



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JR ELC NO. 13 OF 2011

**IN THE MATTER OF AN APPLICATION BY TERESIAH WAMBUI GIKUNA FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW**

AND IN THE MATTER OF LR NUMBER GATAIYU/KAMBURU/478

**AND IN THE MATTER OF JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND
PROHIBITION**

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

KIAMBU DISTRICT LAND DISPUTE TRIBUNAL....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

HANNAH WANJIKU NGIRAU.....1ST INTERESTED PARTY

EX-PARTE

TERESIAH WAMBUI GIKUNA

JUDGEMENT

1. By an amended Notice of Motion dated 16th February, 2011, the *ex parte* applicant herein, **Teresiah Wambui Gikuna**, seeks an order of certiorari to remove into this Court and quash proceedings and award by Kiambu Land Dispute Tribunal in LAR/LND/7/3/4/(2010) and for an order that the costs of the application be provided for.
2. The application was based on the Statutory Statement filed on 10th February, 2011 and the supporting affidavit filed the same day and sworn by the applicant on 8th February, 2011.
3. According to the applicant, she was the wife of the late Gikuna Muinami (hereinafter referred to as the deceased) who was the registered proprietor of land parcel known as Gatamayu/Kamburu/478 (hereinafter referred to as the suit parcel).
4. The Respondent (sic) filed a claim at the 1st Respondent Tribunal challenging the said title and claiming a share of 2.20 acres thereof from the deceased's said land and the 1st Respondent ruled

- that the respondent be given the said portion of the subject parcel and that the same be subdivided into portions of 2.20 acres for the claimant/interested party.
5. It was further contended that the 1st Respondent further ruled that the Land Register issues a title deed of the 2.20 acres to the respondent and in effect failing to appreciate the fact that the deceased had sold part of the suit parcel.
 6. According to the applicant, the 1st Respondent went beyond its mandate by adjudicating on matters concerning ownership hence the instant application.
 7. In response to the application, the interested party filed a replying affidavit sworn on 26th March, 2014. According to the interested party, her claim before the 1st Respondent was on division of land and not title to land which issue the 1st Respondent had jurisdiction to determine. In her view, her entitlement to a portion of the suit parcel was never in dispute as the applicant herself expressly admitted so in her statement before the 1st Respondent. According to the interested party, the mere fact that the suit land is registered did not oust the jurisdiction of the 1st Respondent and further that the issue of first registration and/or sections 27 and 28 of the repealed **Registered Land Act** (Cap 300) were inapplicable because the case did not seek the revocation of the existing title; the Tribunal's award did not purport to revoke the title; and the registration of the deceased as proprietor was ever challenged or made an issue before the 1st Respondent.
 8. According to the interested party, since the applicant is not the owner of the suit parcel the allegations that her rights under Article 40 of the Constitution were violated which any case were not particularized, is superfluous.
 9. It was further contended that the applicant has no locus in these proceedings which ought to be commenced by the Republic, the supporting affidavit filed with the motion is alien to the proceedings and the applicant has not complied with Order 53 rules 4(1) and 7(1) of the **Civil Procedure Rules**. In the interested party's view these proceedings are an abuse of the process of the Court because that there is a similar application pending over the same subject matter being JR ELC Misc. Civ. Appl. No. 8 of 2011 where the Court declined to grant leave.
 10. The interested party averred that the delay in prosecuting these proceedings has prejudiced her and cost her a lot of money as a result of the stay granted herein.
 11. In a rejoinder, the interested party filed a further affidavit sworn on 23rd April 2014 in which she reiterated that since the award of the 1st Respondent interfered with the title, the same amounted to a transfer of a portion of the suit title. On the pendency of another matter, it was contended that the earlier application having been brought under the wrong provisions of the law the Court declined to grant leave and that a notice of withdrawal of the same had been filed.
 12. In the submission filed on behalf of the applicant it was contended that the interested party lodged a claim against the applicant who has no interest in the land since the applicant had not commenced the legal process for the purposes of distribution of the estate of the deceased. Accordingly the 1st Respondent's decision contravened the provisions of the **Succession Act** Cap 160 Laws of Kenya. Apart from that the decision was made in violation of the provisions of law as envisaged hence was ultra vires.
 13. In support of her submissions the applicant relied on **Munyui Kahuha vs. Nganga Kahuha Civil Appeal No. 502 of 2000**, **Jacinta Mugure Kageche vs. David Nganga Kioi Civil Appeal No. 252 of 2004** and **Jane Ngoiri Muchina vs. Land Disputes Tribunal Limuru & Others Misc. Appl. No. 485 of 2007**.
 14. On behalf of the interested party, it was submitted that the 1st Respondent acted within its jurisdiction in making the impugned award under section 3(1) of the repealed **Land Disputes Tribunals Act**, Cap 303A as the interested party only sought subdivision of the land and did not challenge the title thereof.
 15. It was further contended that the mere fact that the suit land was registered did not oust the 1st Respondent's jurisdiction
 16. With respect to the issue of succession it was submitted that the same was introduced for the first time in the submissions contrary to the provisions of Order 53 rule 4(1) of the **Civil Procedure Rules** hence the applicant cannot rely thereon.
 17. According to the interested party the issue of locus being procedural goes to the merit and hence not a proper ground for seeking judicial review orders.

