



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JR MISCELLANEOUS APPLICATION NO. 41 OF 2007

AND

IN THE HIGH COURT OF KENYA AT NYERI

**IN THE MATTER OF AN APPLICATION BY ANDREW KARIUKI BORO FOR AN ORDER
CERTIORARI**

AND

**IN THE MATTER OF LAND DISPUTE TRIBUNALS ACT NO. 18 OF 1990 AND KIAMBU
LAND CASE NO. 46 OF 2000**

MISCELLANEOUS CASE NO. 30 OF 2003

BETWEEN

REPUBLICAPPLICANT

VERSUS

ROBERT BORO MBUGUA.....1ST RESPONDENT

THE KIAMBU KIAMBAA LAND

DISPUTES TRIBUNAL.....2ND RESPONDENT

THE PRINCIPAL MAGISTRATE KIAMBU.....3RD RESPONDENT

EX PATRE: ANDREW KARIUKI BORO

JUDGEMENT

Introduction

1. The applicant in this cause, **Andrew Kariuki Boro**, moved the Court by way of an amended a Notice of Motion dated 10th February, 2005 seeking the following orders:

1. THAT this honourable court be pleased to issue an Order for Certiorari to remove

into the Honourable Court and to quash the proceedings made by the Land Disputes Tribunal Kiambaa in 16/20/74/2000 and to quash the Decree and all subsequent orders pursuant thereto issued by the Principal Magistrate Court at Kiambu in Land Case Number 46 of 2000 under the provisions of the Land Disputes Tribunal Ac No. 18 of 1990.

2. THAT costs of this application 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 19th December, 2002.
3. According to the Applicants, he was the registered owner of LR No. Kiamba/Ruaka/1943 which was registered on 11/2/92 subsequent to a sub-division of LR No. Kiamba/Ruaka/1714 a resultant sub division or LR No. Kiamba/Ruaka/268. He deposed that LR No. Kiamba/Ruaka/268 came to his ownership by virtue of a Succession Case duly tried and determined in the Resident Magistrate Court at Kiamba in 1968 in which himself and one **Peter Kamau Mungai**, a purchaser were the sole beneficiaries of LR. No. Kiamba/Ruaka/268 which was registered in his father's name, immediately prior to his death on 3rd September in 1967. However, since title could not then be issued for land not exceeding 3 acres they were registered in the joint names of **Peter Kamau Mungai** and the applicant with the former holding 2 acres and the applicant acres.
4. Thereafter in 1984, LR No. Kiamba/Ruaka 268 was partitioned into two partitions mine being LR NO. Kiambu/Ruaraka/714 and **Peter Kamau Mungai's** being Kiamba/Ruaka/713. Soon thereafter one **Robert Boro Mbugua** a son of the late sister who was then married to one **Kiiru Muchungo** lodged a claim for 1 acre piece of land from the applicant alleging that the applicant's father had given him. The claim was that the applicant and his two other brothers had sold the land allegedly given to him by the applicant's late father. The applicant's said nephew was then advised by the DO that if he was claiming any family land he should have been claiming from her uncles and further that he should have lodged his claim in the Succession Case in the Resident Magistrate Court at Kiambu. In 1992 the applicant made further sub-division to LR. No, Kiamba/Ruaka/714 into numbers Kiamba/Ruaka/1939/1940/ 1941/1942 and 1943.
5. In June 2000, the aforesaid nephew **Robert Boro Mbugua** filed a land dispute under the **Land Dispute Tribunal Act** at the District Tribunal at Kiamba Division under dispute number 16/20/74/2000 which dispute the tribunal heard the dispute on 01st July, 2000 and the decision thereof was filed in the Senior Principal Magistrate Court at Kiambu in Land Case No. 46 of 2000 after the Tribunal's Ruling made on 9th November, 2000 pursuant to which a was on the 7th August 2002 whose terms were *inter alia* that land parcel number Kiamba/Ruaka/1943 be divided into two portion one measuring 0.405 hectares be transferred to the said **Robert Boro Mbugua** while the Applicant retains 0.755 acres. The Court further directed the executive officer to execute the necessary documents to facilitate the sub-division and transfer of the said land.
6. It was the Applicant's view that the proceedings by the Land Dispute Tribunal at Kiamba in dispute number 16/20/74/2000 filed in the Principal Magistrates Court Land Case under 46 of 2000 are unlawful as the tribunal does not have jurisdiction to determine a case involving title to land hence the orders sought herein.

1st Respondent's Case.

