



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JR MISC APPL. NO. 156 OF 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

AND

**IN THE MATTER OF AN APPLICATION BY ELIJAH KAPOYA MOSIRO TO APPLY FOR
THE ORDERS OF CERTIORARI AGAINST THE RESPONDENTS AWARD READ AND
CONFIRMED ON 24TH MAY 2011, BY THE SENIOR RESIDENT MAGISTRATE'S COURT
AT KAJIADO**

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACTS 1990

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

KAJIADO DISTRICT LAND DISPUTES TRIBUNALS.....RESPONDENT

KIRANGARI INVESTMENT LIMITED.....INTERESTED PARTY

EX-PARTE

ELIJAH KAPOYA MOSIRO

JUDGEMENT

1. The prayers for consideration in this judgment are contained in the Notice of Motion dated 6th July, 2011 and filed in court on 20th July, 2011. In the said application the *ex parte* applicant **Elijah Kapoya Mosiro** is asking for:-

- a. **An order of certiorari do issue for the purposes of removing into the High Court and quashing the respondents purported award as read and confirmed on 24th May 2011 vide L.D.T Case No. 44 of 2010 at the Senior Resident Magistrates Court at Kajiado.**
 - b. **That cost of the application be provided for.**
2. The application is supported by a statutory statement filed on 24th June, 2011, an affidavit sworn by the said **Elijah Kapoya Mosiro** on the same date and other documents filed in the cause. The applicant's case is that through an application dated 25th March, 2010, Kajiado District Land Disputes Tribunal (hereinafter referred to as tribunal), the respondent herein filed an award at the Senior Resident Magistrate's Court at Kajiado for confirmation. The said award was borne out of tribunal case No.44 of 2010 regarding deliberations over land parcel No. Ngong/Ngong/11077, which is registered in the name of **Kapoya Ole Mosiro** the deceased in a case pending before the High Court, Succession Cause No. 1067 of 1991. The Applicant's statement of facts lists the grounds upon which the prayers are sought as follows:-
- a. **That by issuing the said award, the tribunal was dealing with matters *subjudice* H.C.S.C No.1067 of 1991 at Nairobi, as Land parcel No.11077 is part of the estate of the late Kapoya Ole Mosiro**
 - b. **That in deliberating on and issuing/apportioning land reference number Ngong/Ngong/11077, the tribunal acted *ultra vires* its mandate.**
 - c. **That such an award was in conflict with the *lis pendens* doctrine, and the appropriate forum would have been an application in the cause aforesaid.**
 - d. **That the respondent in the tribunal award is an entity unknown at law, and hence the entire award is fatally defective *ab initio* and hence unenforceable.**
 - e. **That the entire award is a gross travesty of justice and tramples on the very provisions of statute that establish the tribunal and its mandate as expressly laid out therein.**
3. The tribunal's action is what the Applicant challenges in these proceedings.

INTERESTED PARTY'S CASE

4. The interested party opposed the application through two replying affidavits, one sworn on 10th November, 2011 and a further replying affidavit sworn on 30th October, 2012; both affidavits were sworn by **Walter Njunge Mungai** a director of the interested party. He avers that the application should be dismissed because:-
- a. **The interested party has a locus standi as is a registered limited company carrying on business in Kenya having been registered on the 21st August, 1979 and thus is a legal entity.**
 - b. **The interested party bought land reference no. Ngong/Ngong/6548 measuring 12 acres from the deceased Kapoya Ole Mosiro in the year 1984. This parcel of land was hived off from Kapoya's land reference no. Ngong/Ngong/11077.**
 - c. **The interested party then subdivided its land and created access road to the subdivisions.**
 - d. **The access road created by the interested party was from its 12 acres and not from Kapoya's land reference Ngong/Ngong/11077.**
 - e. **The interested party carried out these improvements on land reference No. Ngong/Ngong/6548 during the lifetime of the late Kapoya Ole Mosiro.**
 - f. **That after the death of Kapoya Ole Mosiro, a road encroachment boundary dispute arose between the estate of Kapoya Ole Mosiro parcel land reference No. Ngong/Ngong/11077 and the interested Party's land reference No. Ngong/Ngong/6548**
 - g. **The interested party then referred the matter to the tribunal to adjudicate on the boundary dispute and establish whether the access road curved out of land reference No. Ngong/Ngong/6548 belonging to the interested party encroached on parcel No. Ngong/Ngong/11077 which is subject to an administration cause pending in court.**

- h. **The tribunal referred the matter to a land surveyor and relying on the surveyors report and all other evidence brought before it exercised its jurisdiction under section 3 of the Land Disputes Tribunal Act (repealed) and found in favour of the interested party**
- i. **That the dispute dealt with by the tribunal was not *sub judice* H.C.S.C. 1067 of 1991 touching on the estate of the late Kapoya Ole Mosiro as the two are distinct parcels of land and dealing with the issue of boundary did affect the administration of the estate.**
- j. **The applicant should have applied to the Land Registrar for boundary determination to address his grievance with the decision of the respondent.**

RESPONDENT'S CASE

5. The Respondent opposed the application through grounds of opposition filed on 1st March, 2012 as follows:-
 - a. **The disputed it adjudicated was one of boundary determination and right to occupy land within its powers and mandate pursuant to provisions of section 3 of the Land Disputes Tribunal Act(repealed).**
 - b. **As such, it did not deal with the matter subjudice HCSC No. 1067 of 1991 or any other matter as the issue for determination before the respondent were strictly within the provisions of section 3 of the Land Disputes Tribunal Act (repealed).**

DETERMINATION

6. 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.

7. 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 Interested Party is not in doubt. Therefore the dispute cannot have been with respect to title to land. The issue before the tribunal was the determination of whether the access road at the centre of the dispute is on the Kapoya Ole Mesiro's estate parcel No. Ngong/Ngong/11077 which is subject to an administration cause pending in court or on the interested party's parcel No. Ngong/Ngong/6548. A determination whether the access road is on one parcel of land and not another would in essence amount to a determination of boundaries to land and whether or not the construction of access road would not have the effect of trespassing on one's land. In other words, in substance the dispute was in respect of trespass and a determination of the boundaries. In making a determination therefore, the respondent submits that with the consent of both parties it engaged a qualified surveyor who conducted a survey and confirmed that the access road was within the interested party's land and there was no encroachment on the deceased's land which the applicant has an interest in. Further, the interested party submits that although the applicant abandoned the tribunal proceedings half way, other family members of the late Kapoya remained and were part of the proceedings; a fact the applicant has not denied.
8. As was held in **Muhia vs. Mutura [1999] 1 EA 209** 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.**

9. Conversely, in order to determine whether or not a dispute is in respect of a boundary, trespass or title to land it is not the words used but the substance of the dispute that is to be considered. Accordingly, I find that the dispute was substantially a boundary and trespass dispute and therefore the respondent did not act *ultra vires* as it had jurisdiction to hear and determine boundary disputes by virtue of the section 3 of the Land Disputes Tribunals Act (repealed). Further, its award did not affect the land subject to the said pending succession cause. Consequently, I find no merit in the Notice of Motion dated 6th July, 2011 which I hereby dismiss with costs to the Respondents and the Interested Party.

Dated at Nairobi this 21st March 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Ndolo for Chege for Interested Party