



REPUBLIC OF KENYA

High Court at Nyeri

Judicial Review 50 of 2011

MUIRURI KARANJA..... APPLICANT

VERSUS

1. CHAIRMAN KANDARA LAND DISPUTES TRIBUNAL

2. PM's COURT THIKA..... RESPONDENTS

RULING

The suit herein is a Judicial Review application commenced by a Notice to the Registrar under Order 53 rule 2 of the Civil Procedure Rules 2010 dated on 10th of October 2011 and filed on the following day albeit the new Civil Procedure Rules had repealed the provision for the Notice to the Registrar. The new rules that came in force on the 10th September 2010 vide Kenya Gazette Supplement no 65 in Legislative Supplement no 42 and embedded in Legal Notice no 151 do not require a notice being issued to the Registrar

The application for leave was made by way of chamber summons dated 10th October 2011 and filed on the following day. The Chamber summons was placed before Justice Sergon on the same date whereupon he heard the application and granted leave of 21 days for the applicant to take out Judicial Review proceedings as prayed in prayer 2 of the chamber summons.

The substantive Notice of Motion dated 26th October 2011 was filed on the 28th October 2011. In the said Notice of Motion, the applicant seeks orders of *Certiorari* and *Mandamus* to move to the High court and bar the principal magistrate Thika law courts from adopting the award of Kandara Land Disputes Tribunal and/or quash the proceedings and award filed in Land Disputes Tribunal in DO case No. 55 of 2011 at Thika law courts. The applicant also seeks costs of the application.

The application is supported by the verifying affidavit of Muiruri Karanja who is the registered proprietor of land parcel No. Loc 5/Kagunduini/2230. The certificate of search dated 27th September 2011 being search No. 395/9/11 on title No. Loc 5/Kagunduini/2230 confirms that the nature of the title is absolute and measures zero decimal zero eight one hectares (0.08Ha). The same is registered in the name of Muiruri Karanja. The title was obtained through succession where a grant was made, confirmed and property transmitted.

A dispute arose between the *exparte* applicant and the interested party. The *interested party* Alice

Nduta Mburu claimed a share of the parcel of land and wanted the same to be transferred to her. This claim prompted the **interested party** to file case No. 15/2011 before the Kandara District Land Disputes Tribunal. The Tribunal in its brief ruling after considering the evidence before it ordered Mr. Muiruri Karanja to subdivide the parcel of land ref No. Loc. 5/Kagunduini/2230 from the tarmac road into two equal portions of 0.10 acre each and transfer one portion measuring 0.1 acre to Alice Nduta Mburu. The interested party was to meet the costs of transfer.

Mr. Muiruri Karanja further states in his affidavit that the award made on the 16/8/2011 is scheduled for adoption as the judgment of the Principal Magistrate's Court Thika anytime.

The grounds of the application are discernible in the Notice of Motion supporting affidavit and the statement of facts. The statement of facts was filed on 28/10/2011. Basically, the ex parte applicant states that the proceedings before the Tribunal are null and void, and illegal as the Tribunal dealt with matters otherwise not falling within its jurisdiction as provided for under section 3 of the Lands Disputes Tribunal Act now repealed. The applicant further bases his application on the award that the Land Disputes Tribunal lacked jurisdiction to hear and/or determine the matter as it touches on trust.

The Honourable Attorney General on behalf of the 1st, and 2nd respondents filed grounds of opposition through Stella Munyi, Provincial Litigation Counsel Nyeri as she then was. The grounds are that the application is misconceived, incompetent, bad in law, fatally defective and contrary to the mandatory legal provisions. Further that the orders sought are not tenable and therefore the application was an abuse of the process of court.

The interested party Alice Nduta Mburu filed a replying affidavit on the 12th June 2012. The interested party states that the parcel of land belongs to both of them. She states that the ex parte applicant should have stopped the proceedings before the Tribunal instead of waiting to challenge the decision. She goes further to attack the application as incompetent for failing to cite substantial legal provisions and for including evidence in the statement.

The applicant filed his written submissions on 25th September 2012 whose import is that the award by the Tribunal was ultra vires and a nullity **ab initio**

The respondent did not file submissions but relied on the grounds of opposition on record.

The interested party filed her submissions on the 1st of November 2012 whose gist is that the application was incompetent for failure to cite the Law Reform Act. Secondly that the statement of facts contained evidence hence making the application incompetent. Thirdly that the case before the Tribunal was suitable under the Land Disputes Tribunal Act No. 118 of 1990 as the same involved a dispute between a brother and sister on a parcel of land left to interested party by their mother. The interested party further submitted that the matter before the Tribunal was a claim to occupy or work on land hence falling within the meaning of section 3(11) (b) of the now repealed Land Disputes Tribunal Act No. 18 of 1990.

I have considered the Notice of Motion and all documents in support of the application. The grounds of opposition by the Honourable Attorney General, submissions by the ex parte applicant and interested party and do find that the dispute between the ex parte applicant and the interested party is a succession dispute in respect of parcel of No. Loc 5/Kagunduini/2230. The registration of the ex parte applicant as the absolute proprietor was pursuant to succession cause No. 112 of 2004 in the matter of the estate of the late Ndure Chege alias Ndura Chege. On the 31st day of March 2005, the Resident Magistrate Thika issued a certificate of confirmation of grant to Mr. Muiruri Ndure pursuant to the provisions of section 71(1) and (3) of the Law of Succession Act.

The schedule to the **certificate of confirmation of the grant** lists names of heirs of various properties as follows.

Name

Vielina Wanja Wanyoike - Loc 5/Githunguri/T. 163
Virginia Wanjiru Ndungu - Loc 5/Kagunduini/235 – 0.4 acres
Muiruri Karanja - Loc 5/Kagundu-ini/2330– 0.2 acres

The certificate of grant is annexed to the affidavit of Muiruri Karanja as annexure MK 3. However I do note that the description of the property is not clear as to whether the same is parcel No. 235 or 2230. The land in contention is Loc 5/Kagunduini/2230 and therefore the court presumes that the property described to have been transmitted to the applicant is Loc 5/Kagunduini/2230. The court observes as a fact that the property is registered in the name of the applicant as an absolute proprietor as a result of the succession cause. The certificate of official search confirms that the parcel of land in issue was registered in the name of the applicant as an absolute proprietor. Section 3(1) of the Land Disputes Act No. 18 of 1990 provides for the jurisdiction of the Tribunal namely;-

- a) The determination of boundaries to Land including land held in common.
- b) Claim to occupy or work on land.
- c) Trespass.

The interested party argues that her claim before the tribunal was a claim to occupy or work on land which had been left to her by her mother but her brother decided to take it away. I find this argument not convincing due to the fact that the applicant is registered as an absolute proprietor of the suit land. Section 24 of the Land Registration Act No. 3 of 2012 vests to the proprietor absolute ownership of land together with all rights and privileges belonging or appurtenant thereto upon registration as a proprietor. The claim to occupy and work on land can only apply where it is demonstrated that the interested party has other rights known in law that would entitle him to occupy and work on the land in dispute which rights could be enforced by the Tribunal under the Land Disputes Tribunal Act of 1990. The interested party has not demonstrated such rights in the replying affidavit. Moreover, even if the said right existed the interested party should have filed an objection in the succession cause or an application to set aside the grant issued by the court and not to move the Tribunal as doing so amounts to attempting to set aside a decision of a Resident Magistrate in the Tribunal the latter having inferior jurisdiction to the court. The good argument by the interested party could have been made before the Magistrate's Court in the succession cause. The decision by Justice Khamoni in **Republic –vs- Chairman Land Disputes Tribunal Kirinyaga District and another exparte Kariuki** can be distinguished from this case as the former did not revolve on a succession cause where the court had already issued a certificate of confirmation of grant. I do find that this suit has a genesis on the Succession Cause No. 112 of 2004 at Thika Resident Magistrate's Court.

The upshot of the foregoing is that the Tribunal exceeded its mandate in ordering the applicant to subdivide the parcel of land Ref. No. Loc 5/Kagunduini/2230 from the tarmac road into equal portions of 0.10acre each and transfer to one portion measuring 0.1 acres to Alice Nduta Mburu. The court finds the proceedings of the Tribunal and its decision a nullity and the same are hereby brought herein and **quashed** as prayed in the Notice of motion dated 26th October 2011. The court further issues an order of **Prohibition**, prohibiting the Principal Magistrate Thika Law Courts from adopting the award of Kandara Land Disputes Tribunal filed in Thika Land Disputes Tribunal in D.O. Case No. 55 of 2011. Costs to the exparte applicant.

Orders accordingly.

Dated at Nyeri this 25th Day of January 2013

A. OMBWAYO
JUDGE