



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. APPL. JR. NO. 367 OF 2012

BETWEEN

REPUBLIC APPLICANT

AND

THE CHAIRMAN

KIAMBU LAND DISPUTE TRIBUNAL..... 1ST RESPONDENT

KIAMBU LAW COURTS 2ND RESPONDENT

AND

KIMUHU KIMANDO INTERESTED PARTY

EXPARTE

KING'ARA II KIMANDO

JUDGMENT

Introduction

1. The ex-parte applicant (“applicant”) and the interested party are brothers. It is not in dispute that the applicant is the registered owner of the land parcel known as Kiambaa/Kanunga/921 (“the suit property”). The interested party lodged a dispute at the Kiambu District Land Dispute Tribunal (“the Tribunal”) claiming a portion measuring 0.7 acres. The Tribunal heard the dispute and by a judgment delivered on 12th August 2011, it ordered the applicant to transfer to the interested party 0.7 acres of the suit property.
2. The award of the Tribunal was filed at the *Kiambu Chief Magistrate’s Court, Land Case No. 9 of 2011* where it was confirmed on 29th August 2012 and a decree issued on 6th September 2012.

Application and arguments

3. The applicant has moved this court to challenge the award and subsequent decree by the Notice of Motion dated 24th October 2012 in which he sought the following orders;
 - a. *That an order of certiorari do issue to remove into the High Court for purposes of quashing the proceedings and decree issued on 29th August 2012 in the Chief Magistrate's Court in Kiambu in D.O. Case No. 4 of 2011 as well as the proceedings and award of the Kiambu District Land Dispute Tribunal made on 12th August 2011 in land Dispute Tribunal case No. 16 of 2011 in respect of Land parcel No. Kiambaa/Kanunga/921.*
 - b. *That an order of prohibition do issue to prohibit the Chief Magistrate Court Kiambu and Kiambu District Land Dispute Tribunal and/or their agents from enforcing and or executing the decree issued on 29th August 2012 in D.O. Case No. 4 of 2011 as well as the award dated 12th August 2011 made by Kiambu District Land Dispute Tribunal made in LTD No. 16 of 2011.*
 - c. *That the costs of this application be provided for.*
4. The applicant attacked the decision on the ground that the Tribunal award and subsequent court decree are illegal null and void as the Tribunal lacked jurisdiction to hear and determine the dispute lodged by the interested party in view of **section 3** of the ***Land Disputes Tribunal Act (Repealed)***.
5. Another ground of attack was that the Tribunal case and the consequent decree were *res judicata* as the subject of the dispute was determined in ***Kiambu SRMCC No. 10 of 1989, Mungai Kimando v Kangara II Kimabdo Kingara*** where the interested party was awarded 0.4 acres of Kiambaa/Kanunga/330.
6. In the replying affidavit sworn on 19th November 2012, the interested party deponed that the applicant was appointed a *muramati* or trustee over the land belonging to one Kimando Kingara (deceased) when the land was demarcated in 1958 as Kiambaa/Kanunga/329. The applicant then subdivided it into several parcels; 329 into 874 and 875, parcel 874 into 1482 and 1483 and parcel 875 into 920 and 921. He alleges that some of these parcels were sold off to the detriment of the interested party and other family members. He confirms that he sued the applicant in ***Kiambu Land Case No. 10 of 1989*** where he was awarded 0.4 ha out of parcel 330 but due to fraud but that he has not received anything to date. As he was unable to get his share, the interested party filed the case that is now subject of these proceedings. The interested party argued that as the applicant was a *muramati*, the court should exercise its discretion and decline to quash the decision of the Tribunal as this will lead to further litigation.
7. The interested party also opposed the application on the ground that it was time barred under **Order 53(1)** of the ***Civil Procedure Rules*** as read with **section 9(3)** of the ***Law Reform Act*** as the award of the Tribunal was made on 12th August 2011 and was not challenged until 5th October 2012 which was outside the six months of the decision provided by the law. Counsel for the interested party argued that this time could not be extended. He relied on the case of ***Re Gideon W. Gathunguri [1961] EA 520***. He further argued that the entering of the decree by the magistrates court and the decree dated 29th August 2012 was not a decision capable of being quashed but was a mere administrative act which was required by **section 7** of the ***Land Disputes Act*** in order to enforce the award. Counsel relied on ***R v Tongaren Land Disputes Tribunal ex-parte Patrick Mukwana Kitale HC Misc. Appl. No. 23 of 2008 (Unreported)*** and ***R v Naivasha District Tribunal and Another Nakuru Misc. Appl. No. 523 of 2004 (Unreported)*** to support this proposition.
8. Finally on the issue of *res judicata*, the interested party averred that he was not party to ***SRMCC No. 10 of 1989*** and the subject parcel in the matter was parcel No. 330 and not the suit property.

Determination

9. I have considered the rival depositions and submissions and taken into account the important

principle that judicial review is concerned with the process and not merits of the decision impugned.

