



REPUBLIC OF KENYA

High Court at Nyeri

Judicial Review 58 of 2011

SOLOMON KABORO WAWERU & 2 OTHERS.....APPLICANTS

versus

BENARD MWANGI WACHIRA & 2 OTHERSRESPONDENTS

JUDGMENT

The application before the court is a notice of motion dated 11th November 2011 in which the applicants are seeking an order of Judicial Review by way of certiorari to remove into this court from quashing the award of the Kigumo Land Dispute Tribunal dated 26th May 2011 in LDT No. 19 of 201 touching on plot No. Loc.2/Makomboki/T69 together with the subsequent adoption order or decree if any.

It should be pointed out that leave had been issued by this court on 27th day of October 2011.

The application is grounded on the following grounds:

That the applicant is by its former name the registered proprietor of all that parcel of Land Known as LR No. Loc.2/Makomboki/T.69.

That the claim by original Apostolic Church that it is the bona fide owner of the said parcel of land has no basis in law.

That Tribunal had no jurisdiction to hear and determine a matter regarding title to registered land.

That The parties who were before the tribunal were strangers to the suit property as they are not trustees on the appellant.

The application is supported by the statutory statement dated 19th October 2011 and supporting affidavit by Peter Gatimu Ndungu sworn on the same day wherein the same deponed that the suit land was registered in the name of Apostolic Faith of Africa on 4th February 1963 and in support thereof annexed a copy of the official search.

He further deponed that in 1975 the church broke into two groups one lead by WILLY NGANGA KAGO while the second group remained on the suit land and continued as Apostolic Faith of Africa. On 4th September 1975 the Apostolic Faith of Africa changed its name to Apostolic Faith Church and the officers of the said church did not change. In support thereof he had annexed a copy of Certificate of Change.

I must point out at this stage that the applicant has given no reason for the change of names from

Apostolic church of Africa and neither has the same given anything to confirm that the officers of the Apostolic Faith of Africa were the same as those of apostolic Faith church.

It is further deponed that the original title documents of the suit land were kept by WILLY NGANGA KAGO who ceased to be in office in 1975 when he was voted out and therefore the suit land remained in the name of Apostolic church of Africa to date.

That on 19th May 2008 the Split group formerly led by WILLY NGANGA KAGO registered a society by the name of ORIGINAL APOSTOLIC FAITH and that some members of the applicants filed Kigumo Land Dispute case No. 19 of 2011 and the award thereof the subject of judgment was given on 26th May 2011 in favour of the original apostolic Faith. He concluded by saying that the Tribunal acted without jurisdiction in making the award and that the parties who moved the tribunal had no capacity to do so since they were not the registered trustees of the applicant.

In response thereto the respondents filed ground of opposition through the law firm of KIRUBU BEN MWANGI & Co. Advocates as follows:

- a) The application is frivolous vexatious and an abuse of the due process of the court.***
- b) The application as filed is fatal defective for failure to comply with the strict and mandatory provisions of order 53.***
- c) Some parties likely to be affected by the orders sought herein were omitted.***
- d) Having filed the dispute before the Tribunal the same is estopped from denying jurisdiction.***

The parties herein agreed by consent that the matter be determined by way of written submissions which have now been filed.

It is submitted on behalf of the applicant that it is a society registered under societies Act and present the application through its registered trustees and that it is the registered proprietor of L.R. No. LOC.2/MAKOMBOKI/T.69 having changed its name for Apostolic Faith of Africa the original proprietor. It is submitted that the tribunal gave an award in favour of the respondent who now seeks to have the same adopted and that the Tribunal did not have jurisdiction to hear and determine a matter regarding title to registered land. It was submitted that under section 3(1) of the Land Dispute Tribunal Act now repealed the tribunal only have jurisdiction in the following:

- a) The division of or the determination of boundaries, including land held in common.***
- b) A claim to occupy or work land.***
- c) Trespass to land.***

It is submitted that the dispute between the parties herein did not fall in any of the above and that it is a dispute as between two factions of the church both of which claim to be the legitimate owners of the suit land. They therefore urges the court to issue the orders sought.

In response thereto the respondent has submitted that after the dispute was heard on 31/3/2011 an award was delivered by the panel of elders as follows:

- a) The original Apostolic Faith is the rightful occupiers of the plot No. Loc.2/Makomboki/T.69.***
- b) The Apostolic Faith Church claim to occupy Loc.2/Makomboki/T.69 is misplaced as there is another case on the same matter at Thika court.***

It is submitted by the respondent that the applicants were told by the tribunal that their claim to

occupy land was misplaced and therefore it means that the dispute the ex parte applicant had filed on behalf of the Apostolic Faith church regarding the right of occupation over Land Parcel No. Loc.2/Makomboki/T.69 was rejected.

