REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC CIVIL APPLICATION NO. 247 OF 2003

REPUBLIC …….....……..... APPLICANT

=VERSUS=

CHAIRMAN & MEMBERS OF KAPSERET DIVISION LAND DISPUTE TRIBUNAL…...1ST RESPONDENT

ELIJAH RONO …….....……..... 1ST INTERESTED PARTY

DIRECTORS TUGEN ESTATE …….....……..... 2ND RESPONDENT

TUIYOTICH FARMERS CO-OPERATIVE SOCIETY LTD….....….EX-PARTE APPLICANT

JUDGMENT

THE APPLICATION

1. Pursuant to leave granted by this court on 8th July, 2003, the Exparte Applicant ***Tuiyotich Farmers Co-operative Society Limited*** (hereinafter the Applicant) filed a Notice of Motion on 28th July 2003 seeking the following orders:-

i. An order of certiorari to remove into this court and quash the proceedings of Kapsaret Division Land Disputes Tribunal of 31st January, 2003 in the Tribunal dispute No. 11/2001 concerning and about all that parcel of land known as SERGOIT/KARUNA BLOCK 3 (TUGEN)303.
ii. An order of certiorari to remove into this court and quash the award read by Eldoret Resident Magistrate's Court on 6th March, 2003 and its subsequent adoption and decree.
iii. An order of prohibition to prohibit the Eldoret Chief Magistrates court from signing documents effectuating the excision and transfer of any land from the suit in favour of the 1st interested party herein, or in any way whatsoever giving effect to the decision of the Kapsaret Division Land Disputes tribunal of 31st January, 2003.

2. The application is supported by an affidavit sworn by ***Elijah R. Siror,*** the Chamber Summons, application on the basis of which leave to institute these proceedings was granted and its supporting

documents.

It is premised on grounds that the Applicant is the registered proprietor of Land known as LR No.Sergoit/Karuna Block 3(Tugen) 303 (hereinafter referred to as the suit land); that although the Applicant was not party to the dispute filed before the tribunal and did not participate in its proceedings, the tribunal's award adversely affected its propietory rights in the suit land; that the award of the Respondent dated 31st January 2003 has been received and adopted as a Judgment of the Eldoret Resident Magistrate's court.

3. In the affidavit sworn in support of the application on 28th July, 2003, the deponent ***Elijah R. Siror*** annexed to his affidavit the Chamber Summons application dated 28th May 2002 filed under a Certificate of Urgency on 29th May, 2003 in which leave to institute the current Judicial Review proceedings was sought and obtained, the statutory statement and the affidavit supporting the application for leave and all annextures thereto. The same were exhibited as annextures marked "ERS 2".

In the statutory statement dated 28th May, 2003 and the affidavit sworn in support of the application for leave, the Applicant detailed the basis for its complaint in these proceedings and expounded on the grounds stated on the face of the application.

4. The application is opposed by the Respondent (the tribunal) and the 1stinterested party. The Respondent filed grounds of opposition dated 5th October, 2005 while the 1st interested party opposed the application through a Replying Affidavit sworn 22nd March, 2004 and a Preliminary objection dated 24th January 2006.The 2nd interested party described as the Directors of Tugen Estate did not file any response to the application.

It is however not clear from the court record whether they had been served with the Notice of Motion.

BACKGROUND

5. From the pleadings and affidavits filed in this matter, it is evident that these proceedings were triggered by the award delivered on 31st January, 2003 by the Kapsaret Division Land Disputes Tribunal. The dispute before the tribunal was between ***Elijah Rono*** the 1st Interested party herein who was the complainant and the Directors of Tugen Estate the 2nd Interested parties who were the Respondents.

The 1st interested party's main complaint before the tribunal was that he had bought 18.03 acres of land in Tugen Estate and a title deed was issued in his name to that effect.

