



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 160 of 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF
CERTIORARI

AND

IN THE MATTER OF THE AWARD OF THE LAND DISPUTES TRIBUNAL AT EMBU IN LAND
CASE NO. 28 OF 2010 MADE ON 06.07.2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE PROVINCIAL LAND DISPUTES TRIBUNAL AT EMBU.....RESPONDENT

AND

PHYLIS MUTISYAINTERESTED PARTY

RULING

1. This case is yet another melancholic wreath to the tomb of the Land Disputes Tribunal Act. Sometime in 2009, the Interested Party herein, Phylis Mutisya (“Interested Party”) approached the Mutomo Land Disputes Tribunal (“District Tribunal”) with a complaint that her husband, Boniface Ndathini, had unlawfully transferred their matrimonial property, to wit “all that unregistered parcel of land situated (sic) at Kivandeni Sublocation, Kanziko Location along Mutomo-Kanziko Road opposite GNCA Church and measuring approximately 6 acres” to the *Ex Parte* Applicant, Zacharia Mbai Musya (“Applicant”). She complained that the Applicant had purported to purchase the matrimonial property from her husband even though she had warned him that she had not consented to the sale.
2. The Interested Party’s case before the District Tribunal was that the purported sale by her husband was unlawful and unjust because they had jointly purchased the land from the previous buyer, Ndongolo Mwanzi, and that the land was, therefore, matrimonial property. She further reported to the District Tribunal that the purported sale left her destitute since her homestead which was her only abode was on the disputed land.
3. On his part, the Applicant explained to the District Tribunal that he had lawfully purchased from Boniface Ndathini the disputed land for Kshs. 260,000/=. He produced a Sale Agreement dated 05/02/2009 between himself and Boniface Ndathini evidencing the Sale. He also produced a letter dated 16/04/2009 written by Boniface Ndathini and addressed to the Assistant Chief of Kivandeni Sub-location

affirming that he was, indeed, the previous owner of the disputed land but had sold it legally and for valuable consideration to the Applicant and that the land, therefore, lawfully belongs to the Applicant.

4. In the face of these dueling accounts and evidence, the District Tribunal concluded that the land belonged to the Applicant and gave its award as such. The award was adopted by the Mutomo Senior Resident Magistrate's Court as required by law.

5. The Interested Party, being dissatisfied with the outcome, then, perfected her appeal to the Eastern Provincial Dispute Tribunal Appeals Committee ("Appeals Committee"). Apparently, the appeal was slated for hearing on 06/07/2010. The Applicant swears in his affidavit that he did not receive any notification of the hearing date until 8:15 a.m. of the very morning the hearing was to take place. He made a bee-line to Embu accompanied by his witness but arrived there after 4:00 p.m. and long after the Appeals Committee had met and concluded the matter. Needless to say, the Appeals Committee ruled the appeal against him.

6. The Applicant is, obviously, aggrieved by that decision of the Appeals Committee. However, instead of preferring an appeal against that decision, he has elected, instead, to challenge the legality of the proceedings before the Tribunal and the Appeals Committee. He relies on three main arguments in his quest for judicial review:

(a)First, the Applicant argues that the Interested Party did not have locus standi to bring the claim before the District Tribunal, and by extension, the Appeals Committee. As I understand this argument, it is that the land in dispute never belonged to the Interested Party but was owned solely by Benson Ndathini. This, claims the Applicant, is unalterably proved by the Sale Agreement and the letter written by Benson Ndathini. All the Interested Party claims, says the Applicant, is that she is the spouse of the legal owner and should therefore have given consent to the transaction. However, the land in question is still unregistered – and, unlike land registered under Registration of Lands Act (Chapter 300, Laws of Kenya), this transaction required no consent from the spouse of the owner or any other person. To this extent, the Applicant forcefully argues that the Interested Party was a stranger to the transaction and, therefore, should never have been allowed to bring a suit against him.

(b)Second, the Applicant complains that the decision of the Appeals Committee failed the test of procedural fairness because he was not afforded an opportunity to give his side of the story. He complains that he was only served with a hearing notice on the date of the hearing and although he traveled to Embu in haste, he found the proceedings already concluded. He says he was shocked to find a false affidavit of service in the file at the Appeals Committee alleging that he was served earlier. He is categorical that the signature on the returned hearing notice is not his but the work of a forger. He argues that since he was never served, the decision made against him offends the principles of natural justice and should be quashed.

(c)Lastly, the Applicant argues that neither the Tribunal nor the Appeals Committee had jurisdiction to entertain the matter because it involved an issue of ownership of land. In particular, the Applicant complains that the Appeals Committee "usurped the powers reserved only for the High Court by ordering that the applicants name be deleted and that of [the Interested Party] inserted as the owner of the land in dispute."