10. The central issue to be resolved is whether the application before the court is statute barred by reason of **Order 53(1)** of the **Civil Procedure Rules** as read with **section 9(3)** of the **Law Reform Act** which provides that no leave shall be granted to an applicant to apply for an order of certiorari to quash a decision or other proceedings unless the application for leave is made not later than six months after the date of the proceedings.
11. A resolution of that issue depends on whether the award ceases to exist independently once it is adopted by the court so that the time for applying for an order of certiorari is counted from the date of delivery of the award and not the date of the decree of the court adopting the award. The interested party relied on the case of **R v Tongaren Land Disputes Tribunal ex-parte Patrick Mukwana (supra)**, where the court was of the view that, “*Once a decision of the Tribunal is adopted it ceases to continue to exist in law. Instead, it is the judgment and decree ensuing therefrom that takes its place. It would be absurd to have in existence both the award and the decree or judgment at the same time..... Once the adoption of the award takes place, unless it is set aside, the award ceases to exist in law for the purpose of quashing. Unless a person aggrieved by the award to who judicial review is available moves to court before the award is adopted as a judgment of the court first and causes it to be set aside the judgment so entered pursuant to the award, the application for leave is misplaced.*”
12. With respect, I am constrained to depart from this reasoning as it unnecessarily constrains the court jurisdiction to correct errors which is the hallmark of judicial review (see **R v Judicial Commission of Inquiry into the Goldenberg Affairs and 3 Others ex-parte Mwalulu and 8 Others Nrb Misc. Appl. 1274 of 2004 [2004]eKLR**). Once the court adopts the award, the award itself merges into the judgment of the court and ceases to have an independent existence and there is no reason it cannot be quashed by an order of judicial review. There is nothing in the **Land Disputes Act** that displaces the High Court judicial review jurisdiction upon the adoption of the award by the Magistrates Court and none should be implied.
13. The interested party also relied on **R v Naivasha District Tribunal and Another (supra)** where the court struck the application for judicial review as it was filed out of time. This case can be distinguished on its own facts as the learned judge found that, “*What the applicant seeks to be quashed is the Tribunal award and the Appeals Committee’s decision thereon and not the subordinate court’s order adopting the award. The applicant’s verbatim prayer makes this quite clear.*” This shows that the court was guided by the prayers the applicant had sought.
14. In the present case, the applicant has prayed that the proceedings and decree in **Kiambu Land Case No. 4 of 2011** issued on 29th August 2012 be quashed. As the application was filed on 5th October 2012, it is within the 6 months limited under **Order 53(1)** of the **Civil Procedure Rules** as read with **section 9(3)** of the **Law Reform Act**.
15. The next question then is whether the decision made by the Land Disputes Tribunal is *ultra vires*. The jurisdiction of the Tribunal is provided under **section 3** of the **Land Disputes Act** which states as follows;
 - 3(1) Subject to this Act, all cases of a civil nature involving a dispute as to-
 - a. the division of, or determination of boundaries to land, including land held in common;
 - b. a claim to occupy land
 - c. trespass to land

shall be heard and determined by a Tribunal established under section 4.
16. According to the proceedings before the Tribunal, the interested party’s case was the he was

entitled to 0.4 acres of Plot No. 330 which the court had ordered that he be given. The Tribunal observed that the applicant was trustee of the Plot on behalf of the family and that he had wrongfully deprived the interested party of his entitlement hence the direction to the applicant to give up 0.7 acres. The issue before the tribunal was thus not merely a boundary dispute in terms of **section 3(1)(a)** of the **Land Disputes Act** but an attempt to enforce the duties of the applicant as trustee of the family. The court in ***Sarah Nasel Leitepan v Attorney General and 4 Others, Nairobi Petition No. 105 of 2013*** observed that, “[23] *The jurisdiction of the Land Disputes Tribunal is limited and does not include dividing the property of any person or ordering any person to transfer land to another person nor does it include the determination of the validity of a sale agreement.*”

17.I therefore find and hold that in so far as the Tribunal proceed to subdivide the suit property which was registered in the applicant’s name. It proceeded outside the confines of its jurisdiction and its decision must therefore be quashed. I decline to comment on the issues concerning the applicant was a *muramati* or whether the proceedings before the Tribunal were *res-judicata* as these may be issues of contest in further proceedings.

18.Finally, as regards the repeal of the **Land Disputes Act**, I note that the **Environment and Land Court Act, Act No. 19 of 2011** commenced on 30th August 2011 and the award was saved by **section 30(1)** of the Act. As the award has been quashed, the issue is now a moot point.

Disposition

19.I therefore allow the Notice of Motion dated 29th October 2012 and order as follows;

- a. An order of certiorari be and is hereby issued quashing the proceedings and decree issued on 29th August 2011 in ***Kiambu Land Case No. 4 of 2011*** as well as the proceedings and award of Kiambu Land Disputes Tribunal made on 12th August 2011 in ***Land Dispute Tribunal Case No. 16 of 2011*** in respect of Kiambaa/Kanunga/921.
- b. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 9th day of September 2013

D.S. MAJANJA

JUDGE

Ms Mwangi instructed by Waithira Mwangi and Company Advocates for the ex-parte applicant.

Mr Oduk instructed by Oduk and Company Advocates for the interested party.