



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

Misc. Civil App. No. 300 Of 2011

IN THE MATTER OF: THE CONSTITUTION OF KENYA
IN THE MATTER OF: LAND PARCEL NO. RUIRU/KIU BLOCK 12/353
IN THE MATTER OF: THE LAND DISPUTE TRIBUNAL ACT
NO. 18 OF 1990 LAWS OF KENYA
IN THE MATTER OF: LAND DISPUTE TRIBUNAL AT GITHURAI
CASE REF: RUR/LDT/04/2011
IN THE MATTER OF: THE CHIEF MAGISTRATE'S COURT AT
THIKA D.O. CASE NO. 47 OF 2011
IN THE MATTER OF: PREROGATIVE ORDERS FOR CERTIORARI
PROHIBITION AND MANDAMUS

THE REPUBLIC.....APPLICANT

VERSUS

LAND DISPUTE TRIBUNAL, GITHURAI.....RESPONDENT

CHIEF MAGISTRATE COURT, THIKARESPONDENT

TERESIA WAMBUI NDUACHIINTERESTED PARTY

EX-PARTE

CHARLES JOHN MURAGURI

JUDGEMENT

1. By an amended Notice of Motion dated 16th April 2012, the *ex parte* applicant herein, **Charles John Muraguri**, seeks the following orders:
 1. **An Order of Certiorari to bring up into the High Court and quash the decision and the Award and proceedings of the Land Dispute Tribunal at Githurai Case No. Ref Rur/LD/04/2011 and registered as Chief Magistrate's Court Thika D.O. Case No.47 of 2011.**
 2. **An Order of Prohibition to restrain the Chief Magistrate at Thika from enforcing the Award in Land dispute Tribunal Case Rur/LDT/04/2011 pronounced as an order in the said case.**
 3. **An Order of Mandamus directed to the Githurai Land Dispute Tribunal and to the Chief Magistrate Court Thika to observe the Law and particularly the rules of natural justice.**
 4. **Costs of this Application be provided.**

Applicant's Case

2. The application was supported by an affidavit sworn by the applicant on 28th November, 2011.
3. According to the deponent, at the hearing of the aforesaid Tribunal case he was never afforded the opportunity to make his objections to the tribunal entertaining the hearing of the purported case. According to him, he is the registered owner as Lessee from the Government of the Republic of Kenya of L.R. NO. RUIRU/KIU/BLOCK 12/353. He deposed that the award in the aforesaid Tribunal Case was filed at Thika Chief Magistrate Court and was registered as C.C. Court Thika D.O. Case No.47 of 2011. The said suit was fixed for mention on 22nd August, 2011 for the reading of the Award in open Court but was stood over to the 26th September, 2011.
4. In the applicant's view, the Land Dispute Tribunal has no jurisdiction to determine issues of ownership of land. Since he is the registered owner of Land Reference No. RUIRU KIU/BLOCK 12/353, the purported Award and its subsequent pronouncement by the Chief Magistrate Thika D.O. Case No. 47 of 2011 is a nullity hence the said Court engaged in an exercise in futility in entertaining the said award. It was therefore his case that the Chief Magistrate Thika D.O. Case No. 47 of 2011 is a nullity and the said Court engaged in an exercise in futility in entertaining the said award. To him, the actions and decisions of the Land Dispute Tribunal and the Chief Magistrates Court were ultra-vires their mandate and do not have the sanction of the law and ought and should be removed to the High Court and quashed by this Honourable Court.
5. Apart from this affidavit the applicant on 27th September, 2013 swore a supplementary affidavit in which he deposed that he was a share holder in Ngara Mucokanariria Company Limited, a land buying company. According to him, he was a member of the said company after having purchased its shares and he was issued with a Share Certificate. The applicant deposed that he was a victim of the 2007 clashes and moved houses as a result of which his receipts together with the share Certificate got lost.
6. The deponent reiterated that in the year 1997 he was allocated Plot Number RUIRU/KIU BLOCK 12/352 and RUIRU/KIU BLOCK 353 by the Government of Kenya by virtue of being a shareholder and member of the aforesaid Company and was subsequently and upon paying the requisite charges issued therefor with a Certificate of Lease dated 24th August, 2001 by the Government of Kenya.
7. In his view, the interested party has not provided anything to confirm that she was allocated the suit property and that most of the receipts attached as evidence do not show the plot number of the plot of land she was paying for and do not relate to his plot. To the contrary, one of the receipts shows she was paying for Plot No.363 which is totally different from Plot Number RUIRU/KIU BLOCK 12/353 (the suit property) and looking at the evidence that the interested party has attached it does not prove that she is the owner of the said parcel of land.
8. In his view the contention that he attached incomplete proceedings of the Githurai Land Dispute Tribunal are unfounded misguided, misleading and untrue. He accordingly attached what in his view were the proceedings of the Githurai Land Dispute Tribunal from which it was his view that it was established that the Interested Party had wrongly occupied his parcel of land.

