



REPUBLIC OF KENYA

High Court at Kitale

Miscellaneous Civil Appeal 71 of 2010

REPUBLIC.....APPLICANT.

VERSUS

KWANZA L.D.T. COMPRISING OF:-

WAFULA BIBI

SAMUEL KIGEN

MATHEW NABILIKI.....RESPONDENTS.

KITALE CM'S COURT

VINCENT MUKHWANA

R U L I N G.

This is a judicial review application made under section 8 and 9 of the Law Reform Act and order 53 Rules (3) and (4) of the Civil Procedure Rules. The ex-parte applicant Joseph Wanjala, seeks an order of certiorari to remove into this court and quash the decision of the Kwanza Land Disputes Tribunal, read and adopted as a judgment of the court on 14th September, 2010 by the Chief Magistrate's court in Kitale wide land case No. 22 of 2010.

the grounds for the application are firstly, that the applicant was not the administrator of the estate of the late Tedla Nasipwondi and did not therefore have capacity to be sued, secondly, the land disputes tribunal had no jurisdiction to enforce a void contract for sale of land as no consent of the land control board had been sought and obtained, thirdly, the dispute before the tribunal was commenced in a manner which was contrary to the mandatory provisions of the Lands Disputes Tribunal Act as no statement of claim was filed and served, no defence was filed and no notice of the claim was made against the applicant, fourthly, the award affected a person not party to the dispute in contravention of the rules of natural justice.

A supporting affidavit dated 8th December, 2010 by the applicant reiterated the contents of the statement of particulars dated 22nd November, 2010 and the verifying affidavit dated 22nd November, 2010 both filed in support of the application for leave to institute this present matter which leave was granted on 23rd November, 2010.

The first and second respondents, did not file any response to this application, neither did they appear for the hearing of the same. However, the third respondent filed a replying affidavit dated 19th January, 2011

in opposition to the application. Similarly, the fourth respondent filed a replying affidavit dated 24th October, 2012 in opposition to the application.

In the verifying affidavit dated 22nd November, 2010, the applicant avers that his late mother was the allottee of plot No. 356 Maridadi settlement scheme and that she died on 30th November, 2008 having sold a portion thereof to the applicant.

The applicant avers that he was not a party to the sale agreement between his deceased mother and the third respondent and in any event there was no consent of the land control board for the transaction. Further, the applicant was not the administrator of the estate of his late mother and was not served with a statement of the claim lodged against him at the land tribunal.

The applicant admits receiving hearing notices from the tribunal but contends that his advocate wrote to the tribunal indicating that the applicant was not the administrator of the estate of his late mother and that the statement of claim had not been served upon him. Further, the applicant admits having appeared before the tribunal even without a statement of claim and not knowing the case he had to defend.

The applicant contends that he was not invited to the court for the reading of the tribunal award. He only received a letter from the District Surveyor indicating that the decree of the court would be enforced which enforcement the applicant feared would result in the demolition of his houses and his eviction from part of the suit land in favour of the third respondents, an exercise which would in effect be the enforcement of a void contract

The applicant contends that the award of the tribunal ordered that one George Barasa, to surrender 0.25 of an acre of the suit property to the third respondent yet he (George Barasa) was not a party to the tribunal case. For all the foregoing reasons, the applicant prays for the order of certiorari to issue against the first and second respondents.

In response to the application, the third respondent, Vincent Mukhwana, avers that the application is incompetent for want of the notice to the Deputy Registrar and contends that the applicant appeared before the tribunal and gave his evidence and cannot now claim that he was denied an opportunity to file his defence.

The third respondent further contends that he sued the applicant as a trespasser in his land and not for him to give the third respondent land belonging to his mother. Consequently, the tribunal was not enforcing a sale agreement but the third respondent's right to work on the land. Further, the tribunal did not exceed its jurisdiction by ordering the surveyor to erect boundaries on the land.

On his part, the fourth respondent, Sylvester Juma, contends that the application is incompetent for want of notice to the Deputy Registrar. He avers that the applicant was properly served with the claim before the tribunal and that he fully participated in its proceedings and was present when the tribunal visited the suit land.

The fourth respondent contends that the applicant has not come to court with clean hands and that he witnessed the sale agreement made on 21st January, 2007 in which the fourth respondent purchased $\frac{1}{4}$ acre of the suit land. Further, the applicant has encroached into the fourth respondent's portion of land and curved a portion thereof for his occupation.