7. The Interested Party responds forcefully to each of the three arguments by the Applicant. To the argument that she has no locus standi to bring the claim, she states that she is claiming a right to occupy and work on land that she had bought jointly with her husband, and a home which she had built thereon. Hence, she says, she has direct rights and interests in the land. As such, section 3 of the Lands Disputes Tribunal Act permits her to bring a claim since under that section anyone claiming "rights or interests" in the land can lodge a dispute in the District Tribunal.

8. Turning to the question of procedural fairness, the Interested Party argues that there is sufficient evidence to show that the Applicant was served with a hearing notice on 30/06/2010 and that he signed the hearing notice on the back page. She reminds the Court that there is an affidavit of service in the

records of the Appeals Committee. Further, she raises the legal point that there is “back-up” evidence that the Appeals Committee had a “base to act the way it did,” the High Court exercising its power of Judicial Review cannot substitute its own judgment or process for that of the lawful tribunal which made the decision.

9. Lastly, on the important point of jurisdiction, the Interested Party argues, first, that the Applicant is imprecise on whether he is attacking the jurisdiction of the District Tribunal or the Appeals Committee. The Interested Party bifurcates her reasoning thus: If the Application for Judicial Review is against the Appeals Committee, she says, it cannot lie because section 8(9) of the Act provides that if any issue of jurisdiction is raised, it can only be raised as an appeal to the High Court since it is a point of law. However, the Interested Party argues, the appeal that was before the Appeals Committee was one of fact: the Appeals Committee has jurisdiction to hear and determine the appeal before them. One cannot, then, say that the Appeals Committee does not have jurisdiction to hear an appeal lodged to it.

10. On the other hand, the Interested Party argues, if the Judicial Review Application is against the District Tribunal, it should not be granted because of the conduct of the Applicant. She points out that the Applicant appears to have accepted the jurisdiction of the District Tribunal when it made a decision against the Interested Party. This conduct, the Interested Party argues, disentitles the Applicant from the grant of the prerogative order of certiorari. She cites **R Vs The Attorney General & Others (Machakos HCCC No. 59 of 2002)** where Justice Wendoh remarked:

Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing after another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one, must be exercised on the basis of evidence and sound principles.

1. I have considered the competing arguments by the parties in this case and analyzed the affidavit evidence presented. I would agree with the Interested Party that there is no question that she is rightfully before the Court as she was before the District Tribunal and the Appeals Committee. As her Learned Counsel, Mr. Kilonzi properly points out, she had a claim in the disputed land; a claim based on what she now presents as a right to work or occupy the land. In fact, in the District Tribunal and Appeals Committee, she styled it as a right to jointly own the property with her husband who, it would appear, was the technical owner of the land. This gives her a direct interest in the disputed property. It is simply absurd to call her a stranger given her claim and context. It is, of course, a different thing whether she can, in fact, vindicate her claim by evidence.

2. I would also agree with the Interested Party’s position on the issue of procedural fairness. I simply do not think that there is enough here to make a finding, for purposes of judicial review, that there was an absence of procedural fairness enough to trigger review on grounds of the principles of natural justice. As Mr. Kilonzi, Learned Counsel for the Interested Party argues in his submissions, this Court must give deference to the fact that the Tribunal made findings that there was proper service on the Applicant based on the Affidavit of Service on the record. This Court is not reviewing for error but for legality. As such, even if this Court would not have reached the conclusion that the Tribunal reached, unless no reasonable person would have reached that factual decision, then the decision must stand. Here, all the Applicant claims is that the Appeals Committee should have disbelieved the Interested Party’s Affidavit of Service. Perhaps another tribunal would have -- but there is nothing irrational or unreasonable about the Appeals Committee having come to the conclusion that the Affidavit of Service was credible.

3. That brings me to the last and final ground raised by the Applicant: jurisdiction. Jurisdiction is at the heart of every legal decision whether by a tribunal or a court. As was stated by Nyarangi J. in **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited (1989) KLR 1:**

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

4. Ojwang J. (as he then was) also had this to say on jurisdiction in **Misc. Application No.639 of 2005 in the case of Boniface Waweru Mbiyu vs Mary Njeri & another**:

The entry point into any Court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question.

11.I have cited these fabled authorities to unambiguously lay the position that any Tribunal or Court which acts without jurisdiction acts in vain; its decision or order a nullity; not worth the piece of paper it was written on. Here, the Applicant impugns the jurisdiction of the Appeals Committee and contends that the Appeals Committee (and one would imagine, by extension, the District Tribunal) exceeded its authority under **Section 3(1)** as read together with **Section 8(1)** of the **Land Disputes Tribunal Act of 1990 (“LDTA”)**.

12.The Applicant’s argument in this respect is straightforward. Neither the District Tribunal nor the Appeals Committee had jurisdiction to entertain the dispute filed by the Interested Party. This is because, by virtue of **Section 3(1)** of the **Land Disputes Tribunal Act**, the District Tribunal’s jurisdiction is circumscribed thus:

3. (1) 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.

