



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW 38 OF 2006

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR JUDICIAL REVIEW BY JOHN KAMAU WANDUTU, STEPHEN MWAURA WANDUTU & JOSEPH MWANGI KIARIE

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL, GATUNDU SOUTH DIVISION TRIBUNAL CASE NO.63 OF 2005

BETWEEN

JOHN KAMAU WANDUTU.....1ST APPLICANT

STEPHEN MWAURA WANDUTU.....2ND APPLICANT

JOSEPH MWANGI KIARIE.....3RD APPLICANT

-VERSUS-

GATUNDU SOUTH DIVISION LAND DISPUTES TRIBUNAL.....RESPONDENT

MBUTHIA MWANAMI.....INTERESTED PARTY

J U D G M E N T

The Exparte Applicants herein John Kamau Wandutu, Stephen Mwaura Wandutu and Joseph Mwangi Kiarie filed a Notice of Motion on 17th June 2010 seeking the following orders:

- i. An Order for certiorari to remove into the High Court the proceedings and any award in Gatundu South Division Land Dispute Case No.63 of 2005 relating to L.R. No. Kiganjo/Kiamwangi/486 and quash them;
- ii. An Order for prohibition directed to Gatundu South Division Land Disputes Tribunal prohibiting it from hearing or entertaining any dispute relating to the ownership thereof.
- iii. Costs of this application be provided for.

The application is supported by the statutory statement dated 27th May 2010 and an affidavit sworn by the three applicants on 28th May 2010. It is premised on two grounds which are expressed as follows:

(1) Gatundu South Division Land Disputes Tribunal has no jurisdiction under the land Disputes Tribunal

Act or any other provision of Law to hear and determine dispute on title on Land L.R. No. Kiganjo/Kiamwangi/486 and its award would be as void ab initio as the proceedings before it.

(2) All the proceedings are in contravention of the Land Disputes Tribunal Act.

The application is opposed by both the Respondent and the Interested Party. The Respondent through the Hon. Attorney General filed grounds of opposition to the motion on 7th April 2011 which basically challenged the competence of the motion on grounds that it was premature and fatally defective for offending Section 3(1)(a) and S 7 of the Land Disputes Act of 1990 (now repealed) and Order 53 Rule 7 of the Civil Procedure Rules.

The Interested Party Mr. Mbuthia Mwinami who has been acting in person opposed the motion through a replying affidavit filed on 8th April 2011 and annexures thereto.

Trial in the matter commenced before my sister Hon. Lady J. Gacheche who took oral submissions from the parties on 19th July 2011 and then adjourned the hearing to 1st November 2011 to allow the Applicants' Counsel to prepare a reply to the submissions made by the Respondent and the Interested Party.

However, she was transferred to another station before 1st November 2011 and when the case was mentioned before me on 1st November 2011, guided by proposals made by the parties in attendance, I directed that parties file written submissions which were to be highlighted afresh before me at later date.

The Counsel for the Applicants and the Respondents subsequently filed written submissions which were scheduled for highlighting on 5th June 2012 but on that date, the Applicants' counsel chose to entirely rely on his written submissions and together with the Interested Party asked the court to fix a judgment date.

Briefly, the Applicants' case as can be discerned from the pleadings filed herein is that they are the registered proprietors of all that parcel of land known as Kiganjo/Kiamwangi/486 (**hereinafter referred to as the suit land**). The applicants' case is that the suit land was transferred into their names by their late father one George Wandutu Mianya before he died.

From the last annexure to the Applicants' supporting affidavit marked 'C', it is clear that the Interested Party herein lodged a claim with the Thika Land Disputes Tribunal claiming a right of ownership of the suit land which was located in Gatundu Division of Thika District. It would appear from the annexure marked 'B' that the Interested Party's claim was subsequently taken over by the Gatundu South Division Land Disputes Tribunal (the Respondent herein) and was registered as land dispute claim No.63 of 2005.

A reading of the said document (**annexture marked "B"**) shows that it is a notice requiring the applicants to attend the Respondent on 22nd April 2010 for hearing of the dispute filed against them by the Interested Party.

It is the Applicants' contention that the Respondent had no jurisdiction to entertain or hear a dispute relating to ownership of registered land. According to the Applicants, such proceedings are illegal and should be quashed by orders of certiorari and the respondent should be prohibited from further continuing with such proceedings.

The Interested Party on his part deponed in his replying affidavit that the Respondent had jurisdiction to hear and determine the dispute in question in accordance with the Land Disputes Tribunal's Act of 1990.