Respondent's Case

9. In response to the application, the interested party swore a replying affidavit on 30th August, 2013.
10. According to her she has resided on the suit property, Ruirur/Kiu/Block 12/353 since the year 1976 having obtained possession thereof by virtue of her membership in Ngara Mucokaniriria Company Limited, a membership which she acquired in the year 1976, when she purchased its shares. In the same year, the said company allocated to her the suit property and she was among the first 200 settlers of the Ngara Mucokaniriria Company Limited land settlement scheme. She contended that she immediately moved into the suit property with her husband and started developing the same and that she has carried out extensive developments, fenced the property, built permanent and semi-permanent houses, installed piped water, dug pit latrines, planted food crops and fruit trees which are now mature.
11. According to the interested party, all her five children were born on the said property and even though her husband has since passed on, she still resides on the property with her said five children and seven grandchildren. To her, her family has resided on the suit property for over 37 years without any interruption.
12. However, on 20th March 2011, she was attending mass at St. Augustine Catholic Church in Githurai when during the church announcements, she heard that the church was requesting for monetary contributions from the congregation in order to purchase several plots and was shocked when the title number for the suit property since she had not offered it up for sale. On seeking confirmation from the father in charge it was confirmed that the suit property was being offered for sale to the church by the applicant herein.
13. On receipt of the said information, she reported the matter to the local Chief who referred her to the District Officer who in turn advised her to report the matter to the Land Disputes Tribunal.
14. Accordingly, the interested party referred the matter to the Githurai Land Disputes Tribunal which notified both the parties to attend the hearing during which she produced receipts showing that she was a bona fide member of the Ngara Mucokaniriria Company Limited since the year 1976. On his part, the defendant presented to the Tribunal a Certificate of Lease dated 24th August 2001 showing that the property was registered in his name in the year 2001 and receipts for payment of land rent and rates though he never provided any evidence to show how he had acquired the suit property whether he had bought the same as he had alleged or whether it had been allocated to him by the Mucokaniriria Company by virtue of his membership if any. However, it was contended that at the time of the registration of the suit property in the applicant's name, she had lived in the suit property for a period of 25 years.
15. According to the interested party, the Tribunal in the presence of the applicant visited the suit property and found extensive developments she had carried out and further found that the applicant was a relative of the single director of the Ngara Mucokaniriria Company Limited, **Ms. Agnes Njeri Jacobs**, with whom the applicant had colluded to deprive the interested of her property as it is on a very prime area.
16. In the interested party's view, the applicant herein obtained leave from this honourable court to file this application by means of fraudulent misrepresentation since the proceedings relied upon by the applicant were incomplete as applicant plucked out a page from the said proceedings that clearly show that not only was he present during the entire proceedings, but also that he visited the suit property in the presence of the Tribunal. Since the applicant used fraud as well as dishonesty to obtain leave to bring this application in the first instance, the interested party contended that this court should not aid and abet the perpetration of fraud and illegality. She further deposed that despite the applicant being given 30 days to appeal, he chose not to do so.
17. The interested party was therefore of the view that the applicant has not come to court with clean hands. In her view, the Land Disputes Tribunal had jurisdiction to rule on her occupation since she had long acquired possessory and prescriptive rights over the suit property by virtue of adverse possession.

Applicant's Submissions

18. It was submitted on behalf of the applicant that in the instant case, by purporting to hear and determine a dispute involving ownership of the suit land, lacked the Tribunal acted outside its jurisdiction as prescribed under section 3(1) of the repealed Land Disputes Tribunal Act No. 19 of 2011 hence ultra vires its powers. In support of this submission the applicants relied on **Owners of**

Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited [1989] KLR 1, Boniace Waweru Mbiyu vs. Mary Njeri & Another Misc. Application No. 639 of 2005, Republic vs. The Chairman Kapsabet Division Land Disputes Tribunal & Another [2006] eKLR and Kezia Mbone Kitazi vs. Sabatia Land Disputes & Another [2006] Eklr.