18. On the authorities it was submitted that the same are distinguishable from the instant case since they dealt with disputes relating to ownership and title to land and contractual disputes rather than issues of subdivision.
19. The interested party reiterated that based on the pendency of a similar matter these proceedings are an abuse of the process of the Court and that the application is incurably defective hence ought to be dismissed with costs.
20. In his oral highlighting **Mr. Ogola**, learned counsel for the interested party drew the Court's attention to the fact that the notice of withdrawal was filed after the issue was raised in these proceedings and that the applicant admitted that the 1st Respondent had jurisdiction to subdivide the suit land but only challenged the transfer. However, the transfer according to learned counsel was only consequential and was just an implementation of the order of subdivision.
21. On her part **Mrs Muhoro**, learned counsel for the applicant submitted that the notice of withdrawal was inconsequential as the leave had been refused by the Court. According to the learned counsel, issues of jurisdiction may be raised at any time and the mere fact that the issue of succession was not one of the grounds cannot bar the court from dealing with it as the Court has wide powers. In her view by ordering subdivision of the suit parcel the 1st Respondent did interfere with the title of the suit parcel.
22. I have considered the application, the affidavits both in support of and in opposition to the application as well as submissions by the parties herein.
23. The first issue for determination is the competency of the application. According to the interested party the application is fatally and incurably defective on three fronts. The first front is that the applicant has no locus in these proceedings as the applicant ought to be the Republic. Secondly, the supporting affidavit to the motion is alien to these kind of proceedings. Lastly, the applicant has not complied with Order 53 rules 4(1) and 7(1) of the Civil Procedure Rules.
24. On the first issue, it is clear that the applicant herein was dragged into the proceedings before the 1st Respondent by the interested party who ought to have known that there was no basis for the applicant being a party thereto. Having joined the applicant to the said proceedings, the applicant acquired the locus to challenge any decision emanating therefrom by way of judicial review. The first objection is therefore for rejection. On the second issue, **Nyamu, J** (as he then was) in **Paul Kipkemoi Melly vs. The Capital Markets Authority Nairobi HCMA No. 1523 of 2003** held:

“All affidavits must be served with the notice and the statement on the Registrar and a party at the hearing of the Notice Motion seeking the actual orders must rely on the affidavit verifying the statement at the time of leave. A statement can however be amended with leave and further affidavits can be allowed upon notice, if third parties raise new matters.... There is nothing that offends S 9 of the Law Reform Act in allowing a party to file a proper verifying affidavit in an emergency situation because of the word “affidavits” in plural.”

25. This position was restated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** by the same Judge as follows:

“There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete at leave stage and practicing

advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."