However, the land was subsequently resurveyed and subdivided without his consent with the result that part of his land was excised and added onto the suit land thus reducing his land's acreage to 16.4 acres which was different from what was reflected in his title documents. His prayer to the tribunal was to order a rectification of the size of his land on the ground to reflect the original size of his land which was 18.03 acres.

6. The application was canvassed by way of written submissions. On behalf of the Applicant ***Messrs Ngigi Mbugua & Company Advocates*** filed their submissions on 7th July 2014 while those of the Respondent were filed on 11th November, 2014. The 1st Interested Party filed his submissions on 3rd November, 2014 through the firm of Omwenga & Company Advocates.

THE APPLICANT'S CASE

7. In Summary, the Applicant's case as can be discerned from the pleadings and the written submissions made on its behalf is that though it was the registered proprietor of the suit land, it was not joined as a party in the proceedings before the Respondent; that therefore it did not participate in the proceedings but the Respondent proceeded to make a decision which adversely affected its propietory rights without

having given it a right to be heard; that the impugned decision should therefore be quashed as it had been made in total disregard of the rules of natural justice.

It was also submitted on behalf of the Applicant that the Respondent acted without jurisdiction as prescribed under ***Section 3(1) of the Repealed Land Disputes Tribunals Act*** in adjudicating over the dispute lodged before it and arriving at its verdict as it did not have power to order a survey and subdivision of registered land.

Relying on the authorities of ***Republic vs Land Disputes Tribunal Githurai & another exparte Charles John Moraguri & Another Misc.A No. 300 of 2011*** **and** ***Nyeri CA No. 12 of 2003 Jane Wangu vs Jane Wachoka Kariuki,*** the Applicant urged the court to allow the application.

THE RESPONDENT'S CASE

8. In the grounds of opposition dated 5th October, 2005, the Respondent attacked the merits and competence of the application. According to the Respondent, the application lacked merit as it sought to impeach the award of the Uasin Gishu land Disputes tribunal when it had already been adopted as a judgment of the Eldoret Chief Magistrate's court. It should be noted that the Respondent in this case is the Kapsaret Lands Disputes Tribunal and the Litigations counsel's reference to the Uasin Gishu Land Disputes Tribunal must have been a mistake.

That said, the other grounds relied upon by the Respondent to challenge the application are that the application was bad in law as it allegedly offended the provisions of ***Order LIII Rule 1(2) of the repealed Civil Procedure Rules;*** that the orders sought cannot be granted as the Eldoret Chief Magistrate's court had not been enjoined in the proceedings as a party and that the application was supported by a verifying affidavit which was bare and of no evidential value.

9. In its brief written submissions dated 10th November, 2014 filed on its behalf by learned litigation counsel ***Mr. Joseph Ngumbi,*** the Respondent re-iterated the content of its grounds of opposition. It was in addition submitted that as the tribunal's award had already been adopted as a judgment of the court, it could not be challenged independently and that a party aggrieved by such an award ought to challenge the judgment of the adopting court.

Mr. Ngumbi further contended that an order of Prohibition as prayed cannot be issued against the Eldoret Chief Magistrate's court since it was not party to the proceedings and issuing such an order would amount to condemning the court unheard which would violate the rules of Natural Justice. He invited the court to dismiss the application for lack of merit.

THE 1ST INTERESTED PARTY'S CASE

10. As stated earlier, the 1st interested party opposed the application through a Replying Affidavit and a preliminary objection.

In the preliminary objection, the 1st interested party hereinafter ***(Mr. Rono)*** challenged the validity of the application mainly on grounds that notice to the Registrar had not been issued by the Applicant one day prior to the filing of the application for leave nor was the Registrar served with the application and its supporting documents as required by the law. Mr. Rono further contended that the application was defective as the dates in the affidavits filed in support of the application for leave and the substantive motion were different.

