



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Civil Application 90 of 2010

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SENIOR RESIDENT MAGISTRATE’S COURT AT KAJIADO TRIBUNAL CASE NO. TC 109/02/09

AND

IN THE MATTER OF LANDS DISPUTE TRIBUNAL ACT NO. 18 OF 1990

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

TRIBUNAL
COURT, KAJIADO

- 1. KAJIADO DISTRICT LAND DISPUTE
- 2. SENIOR RESIDENT MAGISTRATE’S
- 3. EVANS KURIA GATHIRIRESPONDENTS

EXPARTE

MONICA WANJIKU MIRINGU

RULING

The notice of motion, the subject of this ruling was filed in this court on 31st May, 2010. It was so filed pursuant to leave granted by **Waweru, J** on 10th May, 2010. The application was expressed to have been brought under the then Order LIII rule 3(1) and 2 of the Civil Procedure rules, Sections 8 and 9 of the Law Reform Act and all other enabling provisions of the Law. In the application, **Monica Wanjiku Miringu**, hereinafter “*the applicant*” prayed for orders of *certiorari* to quash all the proceedings and award made by Kajiado District Land Disputes Tribunal, hereinafter “*the 1st respondent*” on 18th February, 2010 relating to land parcel Numbers Ngong/Ngong/46624, 25, 26, 27 and 28 all emanating from title no. Ngong/Ngong/2014. The applicant also sought *prohibitory* orders against the Senior Resident Magistrate’s Court at Kajiado, hereinafter “*the 2nd respondent*” from proceeding to hear and give effect to any orders issued pursuant to the award made by the 1st respondent. The applicant also

prayed that costs of the application be provided for.

The application was anchored on the grounds that the 1st respondent did not have jurisdiction to hear the dispute as it touched on title, the 1st respondent therefore acted *ultra vires* and the award was in the circumstances a nullity in law and lastly, that the applicant had a good case with a high chance of success.

The application too was supported by the affidavit of the applicant. That affidavit gives the background to the dispute which is this; apparently the applicant and her siblings, **Nelson Muthee Miringu, John Kamau Miringu, Elizabeth Wangare Kiriiri** and **Jane Wangeci** are the beneficiaries of the estate of their late father, **Solomon Miringu** which comprised land parcel Ngong/Ngong/2014. Following a confirmation of grant, the said parcel of land was subdivided and the applicant and her siblings acquired individual titles in their names in September, 2009 in respect of Ngong/Ngong/46624 through to Ngong/Ngong/46628 all inclusive.

Their deceased father had bought the original parcel of land from one, **Gerald Oloishorna Kangu** Vide an agreement dated 23rd April, 1977 together with a private road adjacent to it. Survey carried out before the purchase of the said parcel of land by the deceased confirmed that the boundaries were in order. Subsequent thereto, **Evans Kuria Gathiri**, hereinafter "*the 3rd Respondent*", bought the adjacent parcel of land, Ngong/Ngong/2244 and the private access road which had been bought by the deceased was situate in between the 2 parcels of land, which measured 4 meters. The deceased surrendered the private access road to Government to be used as a public road.

On or about 20th August, 2009 the 3rd respondent lodged a claim with the 1st respondent seeking the resurvey of land parcel "**Nos.2244, 2561 and 2014 and according to the available mutations and the official search and ascertaining the accuracy of all the parcels b) A portioned both access roads to the actual location...**". The 1st respondent heard the dispute and pronounced its decision on 18th February, 2010. It was in these terms "**...that, the land surveyor to visit the Disputed Land and Amend the map to correspond with the ground and place the road which is passing between two parcels of land be 6 meters wide as this is the public road...**". To the applicant, this award is null and void *ab initio* because as at the time it was given the land in dispute was non-existent. The award is equally void as it touched on several titles belonging to the applicant's siblings without affording them an opportunity to be heard. This notwithstanding, the award is still bad in law as it seeks to excise land from already existing titles of different individuals, hence the application.

