REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 28 of 2011

JAMES KARANJA KAGECHE.....1ST APPLICANT

LUCY WANJIRU KARANJA .....2ND APPLICANT

DAVID GACHUIRI KARANJA .....3RD APPLICANT

VERSUS

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

ATTORNEY GENERAL .....2ND RESPONDENT

AND

LEAH NJOKI THITU.....INTERESTED PARTY

JUDGEMENT

David Gachuiri Karanja (the 3rd applicant) is the son of James Karanja Kageche (the 1st applicant) and Lucy Wanjiru Karanja (the 2nd applicant). The Land Disputes Tribunal at Kikuyu is the 1st respondent whereas the Attorney General is the 2nd respondent. Leah Njoki Thitu is an interested party.

After the applicants were granted leave on 16th March, 2011 to commence judicial review proceedings they filed a notice of motion on 6th April, 2011 in which they pray for orders that:-

1. THAT an order of certiorari be and is hereby issued removing to this Hon. Court for the purposes of the same being quashed the award of the land disputes tribunal issued and adopted by the magistrate Kikuyu on 25th February, 2011 and all proceedings relating to the land disputes case No. K/LND/14/8 of 2010 LEAH NJOKI THITU VS. JAMES KARANJA KAGECHE.

2. THAT an order of PROHIBITION be and is hereby issued prohibiting the respondents from pursuing, effecting and/or maintaining land disputes case No. K/LND/14/8 of 2010 against the 1st applicant.

3. THAT cost of this application be provided for.

The application is based on the grounds on its face namely:-

i.) The agreement, that brought the parties to the dispute together, was entered into in 1973 and effected in 1976 and is still valid for all intents and purposes, yet the award alters the said agreement.

ii.) The registration of the 1st applicant as proprietor of the disputed land was a 1st registration yet the award of the tribunal cancels that registration and the title thereon unlawfully and without jurisdiction so to do.

iii.) The applicants have lived on the said premises known as Karai/Karai/369 for over 35 years uninterrupted and the said award will cause them irreparable loss and damages.

iv.)The bone of contention is 2 of an acre which contains a rocky patch that is not arable that sits in the middle of the applicants plot and whose omission from measurement was a fundamental issue in the above mentioned agreement.

v.) The award to re-survey the land known as Karai/Karai/369 and its effect goes beyond the jurisdiction of the land disputes tribunal as set out in section 3 of the land disputes act of 1990.

vi.)The complainant in the land dispute case only started agitating for re-surveying in 2009 almost 35 years after the fact and now that the 1st applicant is sickly, old and invalid.

vii.) That even the portion held by the complainant, the beneficiary of the award, has a rocky portion and also exceeds her intended acreage.

The application is also supported by the affidavit in support of the application for leave which affidavit was sworn by the 3rd applicant on 14th March, 2011. The respondents as per the grounds of opposition dated 8th May, 2011 oppose the application for the following reasons:-

1. THAT the application does not disclose issues that are amenable to Judicial Review so the orders sought therein cannot be granted.

2. THAT the 1st Respondent is acting within its mandate as envisaged by Section 3 of the Land Disputes Tribunal Act.

3. THAT the application is frivolous, vexatious and an abuse of the process of the court.

The interested party swore a replying affidavit on 11th May, 2011 in which she averred that no formal survey was done and they demarcated the boundaries using guidance given to them by the Agricultural Officer in 1973. She denied that the parcel of land in question was surveyed in 1979 as alleged by the applicant. It is her case that the 1st respondent had the jurisdiction to entertain the boundary dispute between her and the 1st applicant. She averred that the 1st applicant's title did not arise out of a first registration.

The undisputed facts of this case show that in 1973 the interested party sold two acres out of her parcel number Karai/Karai/19 to the 1st applicant. In 1979 the 1st applicant had the two acres registered in his name and title number Karai/Karai/369 issued in his name. The interested party later discovered that the 1st applicant's parcel of land measured 2.35 acres which meant he had acquired 0.35 acres on top of the two acres sold to him. The interested party filed a complaint before the 1st respondent. After hearing the matter the 1st respondent found in favour of the interested party and ordered the resurvey of L.R. No. Karai/Karai/369 by a Government surveyor. This decision is what is being challenged by the applicants through these proceedings.

I have gone through the affidavits sworn in these proceedings. I have also perused the proceedings that took place before the 1st respondent. When the 1st applicant testified before the 1st respondent he stated

that his land was not more than two acres. The 1st respondent observed that L.R. No. Karai/Karai/369 measured approximately 0.93 hectares which is 2 ½ acres. In the supporting affidavit sworn before this court the 3rd applicant averred that the land measured 2.2 acres and the excess 0.2 acres covers a rocky patch and is in the middle of the farm. He swore that when the parcel of land was being surveyed in 1979 there was an agreement between the 1st applicant and the interested party that the rocky patch should not be taken into consideration.

It is difficult to reach a just decision in judicial review proceedings where facts are in dispute. In my view the respondents and the interested party may be correct when they say that this was a boundary dispute and the 1st respondent had jurisdiction. The other issues may have been better ventilated before a court which could hear the evidence of the witnesses. For example the interested party alleges fraud. The applicants however state there was no fraud. One thing is however certain the 1st applicant received more than the two acres sold to him by the interested party. Without considering whether the 1st respondent had jurisdiction, one can say that its decision appears just.

At the end of the day however, this matter will not be decided on the issue of the jurisdiction of the 1st respondent. The answer lies elsewhere. The applicants have asked the court to quash the adoption of the decision of the 1st respondent by the magistrate's court at Kikuyu. The decision being challenged is the one made on 25th February, 2011 by the magistrate's court. The magistrate's court has not been made a party to these proceedings. Order 53 Rule 3(2) is clear that where an order of a court is being challenged, the presiding officer of the court must be served with the notice of motion. The fact that the magistrate's court at Kikuyu was not made a party to these proceedings can only mean that the presiding officer was not served. That means the prayer for an order of certiorari to quash the decision of the magistrate cannot issue. An order of prohibition looks to the future and is aimed at stopping a foreseeable illegality from taking place. In praying for an order of prohibition against the 1st respondent, the applicants were trying to stop what had been done. An order of prohibition is therefore not available in the circumstances of this case.

For the foregoing reasons, the applicants' application fails and the same is dismissed with costs to the respondents and the interested party.

Dated and signed at Nairobi this **27th** day of **September**, 2012

W.K. KORIR, J