ii. The ruling would amount to elevating technicalities above merits and substance contrary to Article 159 of the Constitution. The applicant should have filed a proper plaint and in the right court, the Environmental and Land Court.
- iii. The new Land Act No. 6 of 2012 has repealed the land disputes tribunal and as such any quashing of the decision shall leave the parties without an option unless a new suit is filed in the Environmental and Land Court.
- iv. The decision of the tribunal did not amount to a decision on ownership and on the title but rather amounted to evidence which will enable the High Court to reach a decision once instituted properly instituted through a Plaint.

[16] It was submitted that the applicant has not explained to the court how he was registered as the sole owner of the suit land without the involvement of his brothers. It was further submitted that the applicant has not explained how his brothers are in occupation of portions of the suit land. Finally it was submitted that the allegations by the applicant that he was not involved in the hearing are false. It was submitted that the applicant was the one who filed an appeal to the provincial Appeals Tribunal and also instituted a case at the District Land Disputes Tribunal.

### **ISSUE FOR DETERMINATION**

[17] The question before the court is the threadbare inquiry whether the tribunal under the now repealed Land Disputes Act 1990, cap 303A Laws of Kenya has jurisdiction to determine an issue of ownership of land, legal or beneficial, and whether the judicial review reliefs sought will be granted.

### **DETERMINATION**

[18] The Land Disputes Tribunal decision dated 2<sup>nd</sup> July 2001 in Tribunal Case NO. 2 of 2001, **Patrick Kesha Dzombo versus Crispin Mwangolo Sanga** made a finding and orders on a issue of ownership as follows:

**“Court**

1. *It did appear before court that the land in the claim was already in parcels used by the specific family line members.*
2. *Apparently, it did appear before the court that there was a precise right for the plaintiff to file a case against the defendant so that the big family land could be subdivided into further divisions to separate the parcels.*
3. *The Panel of Elders court found defendant with his people to had no any right to restrict other people from entering into their parcels to collect their properties.*
4. *The court of the panel of elders at its final [opinion], gives the AWARD to the Plaintiff with his people.*

**Order**

1. ***Defendant Mr. Crispin Mwangolo Sanga with brothers ordered to vacate the claimed parcels with immediate effect, to release the parcels to the owners.***
2. ***Defendant ordered to surrender every bit within Plaintiff’s awarded parcels and pay the prescribed costs for the damages of shamba properties, if any.***
3. ***Panel of elders court orders that, the big family land holding the registration title certificate in the names of Sanga Dzombo Jumaa, be subdivided into further subdivisions, to separate the parcels, making them hold their own registration title certificates members.”***

[19] On appeal, the Provincial Land Dispute Appeals Committee by its decision of 23<sup>rd</sup> February 2011 in **Crispin M. Sanga versus Patrick K. Dzombo**, Provincial Land Appeals Committee - Coast Appeal Case NO. 185 of 2002, identified the issues and made a determination as follows:

**“DECISION OF THE TRIBUNAL -----**

*Having heard and considered the representation of the parties and having considered all the documents submitted to us we hereby decide as follows:*

**BACKGROUND FACTS**

*The dispute is about ownership of the whole land.*

*The appellant claims that this is his father’s personal and provate land which he bought and welcomed his brothers to live with him.*

*He also claims that after sometime some of his Uncles left and his father remained with his sons namely:*

1. *Crispin Sanga*
2. *Stephen Dzombo Sanga*
3. *Gabriel Nyamawi Sanga*
4. *Antony Mwadzombo Sanga*
5. *Cyprian Sanga*
6. *Alphonce Kiti Sanga*
7. *Martin N, Sanga*
8. *Emmanuel Sanga*

9. Mwambogo Sanga
10. Renscelaus Sanga
11. Allan Sanga
12. Mwakai sanga
13. Deche Sanga and
14. Ziro Sanga

on the disputed land.

The respondent claims that this land belongs to his father Dzombo Jumaa and that before he died he subdivided his land to his seven sons, namely:

1. Jumaa Dzombo
2. Mbura Dzombo
3. Sanga Dzombo
4. Patrick Kwesha Dzombo
5. Jumaa Kiti Mwalolo
6. Mwanje Mwadzombo
7. Mwafondo Dzombo

He further claims that an earlier case between Sanga Dzombo and Jumaa Dzombo at Kaloleni Court Sanga lost.

### **ISSUES SUMMARISED**

**1. Ownership of the disputed land at Kilifi/Bandara Salama/125 measuring 12.5 Ha.**

2. Relationship between the disputing parties.

### **FINDINGS/ DISCUSSIONS AND REASONS**

The Panel of Elders considered all the evidence produced by both parties during the hearing sessions and also made a visit to the disputed land so that a fair conclusion could be reached on the matter.

It is a fact that Dzombo Jumaa had seven sons as stated above and that his eldest son's name is Sanga Dzombo. Jumaa had to be used when the registration of this land was taking place as per the Chonyi customary law because Dzombo Jumaa had died. The name of Sanga Dzombo in this respect was to stand for the rest of the family members and not as his personal property.

The site visit made revealed visible marks showing how each of the seven sons is supposed to occupy his plot.

A common grave yard was also seen where all the brothers bury their dead without interference from amongst themselves. Further to this also came clear that a brother to the appellant built a business premises on a portion of land that does belong to his father.

It is also clear that each of the seven brothers planted his own cash crops in his land beside what their late father Dzombo Jumaa had planted for their future generations' use.