26. Although the applicant filed an affidavit in support of the Notice of Motion which document was in my view unnecessary and inconsequential, nothing turns on that issue since the said document was substantially the same as the one filed together with the Chamber Summons seeking leave.
27. An issue was taken with respect to non-compliance with Order 53 rules 4(1) and 7(1) of the **Civil Procedure Rules**. While Rule 4(1) of the said Order stipulates the documents to be served, rule 7(1) requires the decision sought to be quashed to be verified by an affidavit. There was no allegation in the affidavit that any of the documents required to be served were not so served. With respect to rule 7(1) it is my view that the rationale for the rule is to confirm to the Court that there in fact exist a decision that is sought to be quashed. Once the decision is exhibited to disallow the application simply because there is no strict compliance with the rule would in my view amount to elevation of procedural rules to a fetish. In this case the proceedings of the 1st respondent which are the subject of this application were exhibited to the affidavit in support of the application for leave. Accordingly nothing turns on this objection.
28. In this case it is contended that the 1st respondent did not have the jurisdiction to grant the award which it did. If that contention is found to be correct then I would associate myself with the decision of Nyamu, J (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another Nairobi HCMA. No. 689 Of 2001 [2006] 1 EA 318**, to the effect that if an award is made without jurisdiction, it is a nullity and anything out of a nullity is a nullity due to the maxim *ex nihilo nihil fit* – out of nothing comes nothing hence despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role as it has powers to strike out nullities. This is due to the fact that where a decision is a nullity, 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. You cannot put something on nothing and expect it to stay there, as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169**.
29. The foregoing also takes care of the objection that the issue of **Succession Act** was not raised as one of the grounds for seeking leave. Whereas I agree that under Order 53 rule 4(1) of the **Civil Procedure Rules**, the applicant is not permitted to rely on any ground save for the grounds specified in the statement, it is my view that where the issue goes to the jurisdiction of the court, the mere fact that the issue is not contained in the grounds ought not to bar the Court from taking cognizance of the issue. However, where the applicant succeeds on an issue not raised in the statement, the Court may properly be entitled to take that into account in deciding whether or not to award costs to the applicant.
30. An issue was raised on whether the Tribunal had powers to entertain a dispute in respect of registered Land. In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land. Otherwise section 3 of the **Land Disputes Tribunals Act** did not limit the jurisdiction of the Tribunal to lands outside the regime of registered land. I associate myself with the decision of Khamoni, J in **Republic vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex Parte Kariuki [2005] 2 KLR 10** to the effect that the Legislature, and definitely, framers of the **Land Disputes Tribunals Act**, knew the Act was intended to give Land Disputes Tribunals jurisdiction to adjudicate over all land in Kenya, including land registered under the **Registered Land Act** and therefore in cases where the dispute fell within section 3 aforesaid, it did not matter whether or not the land in question was registered under the **Registered Land Act**.
31. It was further contended that these proceedings were instituted during the pendency of another matter in which the subject matter was the same to wit JR ELC Misc. Civ. Appl. No. 8 of 2011. It is correct that the institution of fresh proceedings during the pendency of earlier proceedings seeking substantially the same orders between the same parties does amount to an abuse of the process of the Court. However the decision whether or not to strike out the subsequent proceedings is an exercise of discretion and where at the time of the hearing of the subsequent proceedings it is clear that the earlier proceedings had been withdrawn it would be too harsh on

the part of the Court to disallow the application merely on that ground though again that is an issue that may be taken into account to deciding whether or not to award costs.

32. In this case it is not in dispute that the Tribunal's decision was that the suit parcel of land be subdivided into two. 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.

33. 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.

34. It is therefore clear that whereas the 1st Respondent had jurisdiction under section 3(1)(a) of the aforesaid Act to deal with dispute relating to the division of land, that jurisdiction did not empower it to make a determination whose effect would lead to issuance of titles. Jurisdiction it has been held is twofold. It may arise at inception in that the Tribunal concerned is barred from entertaining the dispute *ab initio* or it may be lost in the course of the proceedings. As was held by **Ochieng, J** in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003**, a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Where, however, the Tribunal lacks jurisdiction, the moment it dawns on it that jurisdiction does not exist, it ought to down its tools before taking one more step as was held in **Owners of The Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1.**

3. An issue of jurisdiction may therefore arise in one of two instances or both. This clarification was made succinctly by **Madan, J** (as he then was) in **Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525** where he held:

"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction. What is forbidden is to question the correctness of a decision or determination which it was within the area of their jurisdiction to make.....The phrase "to make such order thereon as it deemed fit" giving powers to a statutory tribunal must be strictly construed. Powers must be expressly conferred; they cannot be a matter of implication."

35. Similarly, in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics and that if the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of

facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction. Where the Tribunal has made a factual finding, it is not for this Court in judicial review proceedings to interfere with such finding since such a decision would go to the merit of the decision and by interfering with such a finding this Court would be acting as an appellate court rather than a judicial review court.

36. In this case the Tribunal at the end of its decision directed that the Land Registrar to issue Title Deed of 2.20 Acres to the claimant after the subdivision. Clearly the decision of the Tribunal was a nullity and it should not lie in the mouth of the interested party to contend as she did here that the issuance of the said titles was just consequential to the subdivision. In my view though the Tribunal could entertain the dispute arising from division of land, it lost that jurisdiction when it made the orders whose effect it was not entitled to make.

37. It therefore follows that since the decision made by the Tribunal was made without jurisdiction and cannot be allowed to stand, an order of certiorari is hereby issued removing into this Court for the purposes of being quashed the proceedings and award by Kiambu Land Dispute Tribunal in LAR/LND/7/3/4/(2010) and the same is hereby quashed.

38. It is however clear that the applicant fell foul of a number of procedural commands. That being the position there will be no order as to costs.

Dated at Nairobi this 30th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mrs Muhoro for the Applicant

Miss Cheruiyot for the Respondent

Mr Okoth for Mr Okoth Ogola for the 1st Interested Party

Cc Kevin