In Paragraph 4 thereof, he avers that he knows that the tribunal (Respondent) had opportunity to hear and analyse all the evidence put before it and he annexed some of the documents that had allegedly been produced before the tribunal. The said documents includes copies of Green Cards marked Exhibit 3 – 6 which show that one Muinami Mianya who is apparently his late father had been registered as the

proprietor of the suit land on 24th April 1958.

The document marked as annexure 8 shows that by 27th June 2006, the Respondent had not made any award in the dispute filed before it by the Interested Party concerning the suit land.

The Respondent chose not to file a replying affidavit in this case but instead filed grounds of opposition on 7th April 2011. The gist of the said grounds of opposition is that the Applicants' Notice of Motion was fatally defective and incompetent as it allegedly offended the provisions of Section 3(1)(a) and 7 of the Land Disputes Act No.18 of 1990 (*hereinafter referred to as the Act*) and Order 53 Rule 7 of the Civil Procedure Rules.

I propose to deal with the technical objections raised by the Respondent first before considering the merits or otherwise of the application.

Having carefully considered the written submissions filed by the Respondent herein, I find that the Respondent in claiming that the application offended Section 3(1)(a) & 7 of the Act was of the view that the Respondent had jurisdiction to hear and determine the dispute before it since it concerned a dispute over ancestral land and the tribunal had jurisdiction under Section 3(a) to arbitrate over disputes concerning **“the division of, or the determination of boundaries to land including land held in common”**.

For the sake of good order, I propose to deal with this issue later when considering whether or not the Respondent had jurisdiction to hear and determine the dispute in question.

The other objection taken by the Respondents was that the Notice of Motion is incompetent for failing to satisfy the requirements of Order 53 Rule 7(1) of the Civil Procedure Rules. Order 53 Rule 7 of the Civil Procedure Rules which is couched in mandatory terms provides that an applicant seeking an order of certiorari shall not question the validity of proceedings or any order unless the same has been lodged with the court either at the leaves stage of the proceedings or before the hearing of the Notice of Motion and where this requirement is not complied with, an explanation for such failure should be made to the court.

Mr. Njuguna, learned State Counsel instructed by the Attorney General for the Respondent submitted that in this case, the Applicants had failed to attach the proceedings or the award sought to be quashed by orders of certiorari and to that extent the application was fatally defective and ought to be dismissed.

Mr. Kiania Njau, learned Counsel for the Applicants did not address this particular point in his written submissions dated 22nd November 2011 filed on 24th November 2011.

A perusal of the court record reveals that indeed the Applicants did not attach any proceedings conducted before the Respondent or any award made as a consequence of such proceedings. The Applicants did not also offer any explanation to the court for such failure. It is clear from the Applicants' Notice of Motion that Prayer 1 thereof challenges the validity of proceedings and any award in the Respondent's Land Dispute Case No.63 of 2005 relating to land known as Kiganjo/Kiamwangi/486 and seeks orders of certiorari to quash them.

In view of the foregoing, it is evident that the Applicants' Notice of Motion offends the provisions of Order 53 Rule 7 of the Civil Procedure Rules. The Applicants' failure to annex such proceedings or award or offer a reasonable explanation for such failure means that the court cannot be sure that such proceedings or award exists and therefore there is a possibility that there may be nothing to call for to the High Court for quashing. Courts of law are not expected to issue orders in vain or orders which are not capable of enforcement. Without evidence that there were proceedings illegally conducted by the Respondent resulting into an award made contrary to the law, it is not possible for the court to invoke its supervisory jurisdiction to issue the judicial review remedy of certiorari. As correctly observed by J. Lenaola in Republic -Vs- The Chairman Meru Central Land Disputes Tribunal & 2 Others [2005] EKL.R, Judicial Review is concerned with the decision making process of inferior tribunals which involves

scrutinizing their decision in order for the court to decide either to quash or uphold them. If such decisions or in our case proceedings are not annexed to the Applicants' pleadings or availed to the court thereafter then there would be nothing to scrutinize or to quash.

In the premises, I uphold the Respondent's objection and find that failure of the Applicants' to avail the said proceedings and any award made by the Respondent to the court was fatal to the Applicants' motion in so far as Prayer 1 is concerned. This does not however mean that the entire application is defective or incompetent. It only means that the Applicants are not entitled to the order of certiorari as sought in Prayer 1 and the court consequently declines to grant the same.

From the Respondents' submissions, I notice that the Respondents introduced another ground of objection to the Applicants' motion which was not specifically expressed in the grounds of opposition.

The Respondents further attacked the Applicants' motion on grounds that it was incompetent in that the application for leave was not accompanied by a verifying affidavit containing the facts being relied upon by the Applicants.

