



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO.12 OF 2012

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW BY
WAY OF CERTIORARI**

AND

**IN THE MATTER OF : THE LAND DISPUTES TRIBUNAL'S ACT NO 18 O
1990(REPEALED)**

**THE REGISTERED LAND ACT CAP 300 LIMITATION OF ACTIONS ACT CAP 22 LAWS
O KENYA. THE ENVIRONMENT AND LAND COURT ACT 2011**

IN THE MATTER OF: LAIKIPIA WEST DISTRICT RUMURUTI DIVISION

LAND DISPUTES TRIBUNAL CASE NO:B1/04 & NYAHURURU

**PRINCIPAL MAGISTRATE'S COURT LAND DISPUTE CASE NO: 28 OF 2011 AMS
MACHARIA CHEGE-VS-JOSEPH MBURU KIMANI**

REPUBLIC.....APPLICANT

VS

LAIKIPIA WEST DISTRICT RUMURUTI DIVISION

LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

NYAHURURU SENIOR

PRINCIPAL MAGISTRATE'S COURT.....2ND RESPONDENT

AND

AMOS MACHARIA CHEGE.....INTERESTED PARTY

EX-PARTE

JOSEPH MBURU KIMANI.....SUBJECT

RULING

Pursuant to the leave granted to the *ex parte* applicant (herein after called the subject) on 5th March, 2012 the subject, Joseph Mburu Kimani, brought the notice of motion dated 8th March, 2012 seeking an order of *certiorari* to remove to this court for purposes of being quashed the proceedings and award of Laikipia West District Rumuruti Division Land Disputes Tribunal Case No. B1/04 made on 22nd September, 2011 and the proceedings and the decree of Nyahururu Senior Principal Magistrate's Court Land Dispute Case No.28 of 2011; **Amos Macharia Chege** vs. **Joseph Mburu Kimani** issued on 22nd February, 2012.

The application is premised on the grounds that the tribunal erred in dealing with a dispute touching on Agricultural land registered under the Registered Land Act, Cap 300; that the tribunal erred in dealing with a claim which was time barred by virtue of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. Further that the tribunal by dealing with ownership of land and ordering the cancellation of a title deed acted in excess of its powers under the Land Disputes Tribunals Act (Repealed) and that the Nyahururu Principal Magistrate's Court erred in receiving and adopting the award.

The application is supported by the affidavit of the subject sworn on 14th March, 2012 in which reference is made to the statement of facts accompanying the application for leave, the affidavit verifying the facts and the order of the court granting him leave to apply for Judicial review.

The subject contends that the tribunals established under the Land Disputes Tribunals Act No.18 1990, do not have the power to adjudicate over land registered under the Registered Land Act, that by determining the issue of ownership or title to the suit property the tribunal acted in excess of its powers under section 3(1) of the Land Disputes Tribunals Act.

In reply the interested party contends that he balloted for and got allocated the suit property in 1984 having paid Kshs. 3440/=; that he immediately took possession of the suit property and ever since then he has had uninterrupted occupation of the same; that the subjects claim over the suit property is not legitimate because it is not supported by any authenticate or legitimate documents. Further that owing to the long uninterrupted time he has been in occupation of the suit property, he has become the owner of the suit property by prescription (adverse possession); that both the members of the Provincial Administration (D.O Rumuruti) and the Tribunal acknowledged his interest on the suit land and not that of the subject; that the award of the tribunal was legally and validly adopted by the court; and that neither the tribunal nor the lower court acted in excess of its powers.

It is further contended that the application is incompetent as the proceedings or decree sought to be quashed have neither being annexed nor authenticated; and that the application has been overtaken by events as the award and decree sought to be quashed has ever since being executed and a title deed issued to the interested party.

Parties with the concurrence of the court agreed to have the application disposed off by way of written submissions. Subsequently, the parties filed submissions which I have read and considered.

From the pleadings and the submissions filed by the parties, the issues for determination are:-

- i. The competence or otherwise of the motion herein.
- ii. Whether the applicant has made up a case for granting of the orders sought?
- iii. What is the order as to costs.

Regarding the first issue, in the subject's submission it is contented that the tribunal did not forward the proceedings conducted before it to the lower court alongside the award for adoption, that the only document that was received from the Chairman of the Tribunal was the award. Further that from the

award dated 22/9/11, the interested party's claim against the subject was for cancellation of the title deed for L.R NO.MARMANET/NORTH/RUMURUTI BLOCK11/3092 (NDURUMO).

The subject argues that from the order of the Tribunal and the court, it is easy to determine what the claim before the tribunal was.

Regarding the foregoing contention the interested party contends that the subject made no reasonable steps to avail the impugned proceedings of the tribunal and/or or the impugned order of the lower court; that without the proceedings and the impugned order of the court the application is incompetent as this court is denied an opportunity to determine, without any contradiction or doubt, the nature of claim that was presented by the interested party to the tribunal and how the tribunal handled it.

