REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 481 OF 2007

REPUBLIC.....APPLICANT

VERSUS

KIKUYU DIVISIONAL LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

HENRY NGWARE MUNGAI.....2ND RESPONDENT

SENIOR RESIDENT MAGISTRATE 'S COURT KIKUYU.....3RD RESPONDENT

EX-PARTE

LIVINGSTONE GICHANGA KARENGE & EDWARD KUNGU KARENGE

JUDGEMENT

This judgement is an answer to the notice of motion dated 24th May, 2007 in which Livingstone Gichanga Karenge and Edward Kungu Karenge (the 1st and 2nd ex-parte applicants respectively) pray for orders as follows:-

1. **THAT an Order of Certiorari do issue to remove into the High Court and quash the award by the Kikuyu Land Disputes Tribunal Case No. LND/16/20/70 of 2006 and the order of the Senior Resident Magistrate's Court Kikuyu reading and adopting the award as judgment of the court dated 13th April, 2007 in miscellaneous application No. 6 of 2007 directing that the Ex-parte applicants be evicted from that parcel of land known as L.R. No. DAGORETTI/KINOO/665 and that the 2nd respondent do remove the structures thereon at his own cost.**

2. **THAT costs of this application be provided for.**

Kikuyu Divisional Land Disputes Tribunal (hereinafter simply referred to as the Tribunal), Henry Ngware Mungai and Senior Resident Magistrate's Court at Kikuyu are named as the 1st to 3rd respondents respectively.

A look at the grounds in support of the application shows that the applicants' complaint is that the Tribunal acted in excess of the jurisdiction donated to it by the now repealed Land Disputes Tribunal Act. The applicants fault the 3rd respondent for adopting the alleged illegal decision made by the Tribunal. The applicants supported the application through a statement dated 24th May, 2007 and a verifying affidavit sworn on the same date. It is noted that the said statement and verifying affidavit are the same with those dated 7th May, 2004 which had accompanied the application for leave.

The 1st and 3rd respondents opposed the application through grounds of opposition dated 5th March, 2008 as reproduced hereunder:-

(1) The application is incurably defective and bad in law.

(2) The Verifying Affidavit does not contain facts as required by law.

(3) The decision was on merit and is not amenable to Judicial Review.

(4) Notice of application for leave was not given to the Registrar

(5) The Notice of Motion was filed out of time without leave.

I find it necessary to dispense with some of the grounds of opposition at this stage. The claim that a notice to the registrar was not issued as was required by Order LII rule 1(3) at the time the application for leave was filed is not true. There is such a notice in the file. The same was filed on 7th May, 2007 before the chamber summons application for leave was filed a day later on 8th May, 2007. This is therefore a non-issue.

The second issue is that the notice of motion was filed out of time without leave. The application was filed on 7th May, 2007 and it was challenging the judgment of the 3rd respondent dated 13th April, 2007. That was well within the six months for applying for an order of certiorari. The award of the 1st respondent was made on 21st March, 2007. It is therefore clear that the application was brought to court on time.

I will address the 1st and 3rd respondents' other grounds of opposition later in this judgment.

The 2nd respondent opposed the application by way of a replying affidavit sworn by himself on 25th June, 2007. In summary the 2nd respondent's grounds of opposition are:-

(a) The application is fatally defective, misconceived, incompetent, frivolous, vexatious and an abuse of the court process;

(b) The verifying affidavit is not a verifying affidavit as envisaged by order LIII of the Civil Procedure Rules; and

(c) The 1st respondent had jurisdiction to hear the dispute and make the award since the claim was a claim for trespass.

I have perused the documents filed herein and find that there are three questions to be answered in this judgement namely:-

(1) Whether the application is fatally defective;

(2) Whether the Tribunal had jurisdiction to hear the dispute and make the award; and

(3) Who will bear the costs of this application?

On the issue of the competency of the application, all the respondents submitted that the application is bad because it was wrongly titled and the affidavit verifying the application does not contain the facts as required by the rules.

I will address the two issues together. The respondents cited three cases to support their arguments. The three cited cases are:-

1. COMMISSIONER GENERAL, KENYA REVENUE through REPUBLIC v SILVANO T/A MARENGA FILLING STATION CIVIL APPEAL NO. 45 OF 2000;

2. PAUL IMISON v ATTORNEY GENERAL & 3 OTHERS, NAIROBI H.C. MISC. CIVIL APPLICATION NO. 1604 OF 2003; AND

3. JAMES KEGA KANGAU & OTHERS v THE ELECTORAL COMMISSION OF KENYA & ANOTHER NAIROBI H.C. MISC. APPLICATION NO. 1570 OF 2005.

In the **JAMES KEGA KANGAU** Case, Wendoh, J found that failure to make the Republic an applicant was a fatal mistake. In her words:-

"The practice which has acquired the force of law through judicial precedent is that prerogative orders are issued in the name of the Republic. The application for Judicial Review has to be instituted like the format in the FARMERS BUS CASE and WELAMONDI CASE. In the Notice of Motion dated 18th November, 2005 there is no applicant. That application is fatally defective and the court has no option but to strike it out with costs to the respondent and interested parties."

