REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Miscellaneous Civil Case 4 of 2012

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC ……..…….APPLICANT

VERSUS

THE CHAIRMAN, KAJIADO CENTRAL

LAND TRIBUNAL……..1ST RESPONDENT

NKORISHA KONE…….2ND RESPONDENT

THE HON. ATTORNEY GENERAL ……....……3RD RESPONDENT

AND

EXPARTE

TIMAIYO KIRTARI

RULING

The applicant **Timaiyio Kirtari** was is the registered proprietor of all that piece or parcel of land known as Kajiado/Kilonito/127 hereinafter "*the suit premises.*" Sometimes in 2003, the 2nd respondent approached the him with a view to purchasing 20 acres out of the suit premises. They negotiated and agreed on a consideration of Kshs. 40,000/= and 25 heads of cattle. The 2nd respondent however failed to fully meet his end of the bargain prompting the applicant to unilaterally rescind the agreement and offered to refund the Kshs.40,000/= and 13 cows paid by the 2nd respondent as part purchase price.

The 2nd respondent was not amused by the turn of events. He immediately mounted a claim with the 1st respondent. In his statement of claim, the 2nd respondent claimed as against the applicant, *"the division of land in Kilonita Group Ranch."* The applicant only came to learn about the claim through a Notice from the 1st respondent served on him requiring him to attend the hearing on 22nd July, 2012. He did so. Following a full hearing the 1st respondent rendered its award on 25th May, 2011 in these terms.

"***Ruling***

After carefully considering the above findings, the tribunal ruled;

1. That both parties to obtain consents to subdivide and transfer from the Land Control Board.

2. That the surveyor to enter into parcel No.KJD/Kilonito/127 and annex 60 acres for Nkorisha Kone and the remaining for Timayio Kirtari

3. That the Registrar to register parcel for sixty (60) acres in the name of Nkoirisha Kone and the remaining in the name of Timayio Kirtari…"

Aggrieved by the turn of events, the applicant on 20th January, 2012 filed an *ex parte* Chamber Summons application seeking leave to initiate judicial review proceedings in the nature of *certiorari* and *prohibition.* Healso prayed thatshould leave be so granted, the same should operate as stay of the decree dated and issued on 13th December, 2011 by the Senior Resident Magistrate's Court, Kajiado emanating from the award of the respondent.

On that very day, the *ex parte* application came before me and I granted leave. I also directed that the leave so granted do operate as stay and that the substantive motion be filed within the next 21 days failure to which leave and stay so granted would automatically lapse. The substantive motion was subsequently filed on 1st February, 2012. In the said motion the applicant prayed for –

"1. THAT CERTIORARI to quash the award of the Land Dispute** (sic) **Tribunal in case Number TC/653//07/2011 dated and issued on 25th August, 2011 in respect of Title No. Kajiado/Kilonti/127 together with the decree dated and issued on the 13th December, 2011 by the Senior Resident Magistrate Kajiado Law Courts subsequently emanating from the said award.

2. THAT PROHIBITION against the award of the Land Dispute Tribunal in case number TC/653/07.2011 dated and issued on 25th August, 2011 in respect of Title No. Kajiado/Kilonti/127 together with the decree dated and issued on the 13th December, 2011 by the Senior Resident Magistrate Kajiado Law Courts subsequently emanating from the said award pending the establishment of the Environment and Land Court under the provisions of the "*Environment and Land Court Act of 2011"*

The application was expressed to be brought under Order 53 rules 1(1), 2,3,4(2) and (3), 4(1) & (3) of the Civil procedure rules and all other enabling powers and provisions of the law. The complaint by the applicant is that the 1st respondent acted beyond and in excess of jurisdiction when it purported to decide on ownership of the suit premises a matter which was not among the civil disputes which can be heard and determined by 1st respondent, principles of natural justice were not observed during the proceedings before the 1st respondent, equity and conscience were not observed as well, there was fraud and illegality in the proceedings, the 1st respondent had acted in bad faith with improper motive, biased and acted unfairly. Finally, the award was unreasonable in the circumstances.

The application was duly served on the respondents. The 1st and 3rd respondent filed in response, grounds of opposition on 10th March, 2012. They declared to all and sundry, that the application was fatally incompetent, bad in law and was based on a misconception of law. The 1st respondent had acted within its powers and jurisdiction as mandated under the then Land Disputes Tribunals Act and finally that, the orders sought were unavailable as they were contrary to the rule of law, Public interest and could lead to miscarriage of justice.