11. In his Replying affidavit sworn on 22nd March 2004, ***Mr. Rono*** deposed that the proceedings before the tribunal were valid and that they had been conducted in accordance with the law. He contended that he was the registered owner of all that parcel of land known as Sergoit/Karuna Block (Tugen) 215 measuring 18.35 acres as shown by the title deed annexed to his affidavit marked "EKL". He further claimed that in 1996, the 2nd interested parties caused a resurvey of the land while demarcating a utility

plot they had sold to the Reformed church and in the process, they unlawfully excised two acres from his land. It was his view that the orders sought could not be granted as execution had already taken place and that the application was defective, frivolous, vexatious and an abuse of the court process. He urged the court to dismiss it with costs.

12. In the submissions filed on his behalf by his advocates, besides expounding on depositions in ***Mr. Rono's*** replying affidavit as well as grounds supporting his preliminary objection, his advocates pointed out the anomaly regarding the different dates indicated in the Applicant's application for leave and its supporting affidavit. The court was invited to note that the Chamber Summons application and its supporting affidavit were dated 28th May, 2002 which was one year before the impeached verdict was made by the Respondent; that if this was an error by the Applicant's advocates, it was so grave an error that leave ought not to have been granted in the first place.

It was also submitted that the Respondent had jurisdiction to hear and determine the dispute lodged before it by the 1st interested party as the same sought a determination of his land's boundary which was within the mandate of Land Dispute Tribunals as provided for by ***Section 3(1)*** of the ***Land Disputes Tribunal Act No. 18 of 1990.*** For this proposition, reliance was placed on the case of ***Wamukoya vs Kipsaina Lands Disputes Tribunal & Another Kitale MISC.APPN No. 91 of 1999.***

ISSUES FOR DETERMINATION

13. I have carefully considered the pleadings; the affidavits filed herein and the written submissions filed by the parties respective advocates and all the authorities cited. Having done so, I find that the following key issues arise for this court's determination namely;-

i. ***Whether the application is incompetent and fatally defective.***
ii. ***Whether the Land Disputes Tribunal had jurisdiction to make the impugned decision.***
iii. ***Whether the Applicant is deserving of the relief's sought.***
iv. ***What orders should be made on costs?***

DETERMINATION

14. Starting with the first issue, the Respondent and the first interested party have argued that the application was fatally defective on three fronts and must therefore fail. The first front related to failure by the Applicant to comply with the provisions of ***Order LIII Rule 1(3) of the repealed Civil Procedure Rules*** which required that a notice to the Registrar be filed the day before filing of an application for leave. The second ground of attack was that the verifying affidavit sworn on behalf of the Applicant lacked any evidential value and thirdly, that the application was defective as it was filed pursuant to leave which had been improperly granted considering that the application for leave and its supporting affidavit were dated 28th May 2002, a year before the Applicant's cause of action arose.

In response to these objections, the Advocates for the Applicant submitted that the objections amounted to mere technicalities which ought to be disregarded on the strength of ***Article 159 of the Constitution of Kenya 2010.***

15. It is common ground that the application for leave to institute these proceedings was filed before the current Civil Procedure Rules came into force in the year 2010. The law applicable then governing the institution of Judicial Review proceedings was ***Section 8 and 9 of the Law Reform Act*** and ***Order LIII of the Civil Procedure Rules of 1998.***

Though these rules have now been repealed, they are the rules that apply to the instant proceedings since they were instituted when those procedural rules were in force.

The relevant provisions of order LIII whose non –compliance according to the Respondents made the application defective was ***order LIII Rule (3)*** which stated as follows:-

"The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits:

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown.

Though it is not disputed that the applicant did not give the requisite notice to the Registrar as required by the above provision, I am in total agreement with the decision of the Court of Appeal ***in Republic vs Isaac Theuri Githae & Another (2007) eKLR*** that failure to comply with Order LIII Rule 1(3) was an irregularity which was curable and could not invalidate an application for judicial review. It is therefore my finding that the Applicant's failure to comply with the said rule did not render the instant application fatally defective.