The fourth respondent contends that the tribunal did not exceed its jurisdiction in ordering that boundaries be established on the suit land by the surveyor.

At the hearing of the application, learned counsel, **Mr. Kiarie**, reiterated that the applicant had no capacity to be sued before the tribunal and was not a party to the sale agreement between his late mother and the third respondent which agreement was in any event null and void for want of the consent of the Land Control Board.

Learned counsel submitted that the award of the tribunal was in excess of jurisdiction as it involved sub-division of land which could not be effected without the issuance of grant of letters of administration. Further, the award involved a contract which did not fall within the jurisdiction of the tribunal .

Learned counsel submitted that the third and fourth respondents were the complainants in the tribunal case yet the award affected about six people some of whom were not parties to the matter. Further, the proceedings of the tribunal were commenced contrary to the provisions of the land disputes Tribunal Act.

On behalf of the third respondent, learned counsel, **M/s. Munialo**, submitted that the application is defective and incompetent as the prerequisite notice to the Deputy Registrar was not issued. Further, the applicant had the necessary capacity to be sued as a trespasser since the claim was over the right to work on land which fell within the jurisdiction of the tribunal and that the applicant was being asked to move out of the land purchased from his mother by the third respondent. Learned counsel contended that necessary claim and hearing notices to appear before the tribunal were served upon the applicant and that is why he appeared before the tribunal and participated in its proceedings. Further, the applicant was served with a hearing notice to attend court for the reading of the award. Further, the tribunal acted within its mandate and made its decision in accordance with the law.

As for the fourth respondent, he appeared in person at the hearing of the application and opted to fully rely on his replying affidavit in opposing the application.

Certiorari, is one of the three judicial review remedies which would lie where a decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with.

The decision making, process is the key to judicial review rather than the merits of the decision.

Herein, the first two grounds for the application puts into question, the jurisdiction of the land tribunal in handing a matter in which the defendant or respondent or objector had no legal capacity to be sued over a portion of land belonging to a deceased owner and in dealing with a matter which essentially involved a contract for the sale of land between the deceased owner of the land and the claimant.

The last two grounds for the application deal with the aspect of fair hearing of the claim and whether the defendant was given adequate opportunity to defend himself. There is also the aspect that a person not party to the claim was condemned unheard.

With regard to the last two grounds and having heard the arguments presented herein by all the sides, this court is of the view that the grounds are unsustainable for the reasons that the applicant appeared before the tribunal and was allowed to ventilate his case. So that, even if, procedural errors had initially occurred, there were undone by the applicant's appearance before the tribunal and defending himself. He cannot now be heard to challenge a process which he freely participated in and somehow validated it.

The third party who was affected by the decision of the tribunal is not a party to this application. It was therefore inappropriate for the applicant to attempt to argue the third party's cause in this matter.

With regard to ground one and two of the application, it is apparent from the proceedings of the tribunal dated 1⁷th August, 2010 (see annexure marked "JW1" in the verifying affidavit) that the complaint by the third and fourth respondents against the applicant was based on a sale agreement entered between the third respondent and the late mother of the applicant for the sale of a portion of the suit property i.e plot No. 356 Maridadi Settlement scheme.

In effect, the decision of the tribunal amounted to nothing more than an enforcement of the said sale agreement.

In as much as the agreement was not between the applicant and the third respondent and in as much as the applicant was not the legally appointed administrator of the estate of his late mother, the tribunal had no

jurisdiction to deal with the matter at hand. The applicant had no capacity to sue or be sued in the tribunal and the tribunal had no capacity to deal with a claim made against a party without necessary “locus-standi”. Above all, the tribunal was clearly in excess of jurisdiction in purporting to deal in a matter or a cause of action relating to a contract which the defendant was not privy to. Section 3(1) of the then Land Disputes Tribunal Act was very specific on the jurisdiction of a tribunal.

Grounds one and two of the application are therefore sustainable. It would follow that the proceedings of the tribunal and the decision arrived at thereafter were all flawed, null and void.

Consequently, this application is granted to the extent that the said decision of the first respondent adopted as a judgment of the court by the second respondent be removed into this court and be quashed forthwith. The applicant shall have the costs of the application. Ordered accordingly.

[Read and signed this 31st day of October, 2012.]

J.R. KARANJA.

JUDGE.