



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW (JR) NO. 29 OF 2013

REPUBLIC.....APPLICANT

VERSUS

KWALE SENIOR RESIDENT MAGISTRATE'S COURT.....RESPONDENT

CHOGA TSUMA JANGAA.....INTERESTED PARTY

EX PARTE.....NDURYA SAID NDURYA

JUDGMENT

INTRODUCTION

1. By a Notice of Motion dated 7th June 2013 brought under Order 53 rule 3 of the Civil Procedure Rules and section 8 of the Law Reform Act, the applicant seeks Orders that –

1. That pursuant to Leave granted on 31st May 2013, an Order of Certiorari do hereby issue to bring into this court and quash the proceedings and order of Kwale Principal Magistrate's Court issued in Kwale Principal Magistrate's Court Land Case NO. 23 of 2011.

2. That the costs of these proceedings be provided for.

2. The Grounds upon which the relief was sought were set out in the Statement filed under Order 53 rule 1 of the Civil Procedure Rules as follows:

1. That the Respondent acted without jurisdiction in upholding the decision of the Kwale land Dispute tribunal that extinguished the ownership rights of the applicant to the parcel of land.

2. That the Kwale Land Dispute Tribunal acted ultra vires in breach of section 3(1) of the now repealed Land Disputes Tribunal Act No. 18 of 1990 by hearing and determining Land Tribunal case No. 16 of 2010 involving ownership of land.

3. The challenged decision of the Respondent was expressed in a formal Order as follows:

“This land case heard before Panel of Elders at Kinango Division on the 3rd December 2010 and before the resident Magistrate A. O. Aminga on the 22nd December 2011 in the presence of parties [and] it is hereby ordered that:-

1. That the land in dispute belongs to Choga Jangaa (complainant).

2. It is further ordered that he is the rightful owner.”

4. A preliminary objection on the magistrate court’s jurisdiction by the respondent was dismissed in a finding that the court was obliged to enter judgment in accordance with the decision of the tribunal. The court said:

“A careful reading of the provisions governing the lodging of decision of the tribunal in the Magistrate’s court and its subsequent confirmation as a judgment of the court appears to me to leave this court with no option but to carry the procedural motions. Section 7 (1) of the act provides thus:-

The chairman of the tribunal shall cause the decision of the tribunal to be filed in the magistrate’s court....

Subsection (2) further provides –

“The court shall enter judgment in accordance with the decision of Tribunal and upon judgment being entered a decree shall issue....” (emphasis provided).

Section 8 of this Act makes provision for appeal by any aggrieved party against the decision of the tribunal. In my understanding, when the jurisdiction is questioned, the appropriate forum is the High Court through Judicial Review for orders of certiorari. I think this is the way the Defendant should follow. As for now, the tribunal’s proceedings and award thereon still stands until set aside. The preliminary objection therefore fails with costs to the plaintiff.”

5. The Interested Party filed a replying affidavit sworn on 2nd December 2013 opposing the Notice of Motion principally on the ground of failure by the Applicant to file an appeal as provided under the Land Disputes Tribunal Act 1990 against the decision of the tribunal that the Interested Party was the rightful owner of the land in dispute.

SUBMISSIONS

6. Counsel for the parties – M/s. Khatib & Co advocates for the applicant and M/s. Oduor Okumu & co advocates for the Interested Party (the respondent did not file any response - Ms. Kiti for the respondent said the State did not wish to file submissions) filed written submissions and judgment was reserved. The applicant relied on the statutory provision of section 3 (1) of the Land Disputes Tribunal Act 1990 and the decision of the Court (Tuiyott, J) in **R. v. Coast Land Dispute Appeal Committee and Anor. ex p. Yusuf Ali Mwatsahu**, Mombasa HC JR 102 of 2011 and submitted that the tribunal had no jurisdiction to determine issues of ownership of land.

7. Apparently, and properly in my view, counsel for the respondent conceded that the tribunal has no jurisdiction to determine issues of ownership of land, but in his submissions, in a departure from the line of argument in the replying affidavit, argued that the tribunal had determined him the owner of the disputed land and submitted that all the tribunal did was to decide on right of occupation as follows:

“Your Lordship the issue that was determined by the Land Dispute Tribunal falls under section 3 (1) (b). The Interested party only decided on the right of occupation of the land and the issue that arose for determination was who had the right to occupy the disputed unsurveyed land.

The defunct Land Disputes Tribunal only decided on the right to occupation which was adopted by the Court in Kwale therefore should be upheld by this Honourable Court.”

THE ISSUE FOR THE DETERMINATION

8. The issue for the determination of the court, therefore, is whether the tribunal had jurisdiction to entertain and determine the issue it purported to determine by its decision of 3rd December 2010, and consequently whether the Respondent's order in adopting the Tribunal's decision as a judgment of the court was valid.

DETERMINATION

9. In my view, the validity of the enforcement proceedings by the respondent court of the decision of Tribunal is subject to the validity of the tribunal decision. If the latter is invalid, there cannot a valid judgment in recognition and enforcement thereof. The order of respondent making the tribunal's decision a judgment of the court stands or falls with validity or invalidity of the tribunal's decision.

10. It is trite law that failure to exhaust appeal procedures is no bar to pursuing judicial review remedies. I would only restate the observation of learned authors of Wade & Forsyth, *Administrative Law* 9th Ed (2004) at p. 703 that no requirement for exhaustion of remedies before judicial review:

“In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital respect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeals which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal, for example where an appeal is already in progress, or the object is to raise a test case on a point of law.”

11. There is no dispute that the Land Disputes Tribunal has no jurisdiction to entertain an issue on ownership, legal or beneficial, of land. In addition to the decision of **R. v. Coast Land Dispute Appeal Committee and Anor. ex p. Yusuf Ali Mwatsahu**, cited by the counsel for the Applicant, I observed in **Zakayo Kagombe Nderu v. Kilifi Land Dispute Tribunal & Ors.** Mombasa HC JR 73 of 2012 that –

“It has been held in a long line of authorities including the authorities of ex p. Sorothoni Marura Mombasa HC Misc Application no. 135 of 1998, per Waki, J (as he then was), Republic v. Land Registrar, Kwale and Anor. ex p. Formation House Ltd Mombasa HC Misc. application No. 438 of 2006 per Maraga J (as he then was) and Republic v. The Bahari Land Disputes Tribunal and 2 Ors ex p. Stanley Kalume Wanje Mombasa Misc. Application No. 641 of 2005 per Sergon, J. that the Land Disputes Tribunal established under the Land Disputes Act 1990 had no jurisdiction to determine a question of ownership of land. See section 3 of the Act. I also held in Mombasa HC Misc. Civil Application (JR) No. 58 of 2011, Republic v. The Senior Resident Magistrate – Kwale and 3 Ors Ex Parte Said Ali Mwaleso, where I said as follows:

“It is trite law that the Land Disputes Tribunal established under the repealed Land Disputes Tribunal Act, 1990 did not have jurisdiction to deal with disputes relating to ownership of land.”

See also **Republic v. The Land Dispute Tribunal, Taveta & Ors. Ex Parte Nzoki John Mutua**, Mombasa HC JR 400 of 2009.

12. What was the nature of the Tribunal's decision? Did the tribunal decide on the right to occupy the land as it is empowered to do under section 3(1) (b) of the Land disputes tribunal Act, as contended by the respondent or did it determine an issue of ownership without jurisdiction? The Interested party was clear in paragraph 8 of his replying affidavit that the tribunal had *“passed judgment in my favour and I was declared the rightful owner of the land in dispute”*

13. The record of proceedings before the Tribunal dated 3rd December 2010 sets out the complainant's

case as follows:

“I have sued Ndurya because he occupies my shamba left behind to me by my ancestors namely Kombo Bemvua, Ziro Kombo and Mwena Ziro. After the death of all these, the shamba was left to my grandfather Jangaa Ziro...” (sic)

14. In the Judgment of the Tribunal, attached as exhibit No. CTJ1 in the replying affidavit of the Interested Party, the Tribunal’s decision is set out as follows:

“Tribunal Findings

*The tribunal has noted the following facts about the case between **Choga Tsuma Jangaa vs. Ndurya Saidi Ndurya**:*

- 1. Ndurya was given a shamba by Choga’s father after giving a hen and a calabash of mnazi – in the presence of Mwadzombo who was the village chairman at that time.*
- 2. There are old sisal plants planted by Ndurya marking a boundary between his homestead and the disputed area.*
- 3. Choga gave a piece of land in the disputed area to his own son-in-law (Msiti Mwachupha) a relative of Ndurya Saidi (defendant) who planted mango, coconut trees and a few citrus trees in the farm without his consent.*
- 4. Ndurya showed his grave yard which is outside the disputed area.*

Conclusion

The tribunal has decided, therefore, the piece of land in dispute belongs to Choga Jangaa (complainant) and that he is the rightful owner.”

15. I have no doubt that the Tribunal’s decision set out above was a determination on the ownership of the parcel land in dispute. It was not a decision on the right to occupy the land, as urged by the Interested Party. The tribunal had under the Land Disputes Tribunal Act, 1990 no jurisdiction to determine an issue of ownership of land, and its decision was therefore *ultra vires* null and void, and for that reason it could not found a valid order by the Kwale Principal Magistrate’s Court for enforcement thereof. Once the Tribunal’s decision is invalid, the subsequent enforcement proceedings before the magistrate’s court are also invalid.

ORDERS

16. Accordingly, for reasons set out above, the Notice of Motion dated 7th June 2013 is granted as prayed with costs to the Applicant to be paid by the Interested Party.

DATED SIGNED AND DELIVERED THIS 13TH DAY OF MARCH 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mohamed for the Ex Parte Applicant

Mr. Mwinyi for Mr. Oduor for Interested Party

Miss Namahya for the Respondent

Ms. Linda - Court Assistant.