16. Turning now to the discrepancy on dates in the Chamber Summons application for leave and its supporting affidavit both dated 28th May 2002 and the date on the affidavit sworn in support of the substantive motion which is 27th July 2003, I wish to point out that the said discrepancy could not in any way adversely affect the validity of the instant application since as a matter of law, the substantive motion for judicial review does not require to be supported by any affidavit.

In fact, there is no legal requirement that the motion be filed simultaneously with any other document. ***Order LIII Rule 4*** of the repealed ***Civil Procedure Rules*** which is equivalent to ***Order 53 Rule 4*** of the Current Rules only required that the motion be served together with the statutory statement filed in support of the application for leave.

The rule further provided that any affidavits sworn and filed in support of the application for leave would be supplied to any adverse party on demand.

In view of the foregoing, it is clear that the affidavit sworn on behalf of the Applicant in support of the instant application was unnecessary and inconsequential. Nothing therefore turns on the fact that it bore a different date from the dates in the affidavits supporting the application for leave.

Besides, the Applicant annexed to this affidavit as exhibits the Chamber Summons seeking leave, the affidavits filed in its support together with their annextures and the statutory statement. The same were served on the Respondent and the interested party. There is therefore no doubt that the Applicant complied with the provisions of ***Order LIII Rule 4.***

17. With regard to the date of the Chamber Summons application and its supporting affidavit, it is true that the two documents are dated 28th May 2002. But the other documents filed at the same time as the application for leave namely the certificate of urgency, the statutory statement and the verifying affidavit are dated 28th May 2003. The application itself was filed on the same date. With this in mind, it is reasonable to conclude that the date on the application and supporting affidavit was a typographical error which was curable by amendment and filing of a supplementary affidavit. This is however an error which could have been avoided if the Applicant's Counsel had employed due diligence in the drafting of his pleadings.

In any event, the error ought to have been detected at the leave stage. This was not done and the court proceeded to grant leave pursuant to which the instant application was validly filed since there is nothing to show that the said leave was ever set aside. And since leave was granted, the application was spent. The application now before the court for determination is the substantive motion which is independent and distinct from the application for leave.

If the interested party was of the view that leave had been improperly granted owing to the dates appearing on the application and supporting affidavit, he ought to have applied for the setting aside of that leave. This was not done. ***Mr. Rono*** cannot now challenge the validity of leave granted on 8th July, 2003 in the current proceedings.

19. Another ground used to challenge the competence of the application is the verifying affidavit sworn in support of the application for leave. It is alleged that the verifying affidavit sworn by the Applicant sworn on 28th May, 2003 was bare and lacked evidential value.

Though it is true that the said verifying affidavit contained only four paragraphs and did not have any annextures, the Applicant had also sworn another affidavit verifying the facts and annexing the evidence it relied upon in support of its case including the proceedings before the tribunal, its award and a copy of title to the suit land registered in its name.

Order LIII Rule 2 of the repealed ***Civil Procedure Rules*** is clear. It did not require that an applicant at the leave's stage had to file only one affidavit titled "Verifying affidavit" containing the facts relied upon by the Applicant. The rule only required that the application for leave be accompanied by a statement stating the name and description of the Applicant, the relief sought, the grounds on which the relief was sought and by affidavits verifying the facts relied on.

The use of the word "affidavits" shows that the Applicant can swear other affidavits to verify the facts relied upon in the judicial review proceedings.

19. I wish to observe at this juncture that the application for leave was filed in the High Court at Eldoret in Misc App No. 135 of 2003 but once leave was granted, the Applicant filed the substantive motion in a different file namely High Court at Eldoret Misc Civil App No. 247 of 2003 and annexed to it the Chamber Summons application for leave and all its supporting documents.

Though there is no law prohibiting the filing of the substantive motion in a different file, it is my view that the motion ought to have been filed in the same file in which leave was granted. This is in fact the standard practice which appears to be in line with ***Order 53 Rule 3*** and ***4*** which provides for the manner in which the substantive motion should be filed and served. These rules, in my view do not contemplate a situation where the motion would be filed in a separate file and that is why they do not contain a requirement that the motion be filed together with a supporting affidavit or any other document yet requires it to be served together with the statutory statement accompanying the application for leave.