It is submitted that under the Land Dispute Tribunal the applicants should have lodged an appeal to the provincial appeals committee before coming to the High Court on a point of law. It is submitted that since the applicants are the once who had taken the respondents to the tribunal whatever the outcome thereof should be ordered to pay costs.

It is submitted the tribunal did not make an award regarding title to registered land but only ruled on the right to occupation which is within the jurisdiction of the tribunal and that since the tribunal did not order original Apostolic Faith to be registered as the proprietor it did not act without jurisdiction.

It is further submitted that the notice of motion is defective since the tribunal through its Chairman is not named as a respondent in the notice of motion dated 11th November 2011 and since the named respondents were not the makers of the award to be quashed they can not be sued as respondent.

Whereas I agree with the submissions of the Respondent that the Applicants should have named the Kigumo Land Dispute Tribunal as the Respondent since it is their award which the applicant seeks to quash the constitution of Kenya 2010 now put it upon the courts to make decisions without due regard to procedural technicalities under Article 159(d) I take the view that the substance of the application before me is the quashing of the decision of the said tribunal and will proceed with the same notwithstanding the omission on the part of the applicant.

It is further submitted the award complained of was on 31st October 2011 adopted by the Kigumo court and therefore under section 7 of the Act after an award has been made a judgment what follows is execution proceedings as provided for under the Civil Procedure Rules. It is therefore submitted that the application filed after the award has been adopted as deemed to have been overtaken by events and in support thereof the respondent has submitted the High Court case Misc. Civil application No. 23 of 2008 where Justice GBM Kariuki in R. v TONGAREN LAND DISPUTES TRIBUNAL held

“once the decision of the tribunal is adopted under section 7(1) of the Act the decision ceases to continue to last in law. Instead it is the judgment and decree ensuing therefrom that takes its place. It would be absurd to have in existence both the award and the decree of judgment at the same time... But once the adoption of the award takes place unless it is set aside, the award ceased to exist in law for the purposes of quashing.”

I must point out that by the time when the alleged award was adopted on 31st October 2011 this court had on 27th October 2011 issued an order for leave which leave was to operate as stay of execution of or enforcement of the award of Kigumo Land Dispute Tribunal No. 19 of 2011 which was due for adoption by the chief Magistrate's court at Thika. I therefore take the view that the alleged adoption of the same by the court is of no effect and the said decision is therefore available for quashing by this court.

Having dealt with the two issues above the main issue now for this court to decide is whether the Kigumo Land Dispute Tribunal acted without jurisdiction in the matters placed before it by the applicants herein.

To enable one answer this question one has to look at the dispute which was placed by the tribunal. Annexure AFC - 4 at page 2 is entitled statement/affirmation by claimant through Peter Murigi Kimani ID No. 10847508 where it is stated

I am the complainant on behalf of Apostolic Faith Church. The complaint is on occupation of Loc.2/Makomboki/T.69. A church was built on the land long ago.

From the claim one can say that the dispute was in respect of the right of occupation and therefore within the jurisdiction of the tribunal but when one looks at the summary of Tribunal Findings

the tribunal states that in our view the dispute plot belong to the original Faith Church group and they should continue to occupy and develop it.

That in my view clearly shows that the tribunal went outside the scope of the jurisdiction by declaring a right to ownership and therefrom the same acted ultra vires and to that extent based on the authorities of 1 Republic v the Commission of Cooperative Development and another exparte DAVID MWANGI & 15 Others High Court Misc. Civil case No. 805 of 1990 Bosire and Tank JJ where it was stated:

certiorari is an order which issue from High Court directing the removal from an inferior tribunal or authority and bring it before itself for quashing a decision or order of that tribunal made in excess of jurisdiction...

the existence of right of appeal or alternative remedy like review will not preclude an applicant from seeking the remedy”

2. WAMWEA vs CATHOLIC DIOCESE OF MURANG'A REGISTERED TRUSTEES (2003) KLR 389 393 where Khamoni J stated section 159 of the Registered Land Act Cap 300 laws of Kenya) as read with section 3(1) of the land Disputes tribunal Act makes it clear the jurisdiction of the tribunals and land dispute appeal committee under the land disputes tribunal Act. Disputes over title to land are not within the jurisdiction of Tribunals.

I therefore find that when the tribunal stated that the land belongs to the respondent it was ultra vires and therefore subject for quashing through certiorari.

I therefore find that the application before me has merit and therefore quash the award of the Kigumo Land Disputes Tribunal. However the applicant having move both the tribunal and the court shall pay costs of these proceedings and cost in the tribunal at Kigumo. It should also be noted that this judgment does not confer the right to the suit property upon any party.

Dated and delivered at Nyeri this 25th day of October 2012.

J. WAKIAGA

JUDGE

Judgment read in open court in the absence of the advocates but in the presence of Henry Gachanja (Kariuki a respondent)

J. WAKIAGA

JUDGE