



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CIVIL APPLICATION 42 OF 2011

IN THE MATTER OF: AN APPLICATION BY ORDERS OF PROHIBITION & CERTIORARI BY ERASTUS MUNGAI KIARIE AGAINST LAND DISPUTES TRIBUNAL GITHURAI AWARD IN CASE LDT/16/2010

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE COURT AT THIKA IN LAND CASE NO.9 OF 2011

AND

IN THE MATTER OF: THE LAND DISPUTE TRIBUNAL ACT NO.18 OF 1990

AND

IN THE MATTER OF: REGISTERED LAND ACT CAP 300 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

GITHURAI LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

CHIEF MAGISTRATE COURT THIKA.....2ND RESPONDENT

AND

SAMUEL THUO MUGURE.....INTERESTED PARTY

EXPARTE

ERASTUS MUNGAI KIARIE

J U D G M E N T

The Exparte Applicant's Notice of Motion dated 29th April 2011 was filed on even date pursuant to leave granted by Gacheche, J on 8th April 2011. In the said motion, the applicant seeks three orders which are as follows:

- 1) An order of PROHIBITION prohibiting the Principal Magistrate's Court at Thika and Githurai Land Dispute Tribunal from hearing, entertaining, any or further proceeding or issuing any or further orders in Land Case No.9 of 2011 Thika and Githurai LDT/16/2010 respectively.
- 2) An order of CERTIORARI to bring to High Court and quash the proceedings and award of the Githurai Land Dispute Tribunal in respective of LDT/16/2010 and subsequently orders of Principal Magistrate Court at Thika from adopting the said award as judgement of the court and any other orders issued thereafter in Land Case No.9 of 2011 at the Chief Magistrate Court at Thika.
- 3) THAT cost of this application be provided for.

The Application is supported by the statutory statement dated 7th April 2011 and verifying affidavit sworn by the exparte applicant on 7th April 2010.

The application is opposed by the interested party who swore an affidavit on 9th January 2011 which though titled "**supporting affidavit**" is clearly a replying affidavit sworn to oppose the exparte applicant's Notice of Motion.

Though served with the applicant's motion, the 1st and 2nd Respondents did not file any response thereto and chose not to participate in these proceedings.

In his verifying affidavit, the exparte applicant deponed that he is the registered owner of Land known as RUIRU KIU BLOCK 2/1511 which he inherited from his late father James Kiarie Mbugua - (*hereinafter referred to as the suit land*).

That he had always lived in the suit land with members of his family peacefully till June 2010 when the interested party's brother died and the interested party assisted by administration officials forcefully and unlawfully had his brother buried in the suit premises against the wish of the applicant.

The applicant contends that this action by the interested party was meant to create some non-existent proprietary interest in the suit land as thereafter, the interested party attempted to trespass upon the said land but was rebuffed by the applicant and members of his family.

Thereafter the interested party filed a claim at Githurai Land Disputes Tribunal being Claim No.Ruiru/LDT/16/2010 and in its award dated 18th March 2011 after hearing the dispute, the tribunal decided that the family of the interested party had a right over the suit land and that the suit land should be subdivided and three plots of 50ft by 100ft be excised therefrom and be registered in the names of the beneficiaries of Kangethe Mbugua's Estate who included the interested party. The remaining portion was to be registered in the names of the beneficiaries of Kiarie Mbugua's Estate who included the exparte applicant. The Land Registrar Thika was directed to assist in the processing of the proposed subdivision

and transfer of titles to the named beneficiaries.

In his affidavit opposing the applicant's motion, the interested party deponed that the remedies sought herein by the applicant were not available to him as the Githurai Land Disputes Tribunal had jurisdiction to arbitrate over the dispute concerning subdivision of the suit land and that in any case, the applicant unprocedurally and fraudulently obtained title to the said land while the dispute was pending hearing before the Land Disputes Tribunal.