Order 53 Rule 1(2) of the Civil Procedure Rules states:

"An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on".

My interpretation of this section is that an application for leave shall be accompanied by a statutory statement and an affidavit verifying the facts relied upon. In my view the affidavit contemplated by this section does not need to have the title "**verifying affidavit**". It is sufficient if the application for leave is accompanied by an affidavit however titled which verifies the facts the applicant relies on in his application for judicial review. The Applicants in this case filed the application for leave accompanied by a statutory statement and an affidavit titled "**supporting affidavit**" which in my view contained and verified the facts the Applicants were relying on in their Notice of Motion. The title given to the affidavit is in my view irrelevant.

In the circumstances, I find no merit in that ground of objection. I find that the Notice of Motion is properly before the court.

Turning now to the prayer for an order of Prohibition, the Applicants contend that the Respondent should be stopped from hearing or entertaining any dispute relating to the ownership of land known as L.R. Kiganjo/Kiamwangi/486. Though the Respondents and the Interested Party have maintained that the Respondent had jurisdiction to hear and determine the dispute lodged before it by the Interested Party, it is clear from the evidence tendered before the court that the dispute before the Respondent related to issues of ownership of registered land.

From the annexure to the Applicants' supporting affidavit marked 'A' and 'C', it is clear that the Applicants are the registered proprietors of the land in respect of which the Interested Party filed a claim before the Respondent claiming ownership of the same land. The question then to pose at this juncture is – Does the Respondent have jurisdiction to entertain or hear the dispute filed before it by the Interested Party claiming ownership of the suit land?

The answer to that question is a definite no. The jurisdiction of Land Disputes Tribunals to handle disputes related to land is donated by Section 3 (1) of the Land Disputes Tribunal Act which states as follows:

"Subject to this Act, all cases of a civil nature involving a dispute as 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 to land

Shall be heard and determined by a Tribunal established under S4.

It is obvious from the above provisions that the Respondent did not have jurisdiction to entertain or to hear the dispute in Claim No.63 of 2005 since the same concerned issues related to ownership of registered land.

If the Respondent did not have jurisdiction to hear and determine such a dispute, are the Applicants then entitled to an Order of Prohibition as sought in Prayer 2?

To answer this question, I will be guided by the decision of the Court of Appeal in Republic –Vs- Kenya National Examination Council, Exparte Geoffrey Gathenji and 9 Others, C/Appeal No.266 of 1996. When considering the circumstances under which the order of prohibition would issue, the Court of Appeal stated as follows:

“What does an order for prohibition do and when will it issue? It is an order from the High Court 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 lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings”.

It is evident from the material placed before this court that the Respondent had already initiated the process of hearing the dispute lodged by the interested party involving the suit land as evidenced by annexure marked 3 to the Applicants’ supporting affidavit. The Applicants had already been summoned to attend the tribunal for the hearing of the dispute on 22nd April 2010. As noted earlier, the proceedings before the tribunal were not availed to the court and there is therefore no evidence to show what happened on 22nd April 2010 or thereafter.

The Respondent and the Interested Party did not deny that the dispute was pending hearing before the Respondent and they did not avail any evidence to show that hearing of the dispute had been concluded. In the circumstances, the court is entitled to presume that the said proceedings are still pending before the tribunal.

The court has already made a finding that the tribunal had no jurisdiction to entertain the dispute lodged before it by the Interested Party and if the proceedings were to be continued and finalized before it, the tribunal would have acted ultra vires Section 3(1) of the Act and all proceedings before it would be null and void **ab initio**.

The purpose of the remedy of prohibition is to stop an inferior tribunal or public body from acting in excess of or without jurisdiction or acting contrary to the law. If the Respondent was to continue hearing the claim in Land Dispute Case No.63 of 2005, it will be acting beyond its jurisdiction and contrary to the law. This court is in the circumstances mandated to invoke its supervisory jurisdiction to stop the tribunal from acting contrary to the law.

It is therefore my finding that the Applicants have demonstrated that they are deserving of the order of Prohibition in terms of Prayer 2. The application therefore succeeds in terms of prayer 2 only. I accordingly issue an order of prohibition directed at the Respondent prohibiting it from hearing or entertaining any dispute related to ownership of land known as LR. No. Kiganjo/Kiamwangi/486.

As the applicants have only partially succeeded in their application, I will not make any orders on costs. Each party to bear its own costs.

Dated, Signed and Delivered by me at Nairobi this 20th day of July, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence - Court Clerk

N/A for Applicants

N/A for 1st Respondent

N/A for 2nd Respondent

Interested Party in person