The application was served on all the respondents. However, only the 3rd respondent reacted to the same. In a replying affidavit dated 8th November, 2010, he deponed where pertinent that he was the registered proprietor of all that piece or parcel of land known as Ngong/Ngong/2244 which he had since subdivided into Ngong/Ngong/17720 and 21. His original parcel of land aforesaid bordered Ngong/Ngong/2014 which had also been subdivided among the heirs of the deceased. The 2 parcels of land Ngong/Ngong/2244 and 2014 respectively are cut across by a public road measuring 23 feet wide or thereabouts. On or about 23rd July, 2009 he discovered that the said road had been reduced and encroached into his land along the southern boundary upon which he lodged a claim with the 1st respondent to *inter alia* determine the issue of boundary between Ngong/Ngong/2244, 2014 and 2561. On 18th February, 2010, the 1st respondent rendered its verdict in terms that-

- The Land District Surveyor resurveys the dispute land and amend the map to correspond with the position on the ground.
- To place the public road at 6 meters wide.

To the 3rd respondent, the award was within the law as it dealt with issues relating to boundaries to land. He lodged the claim with the respondent on or before 23rd July, 2009 to determine boundaries in respect of Ngong/ Ngong/2244, 2014 and 2561. The allegation that the decision of the 1st respondent touched on a non-existent title cannot therefore hold. That it was in the interest of justice that this court

confirms the award as no prejudice will be caused to the applicant and her siblings if the land is restored in accordance with the proper mutation forms, since they surrendered the road in contention to the Government.

When the application came before me on 3rd July, 2012, parties had filed and exchanged written submissions signalling therefore, that they intended to canvas the application by way of written submissions. I have carefully read and considered the written submissions alongside cited authorities.

It is common ground that;-

- The applicant and her siblings are beneficiaries of the estate of the late **Solomon Miringu** deceased.
- The deceased was the registered proprietor of all that piece or parcel of land known as Ngong/Ngong/2014 measuring 1.62 Ha.
- The said parcel of land had since been subdivided into 5 parcels and shared between the applicant and her siblings.
- The 3rd respondent was the registered proprietor of the original Ngong/Ngong/2244 measuring 2.43 Ha.
- The same had since been subdivided into 2 parcels of land.
- There was a common access road between the 2 original parcels of land.
- The access road had been bought by the deceased which he later surrendered to Government.
- Lastly the 2 parcels of land had not been subdivided when the 3rd respondent presented his claim to the 1st respondent. Indeed the claim is dated 23rd July, 2009 whereas the subdivisions were effected on 29th September, 2009.

Under section 3 (1) of the Land Disputes Tribunals Act, now repealed, the jurisdiction of the tribunals established thereunder such as the 1st respondent was limited to hearing all cases of civil nature involving a dispute as to:-

- The division of, or the determination of boundaries to land including land held in common;
- A claim to occupy or work land; and
- Trespass to land.

From the complaint lodged by the 3rd respondent with the 1st respondent, it is quite apparent that he was complaining that his parcel of land had been encroached upon by the access road along the southern boundary. He wanted the 3 parcels of land Nos. 2244, 2561 and 2014 resurveyed so that the accuracy of the boundaries and the access road can be established. Clearly this was a boundary dispute. The award essentially was aimed at determining boundaries to land. As correctly submitted by the 3rd respondent, the 2 parcels of land, 2244 and 2014 had not been subdivided when the 3rd respondent presented his claim to the 1st respondent. Accordingly, the issue of the award being made upon a non-existent title does not arise. In the same vein the complaint that the award touched on parcels of land belonging to the parties who were not parties to the claim does not arise. It appears to me that despite knowledge of the dispute filed with the 1st respondent by the 3rd respondent dated 23rd July, 2009 the applicant surrendered the title to land parcel 2014 in a calculated move to defeat the ends of justice. I do not think that she should be allowed to benefit from her own mischief. In any event, the 3rd parties allegedly affected by the award,

