



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 92 of 2012

REPUBLIC..... APPLICANT

AND

JOHN IHUGO NJOGU.....1ST RESPONDENT

THE LIMURU LAND DISPUTES TRIBUNAL.....2ND RESPONDENT

THE PRINCIPAL MAGISTRATE,

LIMURU PRINCIPAL MAGISTRATE’S COURTS.....3RD RESPONDENT

EX PARTE: GRACE WAGIO WAWERU

JUDGEMENT

By a Motion on Notice dated 30th July 2012, the ex parte applicant, **Grace Wagio Waweru**, seeks the following orders:

1. **An order of Certiorari bringing into this court and quashing the decision of the 2nd respondent read by the Principal Magistrate of Limuru Principal Magistrate’s Court on 30th September, 2011.**
2. **An order for stay of any further proceedings in the lower court case number Limuru PMCC NO. 14 of 2011 and Kiambu West No. 4 of 2011 being an appeal to the Nyeri Provincial Land Disputes Tribunal.**
3. **An order of prohibition against the Principal MAGISTRATE’S Court, Limuru stopping further steps or proceedings in the said suit No. PMCC No. 14 of 2011 and Kiambu West 4/2011, Nyeri Provincial Land Disputes Tribunal in enforcing the decision pending the hearing of this application.**
4. **Any other order that court may deem necessary**
5. **Cost of this application be provided for.**

The Motion is based on the following grounds:

- a) **The applicant is apprehensive that he might lose her parcel of land especially after the Kiambu West District land disputes tribunal ordered that the suit land be given to the 1st respondent.**

- b) **The Land Dispute Tribunal Act, under Section 3(1) provides for the powers of the tribunal which do not include the powers to defensive issues pertaining to land ownership.**
- c) **The Kiambu West Land Dispute tribunal acted in excess of its jurisdiction, illegally and specifically in excess of its powers as provided under Section 3(1) of the Land dispute tribunal Act.**
- d) **The acts and omission of the respondent fly on the face of the rules of natural justice.**
- e) **The acts and omissions of the respondent are ultra vires their power alienated to it by the Land Disputes Tribunal Act, cap 18 in the circumstance of the case.**

The Motion is supported by an affidavit sworn by the applicant on 30th July 2012. In my view that is not the proper procedure for prosecution an application seeking orders of judicial review. Once leave to apply for judicial review is granted under Order 53 rule 1 of the Civil Procedure Rules, the applicant is expected to make the application by way of Notice of Motion within 21 days of the grant of leave. Under rule 1(4) of Order 53 copies of the statement accompanying the application for leave are to be served with the notice of motion, and copies of any affidavits accompanying the application for leave are required to be supplied on demand and no grounds are, subject to the rule, to be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement. However, under subrule (2) thereof the Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application. In other words once leave to apply for judicial review is granted, the applicant is expected to only rely on the statement and the verifying affidavit filed in support of the application for leave which affidavit ought to contain all the evidence intended to be relied upon by the applicant. In other words, unless leave of the Court is sought and granted no further affidavit is permissible in support of the substantive motion. In this case the verifying affidavit is very scanty and comprises of only 3 paragraphs. However, with leave of the Court a supplementary affidavit sworn on 9th July 2012 was filed on 9th July 2012. The supplementary affidavit itself is however similarly economical with the facts and the statement of facts itself though contains evidentiary material does not have any exhibit. I wish to remind parties of the decision by the Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000**, in which the Court citing **Supreme Court Practice 1976 Vol. 1 at Para. 53/1/7 & R. vs. Wandsworth JJ. ex Parte Read [1942] 1 KB 281** held that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the facts ought to have been contained in the verifying affidavit to which exhibits also ought to have been annexed other than in the statement. To make matters worse the said affidavit filed with the Notice of Motion is drawn in the second person rather than the first person so that instead of the deponent referring to herself as "I" she instead refers to herself as "the applicant". That is not the way in which affidavits are drawn.

The applicant's case is that on 1st July 2006 the 1st respondent entered into a sale agreement for the sale of land parcel No. Limuru/Kamirithu/2787 situated in Limuru, Kiambu District with the applicant's husband, **Dominic Waweru Mbugua** (the deceased) which agreement was attested to by the applicant who similarly attended the Land Control Board. However, the 1st respondent contends, a contention which the applicant disputes, that the deceased also sold land parcel no. Limuru/Kamirithu/2786 to the 1st respondent in the sum of Kshs 500,000.00. The 1st respondent accordingly lodged a complaint with Limuru Land Disputes Tribunal claiming access to the plots of land. The said Tribunal decided that the 1st respondent is the sole owner of the said land parcel no. Limuru/Kamirithu/2786 despite having no such powers and further directed that the Director of Surveys show the beacons and access road of the said plot and ordered the applicant to immediately cease the use of the same parcel of land. The said award was duly adopted by the Senior Principal Magistrate, Limuru on 29th September, 2011. In the applicant's view all the foregoing orders were ultra vires the powers of the Tribunal hence the orders sought herein.

In opposition to the application, the 1st respondent swore an affidavit on 23rd August 2012 in which he deposed that he is the registered proprietor of Plot No. Limuru/Kamirithu/2786 having acquired the same from the applicant's said late husband. According to him, he had previously acquired the neighboring plot

No. Limuru/Kamirithu/2787 from the deceased. The said acquisition was made in 2006 and the applicant never challenged the same. According to him, when the said Plot was surveyed, provision was made for access and his case before the Tribunal was that the applicant had blocked access to the said plot No. 2786 and had trespassed and was cultivating his parcel of land hence these proceedings are meant to sanction the said actions. According to the respondent's legal advisers, the Land Disputes Tribunal Act empowers the Tribunal to decide on matters of boundaries and trespass to land and hence the Tribunal was within its powers to decide the dispute between himself and the ex parte applicant. In his view the issue of ownership of plot No. 2786 was not the issue before the Tribunal and hence cannot be said to have validated a void transaction. Since the applicant has no title to the suit parcel, the grant of the orders sought will be in vain since the applicant will not be able to get title thereto and will remain a trespasser hence the applicant's claim belongs to the realm of Land and Environment Court. According to the respondent, he had agreed to allow the deceased occupy the suit plot while awaiting the harvesting of his crops and relocation of the deceased's semi-permanent house while the respondent would be using the deceased's gate to access the suit property but this access was denied the respondent after the death of the deceased by the applicant. In his view the application ought to be dismissed.

On behalf of the ex parte applicant it is submitted that the Tribunal by determining the issue of ownership of the eight acres of the land acted ultra vires its powers under the Land Disputes Act No 18 of 1990. In support of the said submissions the applicant relies on **Republic vs. Nyeri Provincial Appeals Committee ex parte Ruth Wangui Mwaungi & 11 Others [2012]**; **James Alukoye Were vs. Lurambi Divisional Land Disputes Tribunal and Another [2006]**; **Republic vs. Chairman Nandi Hill Division Land [2006]**; **Republic vs. Chairman, Bumula Lands Disputes Tribunal ex parte Chrisostim Barasa Sangura & 4 Others [2006]**; **Keziah Kitazi vs. Sabatia Land Disputes Tribunal & Another [2006]**; **Jacinter Mugure Kageche vs. David Ng'ang'a Kioi [2006]**; **Republic vs. Chairman the Land Disputes Tribunal Lurambi Division & Another [2006]**.

In the applicant's view the challenge is to the Tribunal's power to declare the 1st respondent "sole owner" of plot no. 2786, something which the Tribunal lacked jurisdiction to do hence the matter falls squarely within the jurisdiction of the Court under section 159 of the Registered Land Act. Since the Tribunal lacked the jurisdiction to adjudicate matters of ownership or sale of land, its decision and everything that flowed from it is null and void including the judgement that was entered by the said Magistrate.

On behalf of the 1st respondent, it was submitted that the fact that the applicant claimed that the 1st respondent had not bought and did not own the suit land as well as the examination by the Tribunal of the title documents did not oust the Tribunal's jurisdiction. Since none of the parties was claiming land from the other as the matter before the Tribunal was in respect of a dispute revolving around trespass to land hence the cases relied upon by the applicant are distinguishable. On his part the respondent relies on **Muhia vs. Mutura [199] 1 EA 209** and submits that the Tribunal had the jurisdiction to decide the matter and the application ought to be dismissed with costs.

The issue for determination by the Court in this application is whether the Tribunal had the jurisdiction to entertain the dispute that was before it. The said Tribunal's jurisdiction 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.

It therefore follows that the Tribunal had jurisdiction to determine disputes revolving around division of, or the determination of boundaries to land, a claim to occupy or work land and trespass to land. That at

the time of the determination of the dispute the suit land was registered in the name of the 1st respondent is not in doubt. Accordingly, it does not make sense to argue that the 1st respondent's claim was in respect of title to land. In his statement of claim the 1st respondent prayed for orders that the surveyor marks the boundaries of the disputed parcels of land and compels the applicant to vacate the suit land and cease its utilization. He also claimed for compensation. A party from the claim for compensation, the 1st respondent's claim to determination of the boundary fell squarely within the jurisdiction of the Tribunal. If the Tribunal was to finally determine the boundary dispute it only followed that it had to secure the services of a surveyor as long as its determination did not have the effect of interfering with the existing titles. By directing the applicant to cease using the suit parcel of land, it is my view that that was an order consequential upon the determination of the issue whether or not the applicant was a trespasser on the suit parcel of land. To contend that the order for cessation of the occupation and use of the disputed land went to the determination of the title to the suit land is to overstretch title to land and hence render the Act not worth the paper it was written on. In its determination the Tribunal stated that the 1st respondent is the sole owner of parcel of land in dispute being plot no 2786. It is this finding that the applicant views to have been a determination of ownership or title to land. In my view the applicant's position is incorrect. The Tribunal only stated what the position was and made no determination with respect to the title to the disputed land since that was not the issue in contention. The other determinations on the cessation of the use of the suit land as well as the survey were necessary consequential orders to the determinations of boundary and trespass and were within the jurisdiction of the Tribunal. As was held in **Muhia vs. Mutura [1999] 1 EA 209** (supra) the issue of trespass was within the jurisdiction of the Land Disputes Tribunal. In determining whether or not the Tribunal was seized of the jurisdiction, the authorities are clear that the Court looks not at the wordings employed by the Tribunal but the effect of the determination so that where 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, the Courts have been in clear in their minds 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. See **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002.**

Similarly, in the present case despite the applicant's reliance on semantics, it is clear that the Tribunal was dealing with a dispute in respect of determination of boundary and trespass to land and it has not been alleged that it had no jurisdiction to deal with the same.

In the premises I find no merits in the Notice of Motion dated 30th July 2012 which is hereby dismissed with costs to the 1st respondent.

Dated at Nairobi this 26th day of February 2013

**G V ODUNGA
JUDGE**

Delivered in the presence of:

Mr Muturi for Mr Mbugua for the applicant and Mr Kiura for the 1st respondent