### **DECISION/DETERMINATION OF THE APPEALS COMMITTEE**

**After careful consideration of facts gathered during the hearing sessions and the site visit made in this case and in accordance with Chonyi customary law, this appeals committee decides as follows:**

*- The land at Kilifi/Bandara Salama/125 is the property of the late Dzombo Jumaa Mwakai and which after his death became the property of his seven sons.*

*- The subdivision and plot allocation of this land made by him before his death must be honoured by his seven sons and their children and the boundaries should be made much more clear so that each person may move to his father's original portion of land to avoid future confrontation.*

*- This Appeals Tribunal orders that the existing title deed be revoked and fresh ones be issued for each of the seven portions as per the seven brothers described above so that each family maintains its own title deed.*

### **COSTS AWARD**

*The appellant to pay the respondents full costs of this appeal.*

### **RIGHT OF APPEAL**

*Any aggrieved party that is not satisfied with this decision has right of appeal to the High Court on point of law within 60 days from the date of this decision.*

*Dated this 23<sup>rd</sup> day of February 2011* \_

[20] Section 3 (1) of the Land Disputes Tribunals Act 1990, cap 303A Laws of Kenya provides for the jurisdiction of the Land Disputes Tribunals and the Appeals committee 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.”***

The Tribunal has no jurisdiction to determine an issue of *ownership* of land. It is trite that the tribunal has no jurisdiction over a question of ownership, legal or beneficial, of property. I agree with the holding of the decisions cited by the ex parte applicant above, that the land tribunal had no jurisdiction on matters of ownership of land.

[21] I do not agree with the submission by counsel for the Interested Party that the issue of jurisdiction is one of technicalities of procedure within the meaning of under Article 159 of the Constitution, which requires courts to dispense substantial justice. The determination of the ownership of a parcel of land as a matter of fact and law, was vested in the High Court under section 159 of the Registered Land Act before the promulgation of the Constitution of Kenya 2010 which provided for the creation a court of equal status with the High Court, the Environment and Land Court. If a body or tribunal, without jurisdiction, purports to make a determination as to the ownership of land, the same is null and void, whether or not the verdict of the body or tribunal is, on the merits, justified. Such a body or tribunal has simply no authority under the law to make the determination purportedly made, and it is a blatant affront to the constitutional principle of the Rule of Law.

### **CONCLUSION**

[22] From the record of decisions of the Tribunal and the Provincial Appeals Committee, it is clear that the Land Disputes Tribunal and the Appeals Committee upon appeal determined the issue of ownership of the suit parcel of land, a matter over which the administrative bodies not only had no jurisdiction. The proceedings of the Tribunal and the Appeal Committee must, accordingly, be quashed by Certiorari and the consequent relief by way of Prohibition and Mandamus granted to restore the situation on the ownership records of the parcel of land to the position existing before the unlawful intervention of the Tribunal and the Appeals Committee in exercise of pretended powers to determine the question of

ownership of the suit land and even to order revocation of existing title, the subdivision of the suit property and rectification of the land register for registration of the subdivisions into the names of persons it determined to be the owners thereof.

[23] Counsel for the respondent was mistaken in thinking that the proceedings before the Tribunal were filed by the ex parte applicant herein and hence the submission that he had used the wrong procedure as the Tribunal had no jurisdiction over the issue of ownership of the titled property. The ex parte application was the defendant in the Tribunal suit who, upon his unsuccessful defence of the claim, lodged the appeal the Appeals Committee, and the objection on procedure should, consequently, be laid at the door of the Interested Party who may now file, if so advised by his counsel, appropriate proceedings before the High Court or the Environment and Land Court for a determination of his interest in the suit property.

[24] With respect, the respondent's submissions supports the ex parte applicant's case on the question of jurisdiction of the Tribunal as follows:

***“Therefore, the disputed property falls under the division of property with title documents where the mandate in determining the dispute lies only with the High Court of Kenya....It does not lie under the regime and/or mandate of the Land Dispute Tribunal as its mandate was clearly laid out under section 3 of the Land Disputes Tribunal, cap 303A Laws of Kenya (now repealed).”***

[25] To be sure counsel for the Interested Parties recognized the want of jurisdiction on the part of the tribunal and the appeals committee to deal with an issue of ownership of land when it was submitted that

***“6. The decision by the Provincial Appeals Tribunal in itself did not amount to making a decision on the ownership and on the title but rather this amount to evidence which will enable the High Court to reach a decision as and when a proper suit is filed through a Plaintiff.”***

## **ORDERS**

[26] Accordingly, for the reasons set out above, the Notice of Motion dated 14<sup>th</sup> March 2011 is granted as prayed with costs to the Ex Parte Applicant.

[27] For avoidance of doubt, as there was indication - in the decision of the Provincial Appeals Committee upon site visit - of occupation of portions of the parcel of land by interested parties, this judgment does not authorize the forcible eviction or removal of any person who may be in occupation of the parcel of land by virtue of the orders of the tribunal or the appeals committee or otherwise, and the Ex Parte Applicant must bring appropriate proceedings in that behalf with notice to any such persons.

[28] The Interested Party is, of course, at liberty to move the Environment and Land Court for a determination of his interest, if any, in the suit property.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JUNE, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

**In the presence of: -**

.....for the Ex Parte Applicant

.....for the Respondent

.....for Interested Party

..... - Court Assistant.