Interested Party’s Submissions

19. On behalf of the interested party, it was submitted that from the evidence adduced by the interested party, the allegation that the applicant was not given an opportunity of being heard by the Tribunal is incorrect as the applicant participated in the said proceedings but chose to pluck from the proceedings the page showing that he did participate in the proceedings in order to obtain leave. It was therefore submitted that this Court ought not to aid an applicant who has come to court with unclean hands.
20. It was further submitted that as the interested party and her family has been in uninterrupted occupation of the suit land for 37 years she had acquired possessory and prescriptive rights which the Tribunal ascertained. To the interested party the Tribunal had jurisdiction to determine matters of occupation and this is exactly what it. It was therefore submitted that the contention that the Tribunal had no jurisdiction is misplaced.

Determination

21. I have considered the application, the affidavits on record as well as the submissions of the parties.
22. The jurisdiction of the Land Disputes Tribunal was circumscribed in section 3 of the repealed ***Land Disputes Tribunals Act*** under which it was provided that:

(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.

23. In my view if the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since a decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void. This is in line with the celebrated decision in **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172** to the effect that that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse.
24. The Court of Appeal in **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002** held that if the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre, it is clear that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of section 3(1) of the ***Land Disputes Tribunal Act*** as such disputes can only be tried by the High Court or by the Resident Magistrate’s Court in cases where such latter court has jurisdiction.
25. In **Republic vs. The Chairman Keiyo Division L. D. T & Another Ex Parte Tabyotin Kabon Ego Eldoret HCMA No. 43 of 2005** Mohammed Ibrahim, J (as he then was) was of the view which view I associate myself with that:

“The interested party’s claim herein does not fall under any of the 3 categories mentioned in section 3 of the Land Disputes Tribunal Act No. 18 of 1990. Her claim is of a beneficiary to the Estate of the deceased. She has to prove that first, the land registered in the name of the Applicant was part of the assets of the said Estate and secondly that it was registered in the name of the Applicant in breach of any applicable law whether Succession Act or otherwise...The Tribunal therefore have no jurisdiction or mandate to consider the claim by the applicant and it is not an answer to state that the applicant participated in the proceedings and submitted herself to the jurisdiction of the Tribunal since jurisdiction can only be conferred by law and not by consent or conduct of parties.”

26. It is therefore clear that if the Tribunal purported to hear and determine a dispute in respect of which what was in dispute was title to land, then its decision would be null and void for lack of jurisdiction and it would not matter whether or not the applicant was a willing participant to those proceedings since the participation of the applicant therein could not confer on the Tribunal what the Tribunal did not have *ab initio* – jurisdiction. Whether or not such an applicant would be entitled to costs if successful is another issue altogether.

27. In its decision, the Tribunal expressed itself as follows:

“Having perused and considered all the available evidence and presentations this tribunal recommends that the plot Ruiru/Kiu/Block 12/532 has been and is for Jane Wambui’s family”

28. Clearly, this was a determination that the said property was the property of the interested party and not simply that the interested party had the right to occupy the same. This power the Tribunal clearly lacked and this decision was clearly ultra vires its powers hence the same was a nullity.

29. The interested party seems to hinge her case partly on prescriptive rights. Whereas the interested party may be entitled to the suit land if such a claim is proved, in **Republic vs. Kapsabet Land Disputes Tribunal & Keter Kipchoge Miso Ex Parte Christine Jepkosgei Ngetich Eldoret HCMCA No. 25 of 2002**, Mohammed Ibrahim, J (as he then was) held:

“The Land Disputes Tribunal under the Land Disputes Act clearly has no jurisdiction to determine claims of prescription or adverse possession as such causes of action can only be heard and determined by the High Court.”

30. It therefore follows that the decision made by the Tribunal cannot be allowed to stand. An order of certiorari is hereby issued bringing into this Court the said decision for the purposes of being quashed and the same is hereby quashed. The Chief Magistrate at Thika is similarly prohibited from enforcing the Award arising from the said decision.

31. This Court cannot however close its eyes to the allegations made by the interested party to the effect that she has been in occupation of the suit land for over 37 years and has made extensive developments thereon.

32. Therefore to enable the interested party pursue the said claim, it is hereby ordered that no adverse transaction be undertaken in respect of the suit parcel of land for a period of 60 days to enable the interested party, if she so wishes, institute appropriate legal proceedings in a Court of competent jurisdiction to determine her claim.

33. As the applicant participated in the proceedings before the Tribunal which Tribunal no longer exists this Court is not inclined to award him the costs. Accordingly, there will be no order as to costs.

Dated at Nairobi this 27th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Anyona for the applicant

Miss Ooko for Mr Mwangi for the interested party

Ms Chilaka for Miss Maina for the Respondent