The practice of filing the substantive motion in a different file from the one housing the application for leave should be discouraged as it leads to wastage of the courts material resources and wastage of judicial time spent in calling for and perusing the other file to verify the authenticity of documents filed together with the motion particularly those related to the grant of leave.

20. Having said that, I now wish to conclude the first issue by saying that given the foregoing, it is clear that the Respondent's and 1st interested party's objection to the validity of the Notice of Motion is unfounded. It has no basis in law and it is for rejection. It is therefore my finding that the instant application is competent and is properly before the court.

21. Having resolved that the application is competent, the next issue which this court must now determine is whether the Respondent had jurisdiction to arbitrate on the dispute lodged before it by the 1st interested party and in arriving at the decision which is the subject of challenge in these proceedings. I will consider this issue in conjunction with the other two issues listed above for the court's determination.

I wish to start by observing that the jurisdiction of land disputes tribunals is circumscribed by ***Section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990*** now repealed (hereinafter referred to as the Act).

Section 3(1) states as follows:-

> ***" Subject to this Act, all cases of a civil nature involving 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.

22. The Applicant avers that the Respondent arbitrated and decided on a dispute which did not fall within the categories it was mandated to deal with by the law as shown above.

The 1st interested party countered this argument by claiming that the dispute required a determination of the extent of his land's boundary and that therefore the Respondent in determining the dispute acted within its jurisdiction.

23. A look at the proceedings before the tribunal annexed to the application shows clearly that the dispute placed before it did not in truth, relate to a boundary dispute. ***Mr. Rono's*** real complaint before the tribunal was that the Respondents had encroached on his land and excised from it two acres which was registered as part of the land belonging to the Applicant. From the proceedings, it is apparent that he was labouring under the misconception that the suit land belonged to the Respondents (the 2nd interested parties herein)

He wanted the two parcels of land resurveyed and two acres be excised from the suit land and be consolidated with his parcel of land known as Sergoit/Karuna Block 3(Tugen)/215 to make it 18.35 acres in size. He was therefore claiming ownership of about two acres of land in the suit land registered in the names of the Applicant. The dispute therefore fell outside the mandate and jurisdiction of the tribunal as prescribed by ***Section 3(1)*** of the Act. The same case applies to its verdict delivered on 31st January 2003.Part of that verdict read as follows:

"That the original land for Public utility should be restored as before and 303 to read 5 acres and 304 to read 5 acres as per the farm secretary statement. The District Survey is requested to visit the site and resurvey the land as per MR. ELIJAH RONOH'S request……"

Clearly, this decision by the Respondent intended to interfere with ownership and title of registered land by having it resurveyed and altering its entries in the land Register by adjusting the acreages of the parcels of land registered in the name of the Applicant and the 1st interested party respectively.

In making such a decision, the Respondent obviously acted outside the jurisdiction bestowed on it by ***Section 3(1)*** of the Act – See ***Jotham Amuhavi vs The Chairman Sabatia Division Land Dispute Tribunal & Another Civil Appeal No. 256 of 2002; M'marete vs Republic 3 others (2004) eKLR Civil Appeal No. 259 of 2000; Republic vs Githurai Land Disputes Tribunal & Another Exparte Erastus Mungai Kiarie (2012) KLR*** among others.

24. It is trite that any action or decision made without or in excess of jurisdiction is null and void abinitio. It is a nullity in law which has no legal effect. If then logically follows that any decision or proceedings flowing from such a decision is equally a nullity and cannot have any legal effect. This important legal principle was succinctly elucidated by **L.*Denning in Macfoy vs United Africa Limited (1961)3 All ER 1169*** when he expressed himself thus;

"If an act is void, then it is in law a nullity and not a mere irregularity. 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 more 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".