For the 2nd respondent he deponed in his affidavit filed in court on 10th May, 2012 where pertinent, that the suit premises no longer existed, the same having been sub-divided and new numbers being Kajiado/Kilonito/218-223 issued. On the basis of the foregoing the application was incompetent, an abuse of the court process as it is premised on concealment of such material fact. That it was trite law that court orders do not issue in vain. Accordingly, in so far as the applicant is seeking orders, relating to the

suit premises which are no longer in existence, the court cannot exercise its discretion in his favour. The applicant had been duly served with all claim documents, participated willingly in the proceedings before the 1st respondent and did not at any point raise objection regarding jurisdiction or the manner in which the proceedings were being conducted. His complaint as to the manner in which the proceedings were conducted is therefore clearly an afterthought and a ruse whose real intention is to enable him dispose off the land. Otherwise the dispute was among those contemplated under the Land Disputes Tribunal Act (*now repealed)* and which act was in force at the time of filing of the claim. Accordingly, the 1st respondent had jurisdiction to hear the dispute. Whereas it is true that Environment and Land Courts Act did repeal the Land Disputes Tribunals Act, the same Act provide in the transitional clause that matters pending under the repealed Act would continue and be determined as contemplated under the repealed Act. The dispute between the applicant and 2nd respondent was essentially about division of land and therefore properly before the 1st respondent.

When the application came before me for *inter partes* hearing on 12th March, 2012, parties agreed to canvass the same by way of written submissions. Subsequently, they filed and exchanged the written submissions which I have carefully read and considered alongside cited authorities.

I have no doubt in my mind that the 1st respondent had no jurisdiction to entertain the claim. Clearly, the claim before the 1st respondent was about a land deal gone sour. There was a sale agreement between the applicant and the 2nd respondent. It never went through. The applicant having received part purchase price decided unilaterally to rescind the agreement and refund the part purchase price he had received. The 2nd respondent would hear none of the above, hence the claim with the 1st respondent to compel him to go through with the transaction. Section 3(1) of the Land Disputes Tribunal Act, sets out limitations to the jurisdiction of the 1st respondent. It was meant to hear cases of civil nature concerning-

- The division of, or the determination of boundaries to land.
- A claim to occupy or work land, or
- Trespass to land

The 2nd respondent's claim did not fall within any of these perimeters. His claim had to do with the contract of sale of land, that was rescinded and the consequences flowing from such breach. The 1st respondent has no jurisdiction whatsoever to deal with issues of sale of land. It is not in dispute that the applicant sold a portion of the suit premises to the 2nd respondent at a consideration of Kshs. 40,000/= and 25 heads for cattle. The applicant has candidly admitted to that fact. He has also admitted to unilaterally rescinding the agreement. This being a transaction involving the sale of land, the 1st respondent had no jurisdiction whatsoever to sit in judgment of it.

I do not agree with the 1st and 3rd respondent's submissions, that the dispute before the 1st respondent was about boundaries and the right to occupy land by the 2nd respondent. It is not true at all that by 2008, the 2nd respondent had his portion of land and what then remained were boundaries to determine or excise his acreage from the suit premises. The issue before the 1st respondent was not for determination of boundaries and use of land that was un- subdivided. The form itself talks about subdivision. Fixing of boundaries does not entail subdivision of the land. Further a claim to occupy or work land does not involve subdivision. It's simply occupation of land as you find it and use thereof. It is not about subdivision and transferring portions thereof to a party. The matter in dispute and for determination was whether the 2nd respondent was entitled to a portion of the applicant's land pursuant to a sale agreement. The award itself puts the matter beyond pre adventure. Basically the 1st respondent is ordering the applicant to subdivide the suit premises in terms of the agreement. In effect the 1st respondent was ordering specific performance of the contract. If award was to be executed, in these circumstances, it will entail the subdivision of the suit premises. In a way therefore, the 1st respondent deliberated on subdivision of land. That kind of dispute does not clearly fall within the disputes contemplated by section

3(1) of the Land Disputes Tribunal Act. The award if enforced would lead to the cancellation of the applicant's title, a mandate not conferred on the 1st respondent. On all these grounds, clearly the applicant has made out a case for the grant of an order or *certiorari.*

Regrettably, however, the application must fail on other grounds. The orders sought to be issued are aimed at a person or entity that is not party to these proceedings. Judicial review orders are prerogative and in the form of directions. They ought therefore to be directed to a specific body or person who is a party to the proceedings for compliance and not by proxy. In this case, the proceedings sought to be quashed by an order of *certiorari* are in the provence of the Senior Resident Magistrate's Court at Kajiado. Yet this court has not been made a party to these proceedings. It therefore follows that the orders sought cannot issue. Even if it was to issue, such an order will be in vain. It is trite law that court orders do not issue in vain. The Senor Resident Magistrate's Court, Kajiado should have been enjoined in this suit so that the orders of *certiorari* and *prohibition* could properly issue against it. In its absence I do not see the efficacy of such orders even if they were to issue.

