REPUBLIC OF KENYA

High Court at Nakuru

Judicial Review 71 of 2010

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW APPLICATION FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA AND THE RULES MADE THEREUNDER

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT OF 1990 LAWS OF KENYA

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT NAKURU LAND DISPUTE NO. 20 OF 2009 LILIAN MUMBI VS. ALFRED MABEYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE RESIDENT MAGISTRATE NAKURU LAW COURTS.....RESPONDENT

AND

1. LAWRENCE MOSES MOMANYI.....1ST SUBJECT

2. CHRISTOPHER OMBONGI MAK.....2ND SUBJECT

AND

LILIAN MUMBI.....INTERESTED PARTY

RULING

By a Notice of Motion dated 13th July, 2010 and filed on 14th July 2010 the Applicant seeks the following orders-

(1) An order of Certiorari to remove into this court the judgment of the Honourable Resident

Magistrate in Nakuru Chief Magistrate Land Dispute Case NO. 20 of 2009 and quash the same.

(2) Costs of this suit.

(3) Any other relief that this court deems fair and expedient to grant in the circumstances.

The Application was filed pursuant to leave granted by this court on 24th June 2010 and is supported by the Statement of Facts dated 23rd June 2010 and the Affidavit in Verification of Facts sworn by Christopher Ombogi Makori on 23rd June 2010.

In opposition thereto, the Respondent filed Grounds of Opposition dated and the Interested Party filed a Replying Affidavit sworn by Lilian Mumbi Kibe on 4th May 2011.

This Application was argued before this court on 11th June 2012 and the Ex-parte Applicants and the Interested Party thereafter put in written submissions dated 10th November and 13th March 2012 respectively.

The Applicants seek to quash by an order of certiorari the decision of Hon. B. Atiang Resident Magistrate Nakuru, made on 12th May 2010 wherein he adopted the Award of the Mbogoini Land Dispute Tribunal made on 5th May 2010 in Tribunal Case No. 45 of 2009 as the judgment of the court. The award of the Mbogoini Land Dispute Tribunal provided-

(1) That the Surveyor of the Government go and verify where the road passes or the position of the road.,

(2) That the 3 plots being Plots No. 13, 14 and 15 be checked so as to find where the road passes.

(3) That the defendant be given 30 days right of appeal to the Provincial Tribunal after the Magistrate has stamped the Ruling.

The Applicants raise several issues. Firstly, they argue that the suit land belongs to their deceased mother's estate of which they are the Administrators. The matter before the Land Disputes Tribunal was between the Interested Party (Lilian Mumbi) and one Alfred Mabeya- who according to the Applicants is not the registered owner of the parcel of land known as Title Number SUBUKIA/ SUBUKIA/ BLOCK 3/14 (the suit land) which the Applicants say is the property of their mother, the late SAROME KIMUTHO MAKORI (the deceased). There is no challenge to this contention by the Interested Party.

Section 7 of the Land Disputes Tribunal Act *(Cap 303A of the Laws of Kenya)* requires the Chairman of the Tribunal to cause the decision of the Tribunal to be filed in the Magistrate's Court together with any such depositions or documents which have been taken or proved