



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION AND JUDICIAL REVIEW DIVISION
MILIMANI LAW COURTS
JUDICIAL REVIEW MISC. APPLICATION NO.370 OF 2013
IN THE MATTER OF KAJIADO LAW COURTS LAND TRIBUNAL CASE NO. 25 OF 2010
SECTION 31 OF THE ENVIRONMENT AND LAND COURT ACT
AND
IN THE MATTER OF ADOPTION OF A TRIBUNAL AWARD
MAGISTRATE KAJIADO LAW COURTS
IN LAND TRIBUNAL CASE NO. 25 OF 2010
MASAGU OLE KOITELEL NAUMO.....APPLICANT
VS.
PRINCIPAL MAGISTRATE KAJIADO LAW COURTS... RESPONDENT
MOLOI OLE LEKISHON.....1ST INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Motion on Notice dated 11th November 2013, the ex parte applicants herein, **Masagu Ole Koitelem Naumo** seeks the following orders:
1. **THAT this honourable court do issue an order of Certiorari to bring to the High Court for purposes of being quashed the ruling of the Senior Resident Magistrate Kajiado Law Courts quashing the ruling of 14th August 2013 confirming the Award of the Kajiado North Land Dispute Tribunal in Land Tribunal Case NO. 25 of 2010 Kajiado.**
2. **THAT the Honourable Court do direct that the aforesaid proceeding in Tribunal Case No. 25 of 2010 Kajiado be quashed forthwith by an order of Certiorari on removal into the High Court.**
3. **THAT costs be provided for.**

Applicant's Case

2. The Motion was supported by Statutory Statement filed together with the Chamber Summons herein and the verifying affidavit sworn by the applicant on 23rd October, 2013.
3. The applicants' case from the said documents is that the proceedings herein relate to his land parcel Known as **Kajiado/Olchoro-Onyore/111** situate within Kajiado Municipality (hereinafter referred to as the suit property). The dispute herein arose as a result of the Interested Party's trespassing thereon in or about the year 2010 as a result whereof the Applicant wrote a protest letter to the area chief initially and subsequently, the matter referred to the Kajiado North Land Dispute Tribunal Case No. T.C. 140/01/010. After the hearing the matter, the Tribunal issued its award dated 25th March, 2010 in favour of the Interested Party and thereafter, the Tribunal wrote a letter dated 25th March 2010 forwarding the award to the Kajiado Senior Resident Magistrate's Court for confirmation of the award pursuant to the provisions of Act Number 18 of 1999 vide Land Tribunal Case No. 25 of 2010, the subject of this application.
4. Pending the confirmation of the Award, which the Applicant was aggrieved with, the Interested Party moved to court in Civil Suit No. 159 of 2010 seeking to permanently restrain the Applicant from dealing with and/occupying the suit land. However, the Applicant applied for an order that a surveyor be ordered to survey the disputed parcel of land for purposes of settling the dispute in the land Tribunal Case No. 25 of 2010 which application was heard and vide orders issued on the 28th January, 2011 the Kajiado District Surveyor was directed to re-survey the disputed parcel of land and file the report in court.
5. However being aggrieved by the said order the Interested Party lodged Civil Appeal No. 13 of 2011 at the High Court in Machakos which appeal is still pending final determination. The Interested Party further filed an application seeking to have the Applicant barred from occupying and/or using the disputed land which application was dismissed for want of prosecution by the Applicants on the 9th day of March, 2013.
6. On the 12th March, 2013, the Department of Surveys gave its report to the effect that the Interested Party herein had encroached on the Applicants suit parcel of land which report was sent by the District Land Registry to the Executive Officer dated 19th March, 2013. Pursuant thereto, the applicant applied to restrain the Interested Party from interfering and/or trespassing on his parcel of land which application was allowed vide the orders were issued on the 28th March, 2012 in the interim. The said interim orders extended on the 15th April 2013.
7. According to the Applicant, the findings of the survey team were very different from the finding of the Tribunal as they found in his favour. He deposed that when the Land Tribunal Case No. 25 of 2010 came to court for confirmation he thought his advocates on recorded objected to the confirmation on the grounds that the award was irregular and that in any event the court did not have authority to confirm the award following the passing and subsequent coming into force of the **Environment and Land Court Act, 2011**. The said objections were however dismissed by the Magistrate who proceeded to confirm the award of the tribunal.
8. In the Applicant's view, Section 32 of the **Environment and Land Court Act** repealed Act No. 18 of 1990 and as such the Magistrate lacked the jurisdiction to confirm the award of the Tribunal hence the ruling should be reviewed and quashed by this Honourable Court. To him, since there is another case Number 159 of 2010 dealing with the same matter and an appeal number 13 of 2011 still pending at the High Court in Machakos, this matter should be settled in terms of the Judgment in that matter as opposed to the Award of the Land Disputes Tribunal which is manifestly unjust.