The award has since been made a judgment of the Senior Resident Magistrate's Court, Kajiado. Once that is done, the award ceases to have a life of its own capable for being brought to an end or quashed. It is no longer an independent award capable of being quashed or prohibited. This is how **Khamoni, J** delivered himself on the issue in a similar situation the case for **Wamwea vs Catholic Diocese of Muranga Registered Trustees [2003] KLR 389-**

"The decision of the Tribunal or Appeals Committee adopted by the Magistrate's Court in accordance with the provisions of Land Disputes Tribunal Act becomes a decision of the Magistrate's Court and ceases to exist as a separate entity challengeable alone."

This is the more reason why, the SRM's court should have been enjoined in these proceedings.

Again it has been alleged and it has not been discounted by the applicant that the suit premises no longer exist. Apparently it was subdivided and new numbers being Kajiado/Kilonito/218- 223 created. Indeed this assertion seem to receive some support from the applicant's own statement tendered before the 1st respondent. These are the rhetorical questions he posed to the 2nd respondent.

"**4.** ***How did he obtain consent to subdivide my land without my consent?***

5. ***Who signed the application for consent to subdivide my land?***

1. How come he has title deed to my land, yet I am in occupation and possession?

2. Who signed the transfer form?

From the tone and direction of these questions, there can be no doubt at all that the suit premises are no longer in existence. They have been subdivided and new titles issued. In those circumstances what useful purpose will be served by orders of *certiorari* and *prohibition* directed at in relation to a non- existent parcel of land? The substratum of the suit as it were is non-existent.

Prohibition issues to restrain or prevent a future happening or confirmation of actions which are unlawful. It is directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings.

In these proceedings, the 1st respondent delivered its award on 25th August, 2011. The resultant award was adopted and became a decree for the court on 13th December, 2011. The 1st respondent having discharged its mandate under the statute, there is nothing left for it to carry that can be prohibited. Much as the Senior Resident Magistrate's Court has not been enjoined in these proceedings, it can also not be

stopped from performing its statutory mandate. It cannot therefore be prohibited from executing its decree if properly moved. A Court of law cannot prohibit that which a body is statutorily empowered and or mandated to do. In the circumstances of this case, I cannot see how an order of *prohibition* can probably issue against the Senior Resident Magistrate's Court.

In any case it is a misconnection of law to pray that the said order of *prohibition* do issue until the establishment of the Environment and Land Court under the provisions of the Environment and Land Court Act, 2011. This Act did not wholly suspend or obliterate the operations of the 1st respondent. Instead in its wisdom, the legislature provided for transitional clause in section 30(1) thereof to the effect that

"***matters pending before the Tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court is established under this Act, comes into operation or as may be directed by the Chief Justice or Chief Registrar..***"

At the time the proceedings were being conducted, the Environment and Land Court had not been established. Nothing therefore stopped the applicant from invoking the appellate jurisdiction provided for within the then Land Disputes Tribunal Act.

Finally, the 1st and 2nd respondents have argued and rightly so in my view that these proceedings are fatally defective for non-compliance with the mandatory procedural law. Judicial review proceedings are by their nature special. They are neither civil nor criminal. That jurisdiction is donated to this court by sections 8 and 9 of the Law Reform Act. Thus it has special mandatory procedure. The orders sought are normally directed to a public body, or a person or body discharging duties of public nature. The orders can only therefore issue in the name of the republic. The mandatory procedure is that all judicial review orders are issued in the name of the Republic. It therefore follows that the Republic is mandatorily the only applicant in the substantive Notice of Motion.

But what did the applicant do in this case? He made the application both in his name and that of the Republic. This was a fatal error. This being as special jurisdiction and with a mandatory procedure, failure to comply with mandatory procedural law is not a technicality that can be cured under either the constitution and or "*the doubt O*" principle. In any event the "*the double O"* principle would apply to civil proceedings. However, as we have already demonstrated, Judicial Review Proceedings do not fall in that category.

For all the foregoing reasons, I am satisfied that the applicant has not met the threshold of granting the orders sought. Accordingly, the application is dismissed with costs to the 2nd respondent.

RULING DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day **JULY, 2012**.

ASIKE-MAKHANDIA
JUDGE