7. The 1st Respondent in response to the application filed a replying affidavit sworn on 26th March, 2014.
8. According to him, LR No. Kiambaa/Ruaka/1943 was the subject matter of the proceedings of land dispute Tribunal at Kiambaa No. 16/20/74/200 which matter the Tribunal had jurisdiction to hear and determine and it determined that the said land be subdivided in to two portions between the Applicant and the 1st Respondent which decision was adopted by the Magistrate's Court and a decree issued.
9. As a result of the applicant refusal to execute the transfer documents the same were executed by

the Court's executive officer and the land subdivided and titles issued. It was therefore deposed that LR No. Kiambaa/Ruaka/1943, the subject matter of the proceedings before the Tribunal and the Magistrate's Court has been tackled and dispensed with hence this application has been overtaken by events.

10. In his view the repealed Land Disputes Tribunal conferred jurisdiction on the Tribunal to adjudicate and determine land matters and that if the applicant was dissatisfied with the judgement of the Magistrate's Court he ought to have appealed against it.
11. According to the 1st Respondent the issue herein is res judicata.
12. It was averred that leave herein was granted on 6th January, 2003 while the application was filed on 11th February, 2003 out of the 21 days period provided for doing so hence the application is void hence the application should be dismissed with costs.

2nd and 3rd Respondent's Case

13. In opposition to the application the 2nd and the 3rd Respondents filed the following grounds:

1. **THAT the Tribunal had jurisdiction to hear and determine the matter placed before it.**
2. **THAT the application as filed is not competent before this Honourable Court**
3. **THAT Judicial Review deals with the procedure and not merits of a case. The Applicant seems to be challenging the merits.**
4. **THAT the application is an abuse of Court process.**
5. **THAT Judicial Review remedies are discretionary in nature.**

Applicant's Submissions

14. On behalf of the Applicant, it was submitted that the Tribunal lacked the jurisdiction to interfere with title to land and ownership thereof. To the applicant the Tribunal's orders and the subsequent orders resulted in the creation of two titles hence involved ownership of the said land. This powers it was submitted did not fall under section 3(1) of the ***Land Disputes Tribunal Act***, 1990 hence the Tribunal exceeded its jurisdiction and its decision is null and void.

1st Respondent's Submissions

15. According to the 1st Respondent, under section 3 of the Land Disputes Tribunal Act, the Tribunal had jurisdiction to adjudicate and determine land matters and subdivide the same.
16. It was further submitted that the filing of the application outside the stipulated period was a procedural flaw on the part of the applicant hence the application is void.
17. It was submitted that in light of the existence of an alternative relief of an appeal, the applicant ought to have resorted thereto.
18. According to the 1st Respondent if this Court is to deal with the issue of the piece of land herein it would go against the doctrine of res judicata as the issue of the land has been dealt with and or disposed of by the Tribunal and the Magistrate's Court.
19. It was further submitted that as the proceedings of the Tribunal and the decree consequent thereon made by the Magistrate's Court have not been exhibited, this Court is incapable of discerning the legality and otherwise of the Tribunal's award. In support of this submission, the 1st Respondent relied on **Republic vs. Chairman Magarini Land Disputes Tribunal & Another ex parte William Nyang'au Ongwae & 4 Others Misc. Appl. No. 20 of 2011 [2014] eKLR.**

2nd and 3rd Respondents' Submissions

20. On the part of the 2nd and 3rd Respondents, it was submitted that the Tribunal had jurisdiction under the ***Land Disputes Tribunal Act***, Cap 303A to adjudicate land matters under section 3 thereof.
21. It was further submitted that in this case that whereas leave was granted on 6th January, 2003, the substantive motion was filed on 11th February, 2003 a period of 37 days without time being extended. According to the Respondents this was not a technical error or procedural one hence the application ought to fail. In support of this submission the said Respondents relied on **Maurice Odhiambo vs. Joel Kipsang A Ngeno & 3 Others [2014] KLR** and **In the Matter of Title No. Chembe Kibabamshe/406 [2013] KLR**.
22. It was further submitted that the applicant has not demonstrated that the procedure was marred with procedural impropriety hence the Applicant is seeking to challenge the outcome and not the procedure yet this Court has no jurisdiction to deal with the merits of the matter.
23. According to the 2nd and the 3rd Respondents the Applicant did not attach the proceedings and order he wants to be quashed hence the omission is fatal as it is a violation of Order 53 rule 7(1).
24. Being discretionary remedies, it was submitted based on the authority of **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and ***Halsbury's Laws of England*** 4th Edition Vol. II page 805 paragraph 1508.

