



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 105 OF 2012

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF EUROTRUCKS & TRAILERS (K) LIMITED AND ARTICLES 22, 23, 40, 47, 48, 165(3) & (5) AND SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF EUROTRUCKS AND TRAILER (K) LIMITED'S FUNDAMENTAL RIGHTS TO PROPERTY, FAIR ADMINISTRATIVE ACTION, ACCESS TO JUSTICE WITH REGARD TO KWALE/DIANI SETTLEMENT SCHEME/222

AND

IN THE MATTER OF: AN APPLICATION ON THE PART OF EUROTRUCKS AND TRAILERS (K) LTD FOR ENFORCEMENT BY ORDERS OF JUDICIAL REVIEW OF ITS RIGHT IN KWALE/DIANI SETTLEMENT SCHEME/222

AND

IN THE MATTER OF: MSAMBWENI LAND DISPUTES TRIBUNAL CASE NUMBER 07 OF 2009 BETWEEN ABDALLAH SALIM MWAMAZURI AND KHALID MUSA; MOHMUD MUSA; MASUDI MUSA; NAHID MOOSA; AHMED ALWY AND EUROTRUCKS AND TRAILER (K) LIMITED

AND

IN THE MATTER OF: THE DECREE OF COURT DATED AND ISSUED ON 21/09/2010 IN KWALE LAND CASE NO. 25 OF 2010 BETWEEN ABDALLAH SALIM MWAMAZURI VS. KHALID MUSA; MOHAMUD MUSA; MASUDI MUSA; NAHID MOOSA; AHMED ALWY AND EUROTRUCKS & TRAVELLERS LTD.

BETWEEN

EUROTRUCKS & TRAILERS LTD.....PETITIONER

VERSUS

1. JUMA ABDALLA MATATA

2. KWALE PM'S COURT.....RESPONDENTS

JUDGMENT

1. This Judgment relates to –

- (1) a Notice of Motion dated 11th December, 2015 and filed on 16th December, 2015 for review of the Ruling of this court made on 11th December, 2015 relating to consolidation of this Petition with Mombasa ELC Case No. 75 of 2013 between Juma A. Matata vs. Ali Changoma & 5 others; and costs of the above application and previous applications be provided for in any event;
- (2) the Petition herein (No. 105 of 2012), consolidated with Judicial Review application Number 51 of 2015.

The Notice of Motion of 11/12/2015

2. By a Ruling delivered on 11th December, 2015, the court ordered consolidation of the Petition, and Judicial Review Application with Mombasa ELC Case No. 75 of 2011. The reason for the review is the discovery of new and important evidence, namely that ELC Case No. 75 of 2011 was in fact dismissed on 13th July, 2015 during the Judicial Service Week, and that the order for consolidation is not practicable anymore.

3. There was no contest against this prayer. There is a decree dated 13th July, 2015, duly issued on 20th August, 2015, that **“the suit be and is hereby dismissed”**, with no order as to costs. The Notice of Motion dated 11th December, 2011 is therefore allowed with no order as to costs.

4. This leaves the Petition herein, and the Judicial Review Application No. 51 of 2015. The Petitioner, Eurotrucks Trailers (K) Limited, the ex parte Applicant, and the Petitioner (in Petition No. 105 of 2012) sought the following orders –

- (a) an order of certiorari to call up to the High Court for quashing the decision represented by action of registering and issuing by the County Land Registrar, a concurrent title for Kwale/Diani/Settlement Scheme/222 in the name of Juma Abdalla Matata on 13th May, 2015 while there was a valid title held by the Petitioner;
- (b) an order of mandamus to compel the county Land Registrar, Kwale to call-up the original title deed issued to Juma Abdalla Matata on 13th May, 2015 for cancellation; and
- (c) a conservatory order to preserve the status quo ante with regard to the suit land.

5. The Petition (No. 105 of 2012) sought the following orders –

- (1) an order of judicial review by way of an order of certiorari and prohibition to call up to the High Court for quashing the award of Mombasa Land Disputes Tribunal in Land Disputes No. 07/2008 and the ensuing decree issued on 21st September, 2010 in Kwale Senior Resident Magistrate’s court from entertaining or issuing decree(s) in matters emanating from a tribunal which proceeded without jurisdiction;
- (2) a declaration that the title held by and vested in Euro Trucks and Trailers (K) Limited with regard to Kwale/Diani Settlement/222 is absolute under the laws of Kenya;
- (3) an interim conservatory order do issue to maintain the status **quo ante** which is Euro Trucks and Trailers (K) Limited owns and is in physically possession of Kwale/Diani Settlement Scheme/222, which it has developed;
- (4) the costs of the Petition be provided for.

