REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Miscellaneous Civil Application 48 of 2008

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW BY MUTHAMI MUSEMBI

AND

IN THE MATTER OF TITLE WAMUNYU/KYAWANGO/137

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE CHAIRMAN YATHUI DIVISION, MACHAKOS

DISTRICT LAND DISPUTE TRIBUNAL .....1ST RESPONDENT

THE CHIEF MAGISTRATE MACHAKOS ..... 2ND RESPONDENT

THE ATTORNEY GENERAL .....3RD RESPONDENT

AND

MUTHAMI MUSEMBI ..... APPLICANT

EX-PARTE:

LUCAS MUTISO MUSEMBI ..... INTERESTED PARTY

RULING

Muthami Musembi, the applicant filed the Notice of Motion dated 18th June, 2008 pursuant to the leave granted on 28th May, 2008 by **Lenaola J.** In the substantive Notice of Motion, the applicant seeks judicial review orders of:-

- **Certiorari to remove into this court the proceedings and award by Yathui Division, Machakos District Land Disputes Tribunal case Number 9 of 2007 on the 1st August, 2007 and adopted as a judgment of the court by the Machakos court in Land Case No.162 of 2007 on 13th February 2008 for purposes of quashing the same.**

- **Prohibition to stop for (sic) further steps being taken to enforce the resultant judgment, decree or order.**

The Applicant too has asked for the costs to be borne by the respondents and interested parties jointly and severally.

From the pleadings so far filed, the history of the dispute appears to be this; **Lucas Mutiso Musembi**, the interested party, instituted a claim with Yathui Division, Machakos District Land Disputes Tribunal, "*the 1st Respondent*" against the Applicant over land parcel **Wamunyu/Kyawango/137**, "*the suit premises*". He claimed that:

"...The land in disputes (sic) belonged to my father Musembi Muutu. During demarcation period in Wamunyu, the Objector who is my brother registered the same land under him. I am requesting the panel of elders to order fresh sub-division..."

After hearing the parties and their witnesses, the 1st respondent delivered its verdict on 1st August, 2007 holding thus:

"3.FINDINGS, DISCUSSIONS AND REASONS

(a) The disputed plot No.137 was an ancestral land belonging to Musembi Muutu who had two sons Lucas Mutiso Musembi and Muthami Musembi.

(b) The objector registered the plot illegally under his name instead of registering the plot under two names, the claimant and the objector.

(c) There was clan meeting on 18.9.2004 for the sub-division of the disputed plot No.137 and ruled that the sub-division between the claimant the objector be done equally.

4. DECISION, DETERMINATION OF THE TRIBUNAL

In view of the above, the disputed plot should be sub-divided equally between Lucas Mutiso Musembi and Muthami Musembi according to customary law."

As required, the award was transmitted to the chief magistrate's court, Machakos, "*the 2nd Respondent"* and on **13th February, 2008**, the Resident Magistrate, **Hon. D. G. Karani** read the award to the parties and adopted it as a judgment of the court.

Aggrieved by the decision of the respondents aforesaid the applicant moved this court for the judicial review orders as aforestated. In his view, he was the registered proprietor of the suit premises. Under the provisions of the Land Disputes Tribunals Act and in particular section 3 thereof, the 1st respondent had

no jurisdiction to adjudicate on ownership of the registered land. Thus the award was *ultra vires* the Act and therefore a nullity. The consequent adoption of the award as a judgment of the 2nd respondent was equally a nullity. The applicant's registration of the suit premises being a first registration was indefeasible and particularly so under the circumstances alluded to before the 1st respondent.

The application was in due course served on the respondents and interested party if the affidavits of service on record are anything to go by. However, it will appear that only the interested party was keen to respond.

In a replying affidavit filed in court on 22nd June, 2010, the interested party deponed where pertinent that the applicant was his elder brother. The suit premises initially belonged to their deceased father and upon his death, it devolved to his brother and himself. During Land Adjudication in 1974, the family agreed that the applicant would be registered as a trustee since it was family land. On 18th September, 2004, he called a clan meeting to compel the applicant to sub-divide the suit premises. Otherwise the land he had in Yatta, he had purchased with his own money and was not therefore family land. Nor had their mother shared out the family land. That the applicant had admitted that the suit premises were ancestral land. The land in Yatta Nguluni was not acquired either by their mother or father. Their mother had no capacity to acquire any land in any event, as at the time he went to Yatta all the land was settled and there was no free land that she could acquire. His claim was therefore for a share in the suit premises being family land held on trust for him by the applicant. In the premises the 1st respondent had jurisdiction to determine the claim on the basis of the right to occupy or to share the land as a son of the deceased.