25. It is not disputed that the tribunal's illegal decision was read and adopted as a judgment of the Eldoret Chief Magistrate's court on6th March 2003.

The judgment of the Chief Magistrate's court was founded on the Respondent's decision which as

demonstrated earlier was a nullity in law. The award of the tribunal and the order of the court adopting that award as a judgment of the court were bad in law and are good candidates for quashing by way of the judicial review remedy of certiorari.

26. It had been argued by the 1st interested party that the reliefs sought ought not to be granted as they had been overtaken by events. He claimed that the judgment adopting the challenged award had already been executed; that the court would be acting in vain if it issued the orders sought.

To support this claim, reference was made to a letter signed by ***M.M Konzani*** for the Uasin Gishu District Surveyor dated 11th July, 2008.

The letter was addressed to the Chief Magistrate court at Eldoret. A perusal of the letter shows that it only confirmed that ***Mr. Rono's*** land parcel No. 215 was resurveyed and the acreage on the ground ascertained to be 18.35 acres.

This means that Mr. Rono's complaint to the Respondent had no factual basis. The acreage of his land was intact as per his title document and apparently there was no real dispute for the tribunal to arbitrate on. But since the tribunal went ahead to arbitrate on what was placed before it and came up with an illegal decision which was subsequently adopted by the Eldoret Chief Magistrate's court, the two decisions cannot be allowed to remain on the records of the tribunal and the court and must be removed to the High Court for purposes of being quashed.

Consequently, I hereby issue orders of certiorari as sought in prayer 1 and prayer 2 of the application.

27. As far as prayer 3 is concerned, though claiming that an order of prohibition cannot issue as the decision of the Chief Magistrate's court had already been executed, ***Mr. Rono*** did not avail any evidence to prove that indeed the Chief Magistrate's court had signed documents to facilitate excision and transfer of part of the Applicants land in his favour which are the acts which prayer 3 sought to have prohibited. The letter exhibited as EK4 does not suffice since its only purpose was to convey to the court the survey's findings on visiting ***Mr. Rono's*** land.

28. However, whether or not the Chief Magistrate's court had put in motion the process of executing the Respondent's award, given the content of the surveyor's letter (EK4), issuing an order of prohibition would be unnecessary in this case. Even if the award was executed, it would not have any effect on the land parcels registered in the names of the Applicant or the1st interested party since the size of ***Mr. Rono's*** land did not require any alteration as erroneously assumed by the tribunal.

I therefore decline to grant the prayer for an order of prohibition as sought in prayer 3 for the above reasons and not for the reasons cited by the Respondent.

29. Having come to the conclusion that the prayer for an order of prohibition is not merited for reasons other than those cited by the Respondent, I find that it will be unnecessary for me in this case to dwell on the argument raised by the Respondent concerning whether the non- joinder of the Chief Magistrate's court as a party in these proceedings made it untenable for an order of Prohibition to issue against it. Suffice it to say that given the role of the subordinate court in the adoption and implementation of awards made by land disputes tribunals which I must say is more administrative than Judicial in nature, the subordinate court in my opinion is not a necessary party in Judicial Review proceedings such as the ones before this court and its non-joinder may not be fatal to the proceedings.

It must always be remembered that judicial review is a tool used by the courts to do justice. And courts in the adjudication of disputes before them must always bear in mind the dictates of the new constitutional dispensation brought about by the promulgation of the Constitution of Kenya 2010, that their main duty is to administer substantive justice to all.

30. The upshot of this judgment is that the application dated 26th July, 2003 is allowed in terms of prayer

1 and 2 with costs to the Applicant. The costs to be paid by the 1st interested party.

Orders accordingly.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY OF JANUARY 2015

In the presence of:-

Mr. Ngigi for the Exparte Applicant

Mr. Ngumbi for the Respondent and holding brief for Mr. Omwenga for the 1st interested party.

Paul Court Clerk

N/A for the 2nd interested party