6. Both the Judicial Review Application (Notice of Motion dated 30th November, 2015), and the Petition are grounded on the claims as stated in the Affidavit of Lanyasunya Naemu Catherine, Verifying the Facts, sworn on 13th November, 2015, and the Supporting Affidavit of the said Lanyasunya Naemu Catherine sworn on 15th November, 2012 of the Petition of 15th November, 2015.

The Petitioner/Applicant's Case

7. The Petitioner/Applicant (the Petitioner), contends that despite the subsistence of Mombasa ELC Case No. 75 of 2011 and the Petition the Respondent went ahead and obtained an award from the Msambweni Land Tribunal that Title No. Kwale/Diani Settlement Scheme/222 and had a new title to the said parcel of land issued in the name of the Respondent. The Petitioner contends that such award was made without jurisdiction as the Tribunal has no jurisdiction to determine questions of ownership of or title to land. In this regard the Petitioner relied upon cases in the Petitioner's List of Authorities dated and filed on 11th March, 2015, including the Constitution of Kenya, which in essence say that a land disputes tribunal has no jurisdiction to entertain disputes concerning ownership of or title to land let alone, disputed land.

8. On their part, the Respondents opposed both the Judicial Review Application and the Petition through the Replying Affidavit of Juma Abdalla Matata sworn on 25th April, 2016, (for the Judicial Review application) and the Replying Affidavit of the said Juma Abdalla Matata sworn on 24th February, 2016 (in relation to the Petition). Counsel also filed written submissions dated 25th July, 2016, as well as a List of Authorities dated and filed on 26th July, 2016. The Respondent's case is **firstly** that the Petitioner has sued the wrong person, the owner of the disputed land was deceased and the deponent had not taken out a grant of letters of administration, and would not be a proper party to the Petitioner as Respondent. The Respondents' counsel relied on the decision of the court of the Court of Appeal in **TROUSTIK UNION INTERNATIONAL & ANOTHER vs. JANE MBEYU & ANOTHER [1993]eKLR** (CA No. 145 of 1990) and **SHEILA NKATHA MUTHEE vs. ALPHONSE MWANGEMI MUNGA & OTHERS [2016]eKLR** (CA No. 314 of 2014), that a person who had not taken out letters of administration had no **locus standi** to sue or be sued! The Respondents' counsel therefore urged the court to dismiss the Petition with costs to the Respondents.

Analysis and Determination

9. The rival claims were set out in my Ruling of 11th December, 2015 in which I granted orders of inhibition to prohibit the Respondent from dealing with or issuing a second title to the disputed land pending the determination of ELC Case No. 75 of 2011, which case had by then been dismissed as I have already observed. So it is now of no concern in this Judgment.

10. This is a convoluted case. It involves a purported award by the Msambweni Land Disputes Tribunal to the estate of the Respondent's father, well after more than 20 years from 1989 to 2009 when the same land was purportedly adjudicated by the Msambweni Land Disputes Tribunal. A claim to recover land is limited to twelve years, where a body has jurisdiction. A land disputes tribunal has no jurisdiction to determine issues of title, other than a claim on the division, and determination of boundaries to land, a claim to occupy and work land, or trespass to land.

11. Part of the convolution in this matter was caused by counsel of both parties. The Respondent filed ELC No. 75 of 2011, and at some stage purported to withdraw it, without even informing his own advocates, hence the dismissal of the case in July, 2015. But the Petitioner's counsel was equally at it, by filing a Judicial Review Application, and a Petition on the same dispute. A multiplicity of suits is not a guarantee to success but rather an assurance of confusion in determining the dispute. The sole issue here is whether the Msambweni Land Disputes Tribunal had jurisdiction to determine a matter of title to land. There are many decisions in the Kenya Law Reports that a land disputes tribunal has no jurisdiction to determine issues of title to land. An example is the case of **REPUBLIC vs. CHAHSMANIMEKA NORTHDISTRICT LAND DISPUTES TRIBUNAL & OTHERS ex parte M'maitutha [2007]1EA 343** where the court held **inter alia** that by entertaining the dispute as to the ownership of the disputed

land, the Tribunal acted **ultra vires** and its decision was for quashing. Similar holding was made in **Eldoret Court of Appeal No. 74 of 2003**, as well as Machakos High Court, **Civil Misc. Application No. 252 of 2006**.