Respondent's Case

9. In opposition to the application the Respondent filed the following grounds of opposition:
 1. **THAT the Magistrate acted within the premise of the law and had jurisdiction under Section 12 Cap 301 laws of Kenya.**
 2. **THAT the Magistrate only adopted the award as forwarded by the tribunal and never dealt with the same as the applicant alleges.**

3. THAT the application is unmerited and an abuse of the due processes of the courts and same should be dismissed with costs.

4. THAT a Judicial Review Court is not an Appeal Court and therefore the applicant is in the wrong court.

Applicant’s Submissions

- 10. On behalf of the Applicant it was submitted that Tribunal made a finding that the disputed land belonged to the interested party while the applicant had title over the same contrary to the settled law that the Tribunal had no jurisdiction at all to entertain a dispute over a parcel(s) that has/is registered (have title) and support for this submission was sought from **R vs. Matayos Land Dispute Tribunal and 2 Others [2013] eKLR.**
- 11. It was submitted that by reading the award in view of the Surveyor’s report which clearly shows the disputed parcel of land belongs to the Applicant, the 1st Respondent acted against the applicant’s legitimate expectation. The case of **Keroche Industries Limited vs. Kenya Revenue Authority and 5 Others Nairobi HCMA No. 743 of 2006 [2007] eKLR 240** was cited to reinforce this submission.
- 12. It was submitted that the fact that the Tribunal held that the land belonged to the interested party contrary to the map which indicated that the suit land belonged to the Applicant clearly cancelled the applicant’s title thereby acting beyond their mandate as provided under section 3(1) of the repealed **Land Disputes Act** and the Applicant relied on **R vs. Chairman, Land Disputes Tribunal Lurambi Division [2013] eKLR** to support this submission.

Determinations

- 13. Before dealing with the merits of this application it is clear that the intitulement of this application at leave stage was improper. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
- 14. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

- 15. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI”

16. Nevertheless, in Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

17. It is therefore my view that whereas the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.

18. The Applicant’s case is that the Respondent ought not to have adopted the award of the Tribunal in light of the report by the surveyor. In order to determine this issue it is important to understand the role of the Magistrate’s Court under the repealed *Land Disputes Tribunal Act*. In Zedekiah M Mwale vs. Bikeke Farm Directors & Another Kitale HCCA NO. 25 of 1998 the Court held which holding I associate myself with that a magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a Land Disputes Tribunal’s award filed in court as section 7(2) only compels the magistrate to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.

19. Similarly, in Peter Ouma Mitai vs. John Nyarara Kisii HCCA No. 297 of 2005, Musinga, J (as he then was) following the decision in Zedekiah M Mwale vs. Bikeke Farm Directors & Another (supra) expressed himself as follows:

“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate’s court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal’s award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise.”

20. It is therefore my view that the mere fact that the Tribunal acted unlawfully did not justify the Respondent in declining to adopt the award.

21. It was also contended that the suit land being registered land, the Tribunal lacked jurisdiction to entertain the dispute arising therefrom. One must treat this line of submission with a pinch of salt because it is the Applicant that invoked the powers of the Tribunal. That however would not necessarily clothe the Tribunal with jurisdiction if it did not have the same though such conduct may be taken into account in determining whether or not to award costs to the applicant.