When the application came before me on 24th April, 2012 for *inter-partes* hearing, **Mr. Kimeu** and **Mr. Kisongoa**, learned counsel for the applicant and interested party respectively agreed to canvass the same by way of written submissions. They subsequently filed and exchanged the written submissions which I have carefully read and considered alongside cited authorities.

It is trite that judicial review jurisdiction is a special one. It is neither criminal nor civil procedure. It is calculated to reign in rogue inferior Tribunals who act with reckless abandon, deciding on matters or issues in which they have no jurisdiction, act in excess of such jurisdiction, deliberately act in breach of rules of Natural justice and above all, breach the laws of the land. If the inferior Tribunal Act in any manner above, they will and must be subject to the supervisory jurisdiction of this court by way of judicial review orders.

The 1st Respondent was a creature of the repealed Land Disputes Tribunals Act whose jurisdiction then was circumscribed by the provisions of section 3(1) thereof which limited its jurisdiction to hearing cases of civil nature involving:-

- **Division of, or the determination of boundaries to land, including land held in common**
- **Claim to occupy or work land, or**
- **Trespass to land.**

If the 1st Respondent in this case went beyond the foregoing in determining the dispute herein, then it may have acted in excess or want of jurisdiction and therefore liable to the judicial review orders sought.

It is common ground that the applicant is the registered proprietor of the suit premises. It is a first registration under the Registered Land Act. Such registration cannot be challenged even if it was obtained through fraud. In his claim before the 1st respondent, the interested party essentially sought the sub-division of the suit premises. If his demand is acceded to as indeed the 1st respondent purported to do, it would entail the closure of the register in respect of the suit premises and opening up of a fresh one upon subdivision. Such an act amounts to challenge to title of the suit premises held by the applicant, which jurisdiction the 1st respondent does not have. Again, such step would lead to the rectification of a register

of the suit premises, a jurisdiction not available to the 1st respondent. ***Aganyanya, J*** (*as he then was*), saw the dilemma succinctly in the case of **Mbugua Thiga Vs. Teresiah Wangechi Macharia and 2 others, Nbi HC Civil Appeal No.460 of 2000** ***(UR)*** when he stated:

"***But neither the Land Disputes Tribunal at Maragua nor the Provincial Land Disputes Appeal Committee had any power to adjudicate over the issue of title to land since this jurisdiction is vested either in the High court and or the resident magistrate's court depending on the pecuniary value of the subject matter – see section 159 of the Registered Land Act. To carry out the orders of Maragua Divisional Land Disputes Appeals Committee would result in the rectification of the register which goes against the spirit of section 143 of the Registered Land Act when conditions laid down in that section for such an order to be made were not shown to exist in this case."***

The reasoning of the Judge accords very well with the circumstances of obtaining in this case.

The interested party has argued that the suit premises were held in common. In other words it was family land. Thus the claim was within the armpit of section 3(a) and (b) of the Land Disputes Tribunals Act. I do not think that the interested party is serious with such submissions. Essentially he is saying that his claim before the 1st respondent was based on trust. If that be the case, the more reason why the 1st Respondent lacked jurisdiction to entertain such a claim. Indeed and as correctly submitted by counsel for the applicant, the 1st respondent by ordering the suit premises to be divided equally between the applicant and interested party meant that, since the interested party claimed a portion of the suit premises and that his claim was based on trust, the 1st respondent therefore in effect found that the applicant was holding ½ of the suit premises in trust for the interested party and therefore terminated the trust. This is a jurisdiction that the 1st Respondent does not have.

Clearly, the proceedings before the 1st respondent related to both title to land, beneficial interest therein and trust. Such dispute in my view does not lie within the purview of section 3(1) of the Land Disputes Tribunals Act. Since the decision of the 1st respondent was without jurisdiction, then the award and the purported entry of judgment were all nullities.

This being my view of the matter, I would grant prayers 1 & 2 of the Notice of Motion. As this dispute involves brothers, I make no order as to costs.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS**, this **15TH** day of **JUNE**, 20**12**.

ASIKE-MAKHANDIA
JUDGE