12. It was argued on behalf of the Interested Party (Juma Abdalla Matata (hereinafter referred to as “JAM”), that the judicial review was brought after the expiry of six months, that an application for an order of certiorari it ought to have been brought within six months of the act, decision or orders being impugned. It was argued that **JAM** was wrongly enjoined, he having no capacity as he had not obtained a grant of letters of administration on behalf of his father, who was then deceased. I will commence with the question of **locus standi**.

13. On the question whether **JAM** had **locus standi** to be enjoined as an interested party in the judicial review application, it is correct that the original applicant to the Msambweni Land Disputes Application was made by Abdalla Salim and others, **JAM’s** father and other interested parties, and not **JAM**. It is not **JAM’s** father who obtained the title registered in his name, but **JAM**, and it is **JAM** who is answerable for the eventual registration and issue of title to himself. He is the person to be directly affected by the outcome of the judicial review application. He is the proper Interested Party and he was properly enjoined in the judicial review application. He has **locus standi**.

14. On the question of limitation of the period within which to file judicial review application for an order of certiorari, I hold the view that where a body had no jurisdiction to determine a matter, its decision made without jurisdiction is a nullity **ab initio, ex nihilo, nihilo est** (nothing comes out of nothing). An illegality is an illegality, time does not cure an illegality. The moment it is discovered, it must be put right. In this case the orders of Msambweni Land Disputes Tribunal made without jurisdiction were a nullity, and anything else done pursuant to, or under those orders, are equally a nullity, and must be so declared. Equally the purported order dated 23rd April, 2015 of distribution of the suit land as part of the Estate of the late Abdallah Salim Mwamazuri, in Succession Cause No. 270 of 2011 at Kwale, has no effect on the suit land.

15. The conclusion on the Judicial Review Application is that a decision made without jurisdiction once brought to the notice of the court, cannot stand for a court of law cannot let an illegality stand once brought to its notice.

16. The Petitioner/Applicant sought essentially the same result but coloured it in the form of a declaration that the Petitioner had been deprived of its property contrary to Article 40 of the Constitution of Kenya 2010. The County Registrar of Lands at Kwale certainly erred by issuing a new title over the same parcel of land. It was an illegal act not unconstitutional act. Like the Privy Counsel said in the case of **HARRIKISSOON vs. ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO [1980] AC 202**

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“The notion that wherever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the constitution is fallacious. The right to apply to High Court under Section 6 (our Section 23) of the Constitution for redress when any human right or freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures of invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the Section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

17. In this case, having filed the Judicial Review Application, and being a Defendant in ELC Case No.

75 of 2011, there was no necessity of filing a Petition in the High Court. It is an unnecessary duplication, and expensive exercise for the client. The action by the Kwale County Land Registrar could have been fully litigated in the ELC Case, let alone the Judicial Review Application in the order of priority following their filing.

18. In the circumstances and having determined the Judicial Review Application that the Land Disputes Tribunal had no jurisdiction to determine matters of title or ownership to land, I find and hold that the filing of the Petition herein was frivolous, vexatious and abuse of process of court. It is therefore dismissed.

19. There shall therefore be an order of certiorari to bring to this court and quash the certificate of title dated 13th May, 2015 and issued to Juma Abdalla Matata.

20. In summary therefore, I find and hold that the Msambweni Land Disputes Tribunal had no jurisdiction to determine matters of title to land, and its award, and subsequent orders of the Kwale Senior Resident Magistrate were null and void, and are hereby quashed by order of certiorari.

21. I direct that the title issued subsequent thereto be cancelled, and the Register be rectified accordingly.

22. Given the finding dismissing the Petition, and allowing the Judicial Review application I direct that each party bears its own costs, though ordinarily costs follow the event.

23. There shall be orders accordingly.

Dated, Signed and Delivered at Mombasa this 23rd day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE