



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 660 of 2007

REPUBLIC.....APPLICANT VERSUS

NYANDARUA LAND DISPUTES TRIBUNAL

(KIPIPIRI

DIVISION).....1ST RESPONDENT

JOHN NJOGU MUIGAI.....2ND RESPONDENT

NJENGA MUIGAI.....3RD RESPONDENT

JOYCE WAMBUI KUNGU.....4TH RESPONDENT

JANE WANJIRU MUCHUHA.....5TH RESPONDENT

EX PARTE: JOSEPH KIMANI KIHU ALIAS KIMANI NDUNGU NJOROGE

JUDGEMENT

1. In their Notice of Motion dated 10th September, 2007 the *ex parte* applicant herein, **Kimani Kihui alias Kimani Ndungu Njoroge**, seeks the following orders:

a. **THAT an order of certiorari do issue to remove to this Honourable Court the proceedings and award of the Nyandarua Land Dispute Tribunal (Kipipiri Division) in case No. 86 of 2006 for purposes of quashing the same.**

b. **THAT the cost of this application be borne by the Respondents.**

2. The application is supported by Statement of Facts filed on 12th July 2007 and Verifying Affidavit sworn by the applicant herein on 11th July 2007. According to him, **LR No. Nyandarua/Turasha/188** (hereinafter referred to as the suit parcel of land) was allotted to his deceased father **Kihui Kabiro Ngugi** (the deceased) who died on 14th July 1998, in the year 1963. According to the applicant, the deceased died intestate and at the time of his death he had sold part of his aforesaid parcel to *inter alia* **Njogu Mungai** (2½ acres), **Njenga Muigai** (1 acre) and **Kihara Gatuhi** (5 acres) but had not transferred the same to them. The applicant subsequently applied for and was issued with grant of letters of administration in respect of the estate of the deceased vide **Nyahururu PM's Court Succession Cause No 12 of 2000** on 11th May 2000. Before the death of the deceased, the deceased had instituted a case against **Mwangaza Primary School** in **Nakuru HCCC No. 473 of 1995** for trespassing on part of the

said parcel of land which suit is still pending and which was inherited by the applicant. Since the said suit is still pending it is deposed that the grant is yet to be confirmed since the disputed portion forms part of the estate to be distributed. However, the 2nd to 5th respondents herein filed a land dispute before the 1st respondent seeking orders compelling the applicant to transfer various portions sold to them by the deceased. On receipt of the said notice to defend himself he received the same under protest on the ground that the said transfer could only be done after the determination of the pending case. According to him as **Joyce Wambui Kungu** and **Jane Wanjiru Muchuha** are daughters of **Kihara Gatuhi**, who is also deceased, he included **John Njogu Muigai**, **Njenga Muigai** and **Kihara Gatuhi** as purchasers for value in the deceased's Succession Cause since he has no intention of depriving them of their portions of land. According to him, since **Joyce** and **Jane** are not legal representatives of the estate of their father, they are not legally entitled to acquire the portion belonging to their deceased father in isolation to the rest of the beneficiaries thereof. According to the applicant, the 1st respondent Tribunal acted in clear contravention of the powers conferred to it under Section 3(1) of the Land Disputes Tribunals Act No. 18 of 1990 by dealing with Registered Land outside the **Registered Lands Act** and in dealing with matters pending in court under the **Law of Succession Act Cap 160** Laws of Kenya. It is further contended that the said Tribunal also erred in purporting to distribute the estate of a deceased person and awarding portions of land to persons who are not legally entitled to claim the same. The Respondents, it is deposed, have filed an application at the Principal Magistrate's Court Nyahururu vide land Disputes Case No. 16 of 2007 and intend to have the said illegal awarded adopted a judgement of the Honourable Court. It is further deposed that the process followed by the Respondent in having the land parcels transferred to them is irregular as they ought to have moved the court vide succession Cause which is pending in court if at all. Since the exact portions of the land belonging to the Respondents have not been determined, it is deposed that the Respondents are likely to settle themselves in portions of land belonging to other beneficiaries. It is further deposed that the tribunal erred in dealing with the property of a deceased person a power outside the scope of the jurisdiction conferred upon the said Tribunal hence the said Tribunal proceeded on the wrong principles of the law and arrived at a verdict that was illegal, null and void *ab initio*.

3. In opposing the application, the Respondents on 19th October 2007 filed an affidavit sworn by **John Njogu Muigai** on 18th October 2007. According to the deponent, the application is a clear abuse of this court process as it does not comply with the fundamental principles of law and should be struck out. Since the requisite notice to the registrar has not been issued, it is contended that the application cannot be sustained since it is bad in law, incompetent, untenable and abuse of process for want of compliance with the mandatory requirements of the law.

4. It is deposed that the said Respondents bought the respective parcels of land from the applicant's father in 1990 which is over 17 years ago, a fact which is not disputed and that the issues raised herein by the applicant were never raised before the Tribunal by the applicant who was a witness to the sale transaction. Since they are purchasers for value, the deponent contends that disputes between the applicant and third parties ought not to interfere with the Respondents' proprietary rights to their respective parcels. According to the deponent, they have been in occupation of their respective parcels of lands for the last 17 years hence the applicant's allegation that they occupy the land in dispute between the applicant and Mwangaza Primary School is just an afterthought. Although given an opportunity to appeal, it is contended that the applicant chose not to do so but instead opted to institute these proceedings when he arrogantly failed to attend the Tribunal proceedings. According to the Respondent, since the case before Nyahururu Principal Magistrate's Court is still pending this court does not have the requisite jurisdiction to hear this matter hence the Notice of Motion filed on 11th September 2007 should be dismissed.

5. According to the submissions filed on behalf of the *ex parte* applicant, in ordering the subdivision and registration thereof, the Tribunal acted without jurisdiction by purporting to deal with ownership of land. Further, it is submitted that the said Tribunal purported to deal with the estate of a deceased person outside the Law of Succession Act Cap 160 Laws of Kenya when the Succession matter was pending before the High Court. It is contended that the said Tribunal purported to deal with land governed under the Registered Land Act Cap 300 Laws of Kenya and proceeded to vest 5 acres of the deceased estate to the 4th and 5th respondents who had no capacity to lodge any claim pertaining to the estate of their

deceased father. In support of his submissions the *ex parte* applicant relies on **Lilian Muranja vs. Kajiado Land Disputes Tribunal Misc. Civil Application No. 689 of 2001, Nakuru Judicial Review Case No. 68 of 2009, Mbotho Mwathi vs. John Chege Mbogo Civil Appeal No. 531 of 2000**. Since the Tribunal dealt with the issue of ownership of land registered in the name of the deceased, the Tribunal's action was illegal, without jurisdiction and a nullity in law and the same should be removed to this Court and quashed.

6. Neither the Respondents nor the Interested Parties filed any submissions in this matter.

7. I have considered the foregoing. The first issue for determination of the Court is the competency of the present application. It is contended that since no notice was given to the Registrar by the *ex parte* applicant before these proceedings were instituted, the said omission renders these proceedings incompetent. It is correct that in 2007 when these proceedings were commenced, Order 53 rule 1(3) of the Civil Procedure Rules enjoined the applicant to give notice of the application for leave not later than the preceding day to the registrar. However, the Court was given powers to extend this period or excuse the failure to give the said notice if good cause was shown. Clearly, therefore the failure to comply with the said rule even then was not necessarily fatal to an application for judicial review. Since then the said requirement has been removed and is no longer necessary. Dealing with the failure by a party to comply with certain procedural requirements in light of allegation of excess of jurisdiction by the Tribunal, Nyamu, J (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** held that despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities. It is my view therefore that taking into account the foregoing and more particularly the fact that the failure to comply with the requirement for notice to the registrar even when it existed was not necessarily fatal coupled with the fact that the said required has been removed, this Court ought to investigate allegations of excess of jurisdiction without undue regard to technicalities of procedure as required under Article 159(2)(d) of the Constitution.

8. The next and most crucial 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.

9. 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 subdivision 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. In the present case the Tribunal directed that the Registrar of Lands Nyandarua District and other relevant government agents should oversee the sub-division and transaction of the pieces of land Nya/Turasha/188 for the claimants but should the objector opt to subdivide the land through succession process, these rightful land buyers should be included in the list of beneficiaries; (be) registered as absolute land owners according to their sizes. In order to implement the said decision it would have been necessary that a subdivision be carried out and new titles to land be issued. That was clearly a jurisdiction that was outside

the Tribunal's under the said provisions.

10. In **Republic vs. The Chairman Keiyo Division L. D. T & Another Ex parte Tabyotin Kabon Ego Eldoret HCMA No. 43 of 2005** Mohammed Ibrahim, J (as he then was) was of the view which view I associate myself with that:

“The interested party’s claim herein does not fall under any of the 3 categories mentioned in section 3 of the Land Disputes Tribunal, Act No. 18 of 1990. Her claim is of a beneficiary to the Estate of the deceased. She has to prove that first, the land registered in the name of the Applicant was part of the assets of the said Estate and secondly that it was registered in the name of the Applicant in breach of any applicable law whether Succession Act or otherwise...The Tribunal therefore have no jurisdiction or mandate to consider the claim by the applicant and it is not an answer to state that the applicant participated in the proceedings and submitted herself to the jurisdiction of the Tribunal since jurisdiction can only be conferred by law and not by consent or conduct of parties.”

11. By directing that the claimants be included in the list of beneficiaries, the Tribunal was in effect trespassing into the jurisdiction of the Succession Court which is the proper court empowered to determine who the beneficiaries to an estate of the deceased are. Accordingly, the Tribunal had no jurisdiction to deal with that matter as well.

12. The other issue raised was that the Tribunal had no jurisdiction to deal with land Registered under the Registered Land Act. I am however not convinced with this line of submission. In my view, what the Tribunal is prohibited from undertaking is a determination with respect to title to land. Otherwise section 3 of the Land Disputes Tribunals Act did not limit the jurisdiction of the Tribunal to lands outside the regime of the Registered Lands Act. I associate myself with the decision of **Khamoni, J** in **Republic vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex parte Kariuki [2005] 2 KLR 10** to the effect that the Legislature, and definitely, framers of the Land Disputes Tribunals Act, knew the Act was intended to give Land Disputes Tribunals jurisdiction to adjudicate over all land in Kenya, including land registered under the Registered Land Act. Therefore in cases where the dispute fell within section 3 aforesaid, it did not matter whether or not the land in question was registered under the Registered Lands Act.

13. On the issue of the pendency of the proceedings before the Nyahururu Principal Magistrate's Court, it is my view that the pendency thereof does not bar this Court from entertaining these proceedings since the said proceedings derive their legality from the decision of the Tribunal and if the decision of the Tribunal is annulled the effect is to terminate the pending proceedings before the Magistrate's Court and where the Court is convinced that the Tribunal's decision is tainted with illegality, nothing prevents this Court from dealing with the matter since under Article 165(6) of the Constitution this Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

14. The Respondents' fear is that they stand to lose their parcels of land which they purchased more than 17 years ago and which they have utilized all this time. That fear, in my view may not be as real as the Respondents may think. If properly advised, the Respondent may still secure orders which will ensure their interests are protected. However, the Tribunal was not the correct place to secure such interests as the Tribunal had no mandate to determine the issues whose resolution they were seeking.

15. It follows that the Notice of Motion dated 10th September 2007 succeeds and is allowed with the result that an order of certiorari is hereby issued removing to this Honourable Court the proceedings and award of the Nyandarua Land Dispute Tribunal (Kipipiri Division) in case No. 86 of 2006 which decision is hereby quashed.

16. The applicants did not comply with the requirements for the giving of notice to the Registrar and as no reason has been given for this omission, there will be no order as to costs.

Dated at Nairobi this 24th April 2013

G V ODUNGA
JUDGE

Delivered in the absence of the parties