In the case before me the Republic has been correctly named as the applicant. The respondents are challenging the naming of Henry Ngware Mungai as one of the respondents. I agree with the respondents that Henry Ngware Mungai should not have been named as a respondent. The respondent is normally the public body which made the decision being challenged. He ought to have been named as an interested party. The question is whether his being named as a respondent has resulted in this motion being fatally defective. I do not think so. The 1st and 3rd respondents are the correct respondents and they have been included in these proceedings. The 2nd respondent has also participated in these proceedings although he was sued under the wrong title. No prejudice has been caused to any of the parties herein. I think justice would be better served if this mistake is ignored. I therefore find that this application is not defective because of the way it has been titled.

The other issue is whether the application is defective on the ground that the facts are contained in the statement and not the verifying affidavit as required by the now repealed Order LIII Rule 1(2) of the Civil Procedure Rules. The said rule is the current Rule 1(2) of Order 53 of the Civil Procedure Rules 2010 which states that:-

"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."

The Court of Appeal had the opportunity of interpreting the said rule in the **COMMISSIONER GENERAL KENYA REVENUE AUTHORITY CASE** where the learned judges observed that:-

"We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII."

I agree that this is the plain meaning of the said rule. There is no other interpretation that can be given to it. As can be discerned from the rule, the statement contains the name and description of the applicant, the relief sought, and the grounds on which it is sought. Anything else placed on the statement would be excess baggage. I however do not think that a statement should be struck out for merely containing excess information.

I have looked at the applicants' statement dated 24th May, 2007 and find that it carries four parts namely: description of the parties; facts relied upon; the relief sought; and the grounds upon which the relief is sought. The inclusion of the description of the respondents and the facts relied upon was not necessary. That alone cannot however, be used to throw out the application since the statement has met

the requirements of the rule in as far as its contents is concerned.

The verifying affidavit sworn by the applicants clearly confirm that facts are contained in the statement. I reproduce paragraph 3 & 4 of the verifying affidavit to confirm this fact:-

"3. THAT the averments contained in the statement to be filed herewith are true and correct.

4. THAT we swear this affidavit in verification of the correctness of the statement of facts"

At this point I should proceed to declare the applicants' application fatally defective and have it dismissed.

Article 159(2)(d) of the Constitution provides that **"justice shall be administered without undue regard to procedural technicalities."** Failure to comply with a clear rule cannot however be equated to procedural technicality. I however think that in passing the Constitution the people of Kenya wanted the courts to as much as possible address the substance of the dispute before it and not use technicalities to finalize a case. In the case before me the applicants opened an escape route for themselves when they averred in the verifying affidavit that:-

"5. THAT we wish to produce and mark "LE1, LE2, LE3, LE4, LE5."

6. THAT we annex herewith the tribunal award and court proceedings adopting the award from the Senior Resident Magistrate's Court Kikuyu and mark them as "LE1" and "LE2"

7. THAT we are informed by our Advocates on record which information we believe to be true that the arbitration by the tribunal was ultra-vires, null and void and the same should be quashed."

In my view the applicants have in these three paragraphs attempted to verify the facts upon which they rely. I believe through these paragraphs they have managed to fulfill the requirements of the said rule. I therefore reject the submission by the respondents that the applicants failed to comply with the requirements of Order LIII Rule 1(2) of the Civil Procedure Rules.

The main issue for determination in this matter is whether the Tribunal exceeded its jurisdiction. The Tribunal's jurisdiction was derived from Section 3(1) of the repealed Land Disputes Tribunal Act which provided that:-

"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 Section 4."

Mrs. Sirei who represented the 1st and 3rd respondents conceded that the 1st respondent exceeded its jurisdiction. Mr. Gikonyo for the 2nd respondent however submitted that the 1st respondent did not exceed its jurisdiction.

Counsel for the applicants told the court that the issue of fraud was addressed by the tribunal in its award. On this issue the 2nd respondent's counsel submitted that the issue of fraud was raised by the applicants in their defence and the Tribunal only commented on it in passing.

The summary of the award is found in the following words:-

"The Tribunal therefore, by the powers conferred upon it under Section 3 (1) (b) and (c) of the

Land Disputes Act (No. 18 of 1990) order:

1. That the Objectors be evicted from Parcel of Land No. DAGORETTI/KINOO/665 which is registered under the names of HENRY NGWARE MUNGAI

2. That failure to honour Order (1) above, the Claimant is ordered to remove the structures on DAGORETTI/KINOO/665 at his cost."

It is not disputed that the 2nd respondent who was the complainant before the Tribunal was the registered owner of L.R. No DAGORETTI/KINOO/665. The Tribunal did not interfere with the title to that parcel of land. What it did was simply to confirm that he was the registered owner and that the applicants herein who were the objectors/respondents before the Tribunal had trespassed upon the parcel of land. The Tribunal cannot therefore be accused of having acted outside its jurisdiction. The award of the Tribunal and the subsequent adoption of the same by the 3rd respondent cannot be faulted at all. As such I find this application has not merit. The same is dismissed. Considering the relationship between the parties herein, I make no orders on costs.

Dated and signed at Nairobi this 19th day of July, 2012

W. K. KORIR, J