Having considered the applicant's motion and the averments by the parties in the affidavits filed herein, I find that the main issue for determination by this court is whether the Githurai Land Disputes Tribunal had jurisdiction to hear the dispute lodged before it by the interested party and to make the award dated 18th March 2011.

Section 3(1) of the now repealed Land Disputes Tribunal Act sets out the powers and jurisdiction of Land Disputes Tribunals. Their jurisdiction is limited to determining cases of a civil nature involving disputes related 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

From the above, it is clear that the land dispute tribunals have no jurisdiction to entertain and purport to determine disputes concerning ownership of registered land. It is also clear that land disputes tribunals do not have jurisdiction to determine rights of beneficiaries or their entitlement to land forming part of a deceased persons Estate.

In this case, it is evident that the *exparte* applicant and the interested party and his family were claiming ownership of the suit land as beneficiaries of their respective late father's Estates. The interested party claims that the suit land was registered in the applicant's names when the dispute filed by him in the Land Disputes Tribunal was going on. The applicant annexed title to the said suit land registered in his name to the application which he exhibited as annexure **marked EMKI**.

Looking at the said title deed, it is clear from its face that it was issued on 21st February 2011 and though it is registered in the applicant's name it relates to Land title No.Ruiru/Ruiru East Block I/1511 not Ruiru KIU Block 2/1511. However, looking at the pleadings herein and the deliberations by the tribunal attached to the application, it is clear that the title exhibited by the applicant related to the land subject matter of the dispute.

The parties did not avail any evidence to show when the dispute was filed in the Land Disputes Tribunal by the interested party. There is therefore no evidence to support the interested party's claim that the said title was obtained when the dispute was pending before the tribunal. There is also no evidence to show or demonstrate that the said title was obtained fraudulently.

The suit land became registered land under the Registered Land Act on 21st February 2011 when title to it was issued and from that date, the tribunal ceased to have jurisdiction to deliberate over issues of ownership regarding the said land whether by virtue of succession or by any other means. Consequently the tribunal's decision directing subdivision of the suit land into several portions and giving directions regarding how each portion was to be registered was *ultra vires* Section 3(1) of the Land Disputes Tribunal's Act.

The tribunal's award dated 18th March 2011 was therefore null and void *ab initio* and had no legal effect. To reiterate this important legal position that nothing can come out of a nullity, I can do no better than to borrow the words of L. Denning in Macfoy –vs- United Africa Limited [1961] 3 All ER 1169

when he stated;

“If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there it will collapse”.

If the interested party and his family have any claims over the suit land or if he wishes to challenge the validity of the title issued to the exparte applicant, then his remedy lies in filing a civil suit in a court of competent jurisdiction seeking the grant of appropriate reliefs.

Since it is clear from annexure **marked EMK I** that the said illegal award was forwarded to the 2nd Respondent Chief Magistrate Court Thika on 18th March 2011 for it to be adopted as a judgement of the said court, I find that the applicant has demonstrated that he is deserving of the orders of prohibition sought against the 2nd Respondent but not against the 1st Respondent since the 1st Respondent had already heard and determined the dispute before the current judicial review proceedings were filed. The remedy of prohibition looks into the future and cannot be used to address past events.

For all the foregoing reasons, I find that the applicant’s Notice of Motion dated 29th April 2011 is merited and is hereby allowed in the following terms:

- 1) An order of **Certiorari** is hereby issued to remove to the High Court the proceedings and award of the Githurai Land Dispute Tribunal in LDT/16/2010 which are now hereby quashed together with all consequential orders.
- 2) An order of Prohibition do issue prohibiting the Chief Magistrate Court Thika from issuing any orders in Land Case No.9 of 2011 or in connection with Githurai LDT/16/2010 or adopting the award in Githurai LDT/16/2010 as a judgement of the Chief Magistrate Court Thika.

Since the applicant has been successful in his application, I will award him costs of the suit which will be borne by the interested party. It is so ordered.

Dated, Signed and Delivered by me at Nairobi this 29th day of May 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk
N/A for Applicant
N/A for Respondents
Interested Party present in person