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 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**.
24. The Applicant also contended that since section 32 of the **Environment and Land Court Act** repealed Act No. 18 of 1990 the Magistrate lacked the jurisdiction to confirm the award of the Tribunal hence the ruling should be reviewed and quashed by this Honourable Court. I have already held that when it came to adoption of awards the Magistrate's Courts had no option but to adopt them. Of course such adoption could still be challenged in the High Court. However the fact that such challenge was available did not bar the Magistrate's Courts from adopting the same.
25. The **Environment and Land Court Act** commenced on 30th August, 2011. The award in question was made on 25th March, 2010 which was obviously before the said Act came into effect. However, the adoption of the award was on 14th August, 2013 by which time the **Land Disputes Tribunal Act**, No.18 of 1990 had been repealed by section 31 of the **Environment and Land Court Act**. Apparently there was no saving provision for proceedings which were either pending hearing before the Tribunal or adoption before the Courts. Accordingly, by repeal of the **Land Disputes Tribunal Act**, No.18 of 1990, no Court could purport to exercise any powers thereunder. In adopting the award on 14th August, 2013, the learned Magistrate was invoking the provisions of sections 7 and 8 of the said repealed Act. In my view the Magistrate could not purport to exercise a jurisdiction which had ceased to exist by operation of law. While the **Land Disputes Tribunal Act**, No.18 of 1990 existed the learned Magistrate had no option but to adopt the award but by the repeal of the said Act that jurisdiction no longer existed. In other words with the repeal of the **Land Disputes Tribunal Act** went the jurisdiction of the Magistrate's Court to exercise any jurisdiction thereunder and the Respondent ought not to have entertained the application effective from the date of the said repeal since the jurisdiction to adopt the award emanated from the said Act without which no such jurisdiction existed. The Respondent had no blanket power to exercise jurisdiction at large as it were and *in vacuo*.
26. In my view if the learned Magistrate had no jurisdiction to entertain the matter, whatever proceedings flowed from her decision would be null and void since a decision made without jurisdiction 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.
27. A similar position was adopted by **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** in which he held that 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 and it has powers to strike out nullities.
28. This finding in my view is sufficient to dispose of this Application and as there are other pending

proceedings in respect of the suit parcel of land it would be improper for this Court to embark on determinations which may prejudice the same.

Order

29. Accordingly the order which commends itself to me and which I hereby grant is that an order of Certiorari is hereby issued removing into this Court the ruling of the Senior Resident Magistrate Kajiado Law Courts of 14th August 2013 confirming the Award of the Kajiado North Land Dispute Tribunal in Land Tribunal Case No. 25 of 2010 Kajiado which decision is hereby quashed.
30. Having quashed the Magistrate's Court's decision it is not necessary to quash the Tribunal's decision. As was held by **Khamoni, J** in **R vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex parte Kariuki** (supra):

“The Court judgement having been entered by a Court, in law, not only was it improper but was also irregular for this notice of motion to have been filed praying for an order of certiorari to quash the decision of the Land disputes Tribunal since under section 7(2) of the Land Disputes Tribunals Act the Court enters judgement in accordance with the decision of the tribunal and upon judgement being entered a decree issues and is enforceable in the manner provided for under the Civil Procedure Act. Once such a decision is adopted by a Court, it becomes a judgement of the court thereby ceasing to exist as a decision, which can be separately quashed as contemplated in this notice of motion. What has to be dealt with now is a judgement of a court and not a decision of a tribunal just as a party would have appealed against the decision of the Provincial Land Disputes Appeals Committee and not against the decision of the Land Disputes Tribunal had the appellant's appeal in the Provincial Land Disputes Appeals Committee been heard and determined without the existence of an intervening court judgement adopting the tribunal's decision.”

31. In light of the wrong intitlement of these proceedings and the fact that the proceedings before the Tribunal were initiated by the Applicant who now contends that the Tribunal had no jurisdiction, there will be no order as to costs.

Dated at Nairobi this 18th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mbuvi for the Applicant

Mr Odhiambo for Ms Chilaka for the Respondent

Cc Kevin