The interested party argues that without the proceedings, this court cannot determine whether the tribunal acted in excess of its powers, against any law and/or in breach of the rules of natural justice.

It is further submitted that the true identity of the subject cannot be ascertained as the documents adduced in support of the application bear different names namely, Joseph Mburu Njoroge and Joseph Mburu Kimani. Further that the documents adduced in support of the application are not authenticated by the Registrar or stamped by a commissioner of oaths and as such are bad in law.

Owing to the foregoing contentions and in view of the provisions of Article 159(2) (d) of the constitution obliging this court to administer justice without undue regard to procedural technicalities, I took liberty to ascertain whether from the pleadings and the affidavit evidence it is possible to decipher what the claim at the tribunal was.

My observation is that notwithstanding the flaws complained about, the material presented before court are sufficient to determine the matter as the court is not required to consider the merits of the decision but whether the decision and/or procedure that led to the making of the decision was lawful. See **Republic V. Secretary of State for Education and Science ex parte Avon County Council** (1991) 1 ALL ER 282 at 285).

The point was more succinctly made in the English case of **Chief Constable of North Wales Police V. Evan** (1982) 1 W.L.R. 1155, by Lord Hailsham of St. Marylebone, thus:-

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court.” (emphasis mine).

The key point here is in a matter it is authorized by law to decide for itself.

From the record before me, I have no doubt what the claim before the tribunal was. In my view, if the tribunal was not authorized by law to consider the issue before it, its decision is amenable to quashing by an order of certiorari, whether it has been acted upon or not. This is so because a nullity in law is always a nullity and cannot be validated by a future action.

Without belabouring this point, I note that even without looking at the documents supplied by the subject, from the interested party's replying affidavit, I am able to gather that the interested party lodged a claim at the tribunal to challenge the subject's registration as the proprietor of the suit property which he claimed to have been effected by mistake or fraudulently procured (paragraph 11 of the interested party's replying affidavit).

Although the interested party claims that the identity of the subject is not verifiable, I note that through his pleading he has acknowledged that the subject is not any other person but the person he suit at the Tribunal. Having so done, he cannot reasonably be expected to impeach the subject's claim on such a ground.

It also not in dispute that the tribunal heard the interested party's claim against the title issued to the subject and made a finding in respect thereof which was to the effect that the title was not valid and ought to be cancelled.

The order of the tribunal was subsequently adopted by the Principal Magistrate's court Nyahururu culminating in issuance of a new title to the interested party. The question arising from this fact is whether the tribunal had power to hear and determine a claim touching on the subject's ownership of the suit property leave alone to order cancellation of the subject's title.

If the decision was made in excess of the tribunal's power, it matters not that the decision was the right decision in the circumstances. If the decision was *ultra vires*, unlawful, unreasonable and/or against the rules of natural justice this court, will have no option but to quash the decision. See **Kenya National Examination Council V. Republic Ex parte Geoffrey Gathenji Njoroge and others**

In view of the foregoing I decline to declare the application incompetent.

Turning to the 2nd issue, under Section 3 of the Land Disputes Tribunals Act, the Tribunal's jurisdiction is restricted to hearing and determining cases involving-

- a. the division of, or determination of boundaries to land, including land held in common;
- b. a claim to occupy or work land; or
- c. a claim on trespass to land.

Disputes relating to title or the possession of land registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) were the preserve of the High Court or the Resident Magistrate's courts depending on the monetary value of the suit property. See Section 159 of the Registered Land Act.

There is no doubt that the issue before the tribunal and subsequently before the Principal Magistrate's Court Nyahururu related to ownership of the suit property which was at the material time registered in the name of the subject. In determining the issue of ownership of the suit property, the Tribunal no doubt exceeded its jurisdiction. Any action done without jurisdiction is in law a nullity, that is to say of no legal force. As such it could not and was not validated by its adoption by the lower court.

I take note of the fact that the wrong decision of the tribunal and the lower court has ever since been acted upon but as an order of certiorari looks into the past, nothing prevents this court from quashing the unlawful order of the Tribunal. After all under Article 35(2) of the Constitution the subject has a right to correction or deletion of untrue or misleading information that affects him.

Having found the order of the Tribunal to have been a nullity in law, permitting it to continue forming the record of the Tribunal or the lower court is, in my view, a violation of the subject's rights.

For the foregoing reasons the application has merit and is allowed as prayed.

Dated, Signed and Delivered at Nakuru on this 15th day of November, 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Mureithi holding for Mr Sigilai for Interested Party

N/A for Respondent

Emmanuel Maelo: Court Clerk

L N WAITHAKA

JUDGE