Interested Party's Submissions

25. According to the interested party, he was a purchaser for value without notice. He submitted that by the time these proceedings were instituted the parcel of land in issue had already been subdivided and titles issued on 20th November, 2002 including the ex parte applicant's own title and the Green Card in respect of the parcel of land was opened on 20th November, 2002. It was submitted that the interested party purchased the said property having undertaken all due diligence and establishing that the Title had no encumbrances and impediment on any transaction.
26. According to him, he holds a Title to the parcel of land known as Kiambaa/Ruaka/1956 which title is protected under section 26 of the Land Registration Act, No. 3 of 2012. It was therefore contended that the delay by the ex parte applicant in filing and prosecuting his claim has prejudiced the interested party's interest and ought not to be aided for his indolence.
27. In light of the repeal of the Land Disputes Tribunal by section 31 of the ***Environment and Land Court Act***, the Court was urged to consider its effect in granting the orders sought. It was submitted that any order in favour of the applicant will not put this matter to rest.

Determinations

28. I have considered the application. It was contended that the application is incompetent because the Application was filed outside the 21 days period provided under Order 53 rule 3(1) of the ***Civil Procedure Rules***. That provision provides as follows:

When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

29. Although the original ruling indicated that the application for leave was granted on 6th January, 2003, the same was amended on 22nd June, 2011 and the date of delivery of the ruling was corrected to read 6th February, 2003. The Motion was filed on 11th February, 2003 which was definitely within the 21 days period provided under Order 53 rule 3(1) aforesaid. Accordingly nothing turns upon that issue.
30. With respect to the effect of the non-existence of the Tribunal a similar issue arose in **David Mugo T/A Manyatta Auctioneers vs. Republic Civil Appeal No. 265 of 1997**, the Court of Appeal in that matter held that where the body has ceased to exist but its decision is still enforceable, certiorari must issue to quash or nullify it. See also **Republic vs. The Funyula Land Dispute Tribunal Ex Parte Prof. Washington O.Pamba Busia HCMA No. 78 of 2003 [2005]**

eKLR.

31. Accordingly the mere fact that the Tribunal no longer exists does not bar the court from granting the orders sought as long as the same are merited.
32. In the present case, it is not in dispute that the decision of the Tribunal had the effect of subdividing the disputed parcel of land. 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. It follows that the Tribunal had no powers to make the order it made.
33. It has been contended that the decision having been made by both the Tribunal and the Magistrate's Court, the issue now before this Court is *res judicata*. *Res judicata*, it must be remembered only applies where the Court that made the earlier decision was clothed with the jurisdiction to do so. In this case since the Tribunal had no jurisdiction to make the decision it purported to have made, the doctrine is inapplicable. Similarly, the award of the Magistrate's Court which purported to effect the said award was inconsequential legally. As was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993**, if an act is void, then it is in law 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 pursuant thereto 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. It follows that the court proceedings which were instituted pursuant to the said decision must likewise collapse.
34. However, it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court therefore does not issue orders in vain even where it has jurisdiction to issue the prayed orders and can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, even if merited. The Court would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. See **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209**, **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000** and **Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508**.
35. In this case, it is not in doubt that whether rightly or wrongly, land parcel no. Kiambaa/Ruaka/1956 was transferred to the interested party herein, **David Kinuthia Kimani**. According to the interested party, he purchased the same on or about 5th March, 2012 from the 1st Respondents though the copy of the certificate of official search exhibited by the applicant indicates that he was registered on 11th March 2010. Although he contended that these proceedings were instituted after he had been registered, that contention is obviously untrue. However, the position remains that the grant of the orders sought herein will not necessarily have the effect of nullifying his title whether rightfully or unlawfully acquired.
36. Sound legal principles, in view, dictate that where to grant the orders sought would not lead to a realisation of the ultimate goals targeted by the applicant but that there is availability of another remedy through which that goal may be achieved without a multiplicity of proceedings, the court ought to exercise its discretion by disallowing the orders sought in the judicial review proceedings and let the parties to pursue the said remedy in order to save valuable judicial time from being

spent on one case to the detriment of other cases. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000** and **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209.**

37. Accordingly whereas I find the applicant's application otherwise merited, it is my view that the kind of the orders he seeks will not bring the dispute herein to its finality and that the issue may be properly and finally determined in a forum other than judicial review proceedings.

Order

38. In the result I decline to grant the Motion dated 10th February, 2005. I however award the costs of the Motion to the applicant to be borne by the 1st Respondent herein, **Robert Boro Mbugua.**

Dated at Nairobi this 31st day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for the 1st Respondent

Mr Kurauka for Mr Nyakiengana for the Applicant

Mr Kimathi for Mr Mbaabu for the interested party

Cc Kevin