REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 285 of 2011

In the matter of an application by Naumi wambui gachucha for leave to apply for orders of certiorari

In the matter of: the constitution of Kenya

In the matter of: land parcel number ruiru/kiu/block 2/2511

In the matter of: land dispute tribunal act No. 18 of 1990

In the matter of: land dispute tribunal case No. 8 of 2010

In the matter of: the resident magistrate court at thika in D.O case no. 81 of 2010

In the matter of: prerogative orders of certiorari.

Naomi wambui gachucha……Applicant
Versus

Chief magistrate thika…….1st Respondent

Keziah mugure Njuguna……...2nd Respondent

JUDGEMENT

1. The prayers for consideration in this judgment are contained in the Notice of Motion dated 23rd November 2011 and filed herein on the 24th November, 2011. In the said application the *ex parte* Applicant **Naomi Wambui Gachucha** is asking for:-

a. An Order of certiorari seeking orders of certiorari to quash the proceedings and record relating to the Ruiru Land Disputes Case No. 8 of 2010 between Naomi Wambui Gachucha and Keziah

Mugure Njuguna and all consequential orders.

b. An Order of certiorari to remove into High court and quash the decree of the Resident Magistrate Thika issued on 10th August, 2011 in its D.O case Number 81 of 2010 and all the consequential orders made there under.

c. An Order condemning the 2nd Respondent to pay costs.

2. The application is supported by a statutory statement filed on 14th November, 2011, an affidavit sworn by the said **Naomi Wambui Gachucha** on the same date and other documents filed in the cause. The Applicant's case is that the Ruiru District Land Disputes Tribunal (hereinafter referred to as tribunal) the 3rd Respondent herein made an award to the effect that the Land Parcel Number **Ruiru/Kiu/ Block 2/ Githunguri 2511**belongs to the 2nd Respondent one **Keziah Mugure Njuguna**. The said award was confirmed by the Provincial Lands Disputes Appeal Tribunal and adopted as the judgment of the court by the Resident Magistrate's court Thika and a decree thereof issued on 10th August, 2011.It is the Applicant's submission that the Ruiru Land Disputes Tribunals acted *ultra vires* as it had no jurisdiction to deal with proceedings relating to title to land or beneficial interest therein thus any subsequent orders filed with the 1st Respondent were null and void. In making the said award, the Applicant contends that the tribunal made a disposition of land from the Applicant to the Respondent which action fell outside the mandate of the Tribunal as conferred by Section 3(1) of the ***Land Disputes Tribunal Act*** (hereinafter referred to as the Act). The Applicant relied on **Republic & 2 Others –v- Chairman Migori District Land Tribunal-Awendo & Another [2011]eKLR.**

3. In opposition to the application, the 2nd Respondent swore an affidavit on 3rd January, 2012 in which she deposed that she was the plaintiff in the dispute before the tribunal. She contended that present application is an abuse of the court process as the matter had been heard and determined and a decree issued. She attached among others a copy of a title deed showing the suit property is registered in the name of **Samuel Njuguna Karera**, her deceased husband and a certificate of confirmation of grant dated 16th July, 2008 to show she is the administrator of his estate. The other Respondents did not appear.

4. Section 3(1) of the Act specified the jurisdiction conferred to Land Disputes Tribunals is in the following terms:

(1) subject to this Act, all cases of 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

5. 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 2nd respondent is not in doubt. Accordingly, it is clear that the dispute was not in respect of title to land. According to the Tribunal, the 2nd respondent's claim was that in the process of registering the estate into her names in 2009, the 2nd respondent, who was the administrator of the estate of her deceased husband, the registered proprietor of the suit land, discovered that the *ex parte* applicant had actually settled and constructed houses on the suit land. It is therefore the settlement of the *ex parte* applicant on the suit land that provoked the dispute before the Tribunal. There was no claim as far as the Court can see with respect to the title in question since the legal title was not contested. In my view, in determining whether or not the Tribunal was seized of the jurisdiction, the Court ought to look not at the wordings employed by the Tribunal but the effect of the determination. That, in my view, was the effect of the determination in See **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil**

Appeal No. 256 of 2002, in which the Court of Appeal held 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 Act.

6.After hearing the dispute the Tribunal found that the disputed parcel of land belongs to the late **Samuel Njuguna Karera** whose administrator is his wife **Keziah Migure Njuguna**, (the 2nd Respondent), so it should remain. In its determination, the Tribunal therefore did not interfere with the title to the disputed land but simply stated the legal position of the disputed parcel of land. That determination cannot, in my view, amount to a determination of the title to the disputed land. The *ex parte* applicant's contention that she is the owner of the suit land with the mandate to occupy, use and do whatever she legally likes with her land was not supported by the evidence that was presented before the Tribunal where she failed to appear and tender any evidence.

7.It is therefore my view that the 2nd respondent's cause of action was for the ex parte applicant to vacate the disputed parcel of land on the ground that the said land was the property of her deceased husband whose estate she was administering. That dispute was substantially an issue of trespass and not an issue of title. The law is that a claim for trespass can be made by a party claiming possession and not necessarily the person in whom the legal title is reposed. According to ***Winfield and Jolowicz of Tort*** 12th Edn. by **W V H Rogers** at page 361:

"Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another's right to possess (the "*jus terii*") unless he can prove that he acted with that person's authority. Even the wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf."

8.Since the dispute was, in my view, substantially an issue of trespass to land, the matter was squarely within the jurisdiction of the Tribunal and as was restated in **Muhia vs. Mutura [1999] 1 EA 209** the issue of trespass was within the jurisdiction of the Land Disputes Tribunal.

9.Although the Provincial Appeals Committee found that the land legally belongs to the 2nd respondent, nothing turns on that finding since the quashing of the Committee's decision would leave the Tribunal's decision undisturbed. It is trite that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders being discretionary, their grant is 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. Being discretionary, the decision whether or not to grant the same must be exercised on the evidence of sound legal principles and the court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. The Court may therefore 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 fulfill 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 realized or where to grant the same would merely serve an academic purpose since it would not have the effect of changing the positions of the parties before the Court. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

10.In my view to grant the orders sought herein would have the effect of confirming the title of the disputed land in the name of the deceased which is what the Tribunal determined.

11.Before concluding this judgement, I wish to deal with one pertinent issue raised by the 2nd respondent.

It was contended by the 2nd respondent that the application is an abuse of the court process as the matter had been heard and determined and a decree issued. This position calls for an examination of the status of an award made by the Tribunal on being adopted as a judgement of the Court. **Khamoni, J** in **Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex Parte Kariuki [2005] 2 KLR 10**held:

"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."

12.That however does not mean that the entry of judgement by the Court in terms of the Tribunal has the effect of sanitizing or validating the Tribunal's award if the same was made without jurisdiction. It must be noted that the role of the Court is simply to enter the judgement and not to decide whether or nor the Tribunal's award was valid hence the issue of validity or otherwise of the Tribunal's decision is not an issue at that stage. However, in judicial review proceedings, the High Court is empowered to determine whether or not the decision of the Tribunal which led to the entry of judgement was itself valid. If the same is found to be invalid it would follow that the decision of the Court which derives its validity from the award would itself be invalid for the same reason. It is trite that an action taken without jurisdiction is void *ab initio* and if an act is void, then it is in law a nullity and it is not only bad, but incurably bad. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. See **Macfoy vs. United Africa Co Ltd [1961] 3 All ER 1169 at 1172.**

13.Therefore where the decision of the Tribunal is void, a Court decision cannot be superimposed on it and be expected to stand. The Court decision itself will have to collapse once the Tribunal's decision gives way.

14.In the foregoing premises I find that no useful purpose will be served by granting the Motion dated 23rd November 2011. The same is therefore disallowed but with no order as to costs.

Dated at Nairobi this 26th day of April 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr. Mbuvi for Mr. Karuga for the applicant