13.The Applicant argues that the decision of the District Tribunal exceeds the narrow confines of the power donated to it by **Section 3(1)** of **LTDA**. At its core, this was a dispute about the ownership of land. The appealed decision of the District Tribunal “awarded” the disputed land to the Applicant who, the District Tribunal held “bought it from Boniface Musembi Ndathini (husband to claimant).” The Appeals Committee, on the other hand ruled “that the District Commissioner Mutomo to cancel the land name from Zacharia Musya to read Phylis Mutisya.” As I have held before (see **R v Makueni District Land Disputes Tribunal ex parte Sammy Nzioki Machakos HCCC Misc. No. 216 of 2009**), despite a few dissenting opinions, the overwhelming majority of our jurisprudence has converged on the view that questions of ownership and title are not within the jurisdiction of the District Tribunal (see **Asman Maloba Wepukhulu**). There is, of course, the opposing view of, for example, *Khamoni J.* who, in refining **Asman Maloba Case** held that, LTDA does not oust the jurisdiction of the District Tribunals to deal with questions of title if it is correctly interpreted. I am, however, persuaded by the weight of authority, plain reading of the statute as well as the objectives of the statute, that the District Tribunal does not have jurisdiction to pronounce on issues of title.

14.Even if I were to agree with *Justice Khamoni’s* opposing view, however, a different issue distinguishes this case from *Republic v. Chairman, Land Disputes Tribunal, Kirinyaga District & Another*. Here, the uncontested facts show that it would have been impossible for the District Tribunal and the Appeals Committee to dispose of the matter without determining the validity of the alleged Sale Agreement between the Applicant on the one hand, and **Boniface Ndathini**, on the other. However clothed, the issue for determination in this case was whether the Sale Agreement between the Applicant and the Interested Party’s husband was valid to transfer the disputed land to the Applicant. That is squarely outside the jurisdiction of the District Tribunal.

15.The Interested Party, however, innovatively argues that the Court should consider that the impugned decision is not from the District Tribunal but from the Appeals Committee. As such, the relevant legal provision is **Section 8(1)** of **LTDA**. Under that section, Interested Party’s argument goes, the Appeals Committee’s task is to hear and determine all appeals that come from the District Tribunal. As such, it

cannot legitimately be said that the Appeals Committee has no jurisdiction yet it is required by law to deal with the appeals lodged to it.

16.As I held in ***R v Makueni District Land Disputes Tribunal ex parte Sammy Nzioki Machakos HCCC Misc. No. 216 of 2009***) this is a clever but ultimately unavailing argument. The point is that that the Appeals Committee pronounced itself on a dispute between the parties and came up with a substantive decision presumably applying both facts and law. It did not simply refuse to confirm the decision of the District Tribunal for being “wrongful.” It sat on appeal from that decision. At the end of the hearing, it chose to disturb the decision of the District Tribunal, as indeed it is legally entitled to do. The question of jurisdiction becomes important then. The Appeals Court could only have jurisdiction if the District Tribunal, in the first place had jurisdiction. As I have already concluded above, the District Tribunal had no jurisdiction.

17.It is true that the conduct of a party gives the Court discretion to determine whether to grant prerogative orders in certain circumstances. However, I do not believe that, whatever the threshold it has been met here. While it is true that the Applicant did not question the jurisdiction at the earlier stage in the District Tribunal, in my view, that does not bar him from raising the issue of jurisdiction now. To say otherwise would be to reach the remarkable legal position that a party can invest a Tribunal with jurisdiction by failing to raise the question of jurisdiction at the earliest opportunity. As I held in the case cited above, a litigant does not impart jurisdiction on a tribunal by acquiescing to it in the initial stages, failing to raise objections or by even seeking to benefit from the wrongful exercise of jurisdiction. Lack of jurisdiction makes the proceedings a nullity; they are void *ab initio*. The proceedings cannot be purged and sanctified by the acquiescence or conduct of the parties to the proceedings.

18.In the end, I have reached the conclusion that both the **Mutomo District Land Disputes Tribunal** and the **Eastern Provincial Dispute Appeals Committee** acted in excess of their jurisdiction in entertaining and arriving at a decision in Mutomo Claim No.86 of 2009 and Appeal No.28 of 2010 respectively. The standing decision of the Eastern Provincial Dispute Appeals Committee is hereby quashed by an order of *certiorari*. The Senior Resident Magistrate’s Court at Mutomo is prohibited from issuing a decree emanating from these proceedings. It follows that the *certiorari* issued herein also infects the Makueni District Land Disputes Tribunal decision in Claim No.86 of 2009. The result is that both decisions are a nullity in law. The Interested Party shall bear the costs of these proceedings.

DATED, SIGNED and DELIVERED at MACHAKOS this day 17TH day of OCTOBER, 2012.

J.M. NGUGI
JUDGE