



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

MISC. CIVIL APPLICATION NO. 28 OF 2010

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN, KIPKELION LAND

DISPUTES TRIBUNAL.....1ST RESPONDENT

THE RESIDENT MAGISTRATE, KERICHO.....2ND RESPONDENT

WESLEY KIBET.....3RD RESPONDENT

EXPARTE

ESTHER CHEPTONUI RUGUT

JUDGMENT.

(Judicial Review motion to quash award of Land Disputes Tribunal; Tribunal having determined matters of ownership and sale of land; dispute clearly outside the jurisdiction of the tribunal; ex-parte applicant as registered owner of the land not even a party to the dispute before the Tribunal; award quashed; orders of transfer made pursuant to the decree also quashed; land ordered to revert back to the proprietorship of the ex-parte applicant.)

This is a judicial review motion, and as drawn, it seeks the following orders :-

(a) That this honorable court may be pleased to issue an order of certiorari removing unto this court for purposes of quashing forthwith the decree and order of the Resident Magistrate's Court Misc. Application dated 17.5.2010 and 27.9.2010 together orders of certiorari to quash the decree and order of the Resident Magistrate's Court dated 17 May 2010 and 27 September 2010, together with the award of Kipkelion Land Disputes Tribunal dated 15.10.2009 that was read and adopted as an order on 17.5.2009.

(b) That costs of this application and entire proceedings be borne by the respondents.

The application seeking leave to commence the above action was filed on 5th October, 2010 and leave was granted on 11th October, 2010. The main motion was filed on 19th October, 2010.

It will be seen that what the applicant wants is to quash the award of the Kipkelion Land Disputes

Tribunal together with the decree issued by the Magistrate's Court pursuant to that award. The State Law Office for the 1st, 2nd and 4th respondents did not oppose the motion but the 3rd respondent has.

I have seen the award which is annexed by the ex-parte applicant and I wish to go straight to it.

The dispute was registered as Claim No. 58 of 2009 before the Kipkelion Land Disputes Tribunal. The land in issue was the land parcel Kericho/Kipkelion/Chepseon Block 12 (Ngatumek) /19 (land parcel No. 19) which was said to be registered in the name of the ex-parte applicant. The claimant in the case was Wesley Kibet (the 3rd respondent) and the objector was one Vincent Ruto. The case of the claimant as presented at the Tribunal, was that he purchased the land from one Jonathan Kirui, who had purchased from Rugut's family (presumably the family of the ex-parte applicant) . This purchase was said to have been done before the land was surveyed in the year 2007. In December 2007, the claimant stated that he purchased another 3 acres, near the 2 acres that he had earlier purchased. He fenced the land in the year 2008 and started cultivating it. He then got surprised when one David Rono came to the land, claiming to have purchased it, and constructed a house. He reported to the chief who stopped construction of the house and called a meeting, but Vincent Ruto did not attend.

I have seen that several persons testified as witnesses before the tribunal. The witnesses of the 3rd respondent (as claimant) testified that Jonathan Kirui had purchased the land in dispute from Vincent Ruto on 11 June 2007, and that the said Jonathan Kirui, later sold the land to the claimant. David Rono testified in the case on behalf of Vincent Ruto. His position was that he is Jonathan Kirui's employer and that he handed the cheques to Jonathan to pay for the land on his (David Rono's) behalf. He had no idea that Jonathan Kirui later sold the land to the claimant (3rd respondent). That is the reason he came to construct a house on the land.

After deliberation, the panel of elders concluded that the land belonged to Wesley Kibet (3rd respondent and claimant at the Tribunal) and that David Rono should deal with Vincent Ruto for refund of his money.

The award is not dated but it seems as if it was filed in the Kericho Magistrate's Court and adopted on 17th May 2010. There was followed an application to have the Executive Officer execute the transfer of 2.124 hectares from suit property to the 3rd respondent which was allowed on 27 September 2010. The order as extracted, was to the effect that the Executive Officer do execute transfer of the land parcel Kericho/Kipkelion/ Chepseon Block 12 (Ngatumek)/ 101 measuring 2.124 hectares to the applicant.

In her grounds listed in support of this motion, the ex-parte applicant has inter alia averred that the Tribunal did not have jurisdiction to deal with the matter. It is her view that the entire proceedings and the order of the Magistrate, directing the transfer of 2.124 hectares to the 3rd respondent was illegal and unfounded. In her Verifying Affidavit, the ex-parte applicant has averred that she is the registered owner of the land parcel Kericho/Kipkelion/Chepseon Block 12 (Ngatumek)/19 and annexed a copy of the official search. She stated that the 3rd respondent is a total stranger to her and the award is prejudicial to her.

In his replying affidavit, the 3rd respondent has averred that the motion is not properly filed because Vincent Ruto, said to be a son of the ex-parte applicant, is omitted, yet he was the 1st respondent before the Tribunal. The other paragraphs of the replying affidavit basically justify the decision of the Tribunal. It is inter alia averred that the land parcel Kericho/Kipkelion/Chepseon Block 12 (Ngatumek)/19 devolved to the ex-parte applicant after the death of her husband and that she became registered as trustee for the other beneficiaries, who included her four sons, after completion of succession in the year 1998. It is averred that the land was then subdivided into five portions, one to herself (2.023 Ha approximately 5 acres), and the other four portions to Henry Mattinkwony, Vincent Ruto, Ben Ruto and Wyclife Ruto. It is said that these sons sold their portions as early as the year 2003 and the buyers settled on it. However, the map still showed the ex-parte applicant as owner of the whole land upto the year 2008. He asserted that he purchased 2 acres of the land from Jonathan Kirui, who had purchased the same from Vincent Ruto, a son of the ex-parte applicant. He also bought 3 acres from Ben Ruto, another son of the ex-parte applicant, and another 1/4 acre from one Nelson Chepkwony who had purchased from Vincent Ruto. In

total, he purchased 5.25 acres making 2.124 hectares. He has averred that the ex-parte applicant and Vincent Ruto were however reluctant to subdivide the land to the persons who had purchased and that complaints were made to the Provincial Administration who intervened and the process continued. A committee of five people was formed to facilitate negotiations leading to the official subdivisions of the property and finally acquisition of title deeds.

He has averred that survey fees was paid and that consent to have the land subdivided into 120 portions was given. A copy of the consent dated 4 December 2008 is annexed. He averred that Vincent Ruto tried to intimidate him from the land and reported him to the police. A meeting was later held on 19 September 2009 under the Chairmanship of the Chief but Vincent Ruto did not attend. A verdict was made that Vincent Ruto had sold the land to the 3rd respondent. It is said that Vincent was not happy with this verdict and therefore sent Daniel Rono to forcefully construct a house on the land. That is when he took the case to the Tribunal. He has stated that the ex-parte applicant's title was closed on subdivision on 29 January 2010 and new titles from numbers 74 to 194 issued. However, the ex-parte applicant failed to sign the transfer forms. She was later summoned to the D.O's office Chesinende and she agreed to sign some transfer forms. He has stated that the award is not ultra vires as at the time it was read, the land parcel No. 19 had already been subdivided. He has seen nothing wrong with the transfer executed by the Executive Officer in his favour for one of the subdivisions of the land.

I have considered the matter. The main complaint raised by the ex-parte applicant is that the Tribunal did not have jurisdiction to entertain the dispute.

The Land Disputes Tribunals are now defunct owing to the repeal of the Land Disputes Tribunal Act, by the Environment and Land Act of 2011. The jurisdiction of the Tribunals was contained in Section 3 of the Land Disputes Tribunal Act, which provided 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.

It will be seen from the above that the jurisdiction of the tribunal did not extend to entertaining disputes over ownership of land yet this was precisely the nature of dispute that was presented before the Tribunal. The dispute was whether or not the 3rd respondent was entitled to own land in the land parcel No. 19. That dispute was clearly outside the parameters of Section 3 of the Land Disputes Tribunal Act. I have no difficulty in holding that the Tribunal exceeded its powers and proceeded to entertain a dispute that went beyond its jurisdiction. To make matters worse, the ex-parte applicant, who was the registered owner of the land as at the time the dispute was filed and entertained, was never given a hearing and was never a party at the tribunal. The party before the tribunal was one Vincent Ruto who was not a proprietor of the suit property. I am at a loss how the Tribunal, even assuming it had jurisdiction, could entertain a dispute over land owned by a person, and make decision on it, without the land owner being given a hearing. This clearly violated the cardinal principle of natural justice of the right to be heard. It was argued that the land parcel No. 19 did not exist at the time the dispute was heard, but this cannot be the case. The dispute, as the number of it shows, was registered in the year 2009 when the land parcel No. 19 was intact.

Neither I am convinced that this motion is defective for failure to enjoin Vincent Ruto. The ex-parte applicant is the owner of the suit property that was discussed, and she has every right to sue on it. She does not need Vincent Ruto to do it for her, and it matters not that Vincent Ruto is not a party to this suit.

There is no justification that can be given for the award for it was clearly outside jurisdiction. The 3rd

respondent alleged that the land sold devolved to Vincent Ruto by way of transmission but I have no proof of this. Even if it had, the dispute would still be a dispute over ownership of land which the Tribunal could not entertain. It changes nothing. What is important is whether or not the dispute was within the ambit of Section 3 of the Land Disputes Tribunal Act, and it is clear that it was not. The proceedings, together with the award are null and void. So too the decree that adopted that award. I have little option but to proceed to quash the same by an order of certiorari.

I do not know how the land parcel No. 19 was subdivided into the numerous parcels of land, for that is not the issue before me. But pursuant to the decree, one subdivision, the land parcel No. 101, was ordered transferred to the 3rd respondent. The Executive Officer, pursuant to the orders issued by the Magistrate's Court on 27 September 2010, proceeded to execute the transfer of the said land to the 3rd respondent.

Given that I have nullified the award and the decree, it follows that I have to nullify the transfer of the land parcel Kericho/Kipkelion/Chepseon Block 12 (Ngetumek) /101 to the 3rd respondent. That land should revert back to the ex-parte applicant and the register should be rectified to show that the proprietor is the ex-parte applicant.

If the 3rd respondent feels that he is justified to have the said land as his, then he needs to file an appropriate suit, in the correct forum, for the adjudication of that dispute. But he cannot benefit from a decision that is a nullity in the first place.

The ex-parte applicant has succeeded. I see no reason why costs should not follow the event. I award her costs, jointly and/or severally, against the respondents.

In summary I make the following orders :-

(1) An order of certiorari is hereby issued, quashing the award of the Kipkelion Land Disputes Tribunal in Case No. 58 of 2009, alongside the decree of the Kericho Magistrate's Court in Miscellaneous Application No. 31 of 2010 and all orders issued therein including the order of 27 September 2010.

(2) The registration of the 3rd respondent as proprietor of the land parcel Kericho/Kipkelion/Chepseon Block 12 (Ngatumek)/101 made pursuant to the award and decree of the Kericho Magistrate's Court, is hereby nullified.

(3) The register of the land parcel Kericho/Kipkelion/Chepseon Block 12 (Ngatumek)/ 101 be rectified and the name of the 3rd respondent if registered, be cancelled and the name of the ex-parte applicant be reinstated thereto.

(4) The ex-parte applicant shall have costs of this suit, jointly and/or severally as against the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 13th DAY OF NOVEMBER, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of;

1. N/A on part of M/s Enock Miruka & Co. Advocates for ex-parte applicant.
2. N/A on part of State Law Office for 1st, 2nd and 4th respondents.

3. N/A on part of M/s Motanya & Co. Advocates for 3rd respondent.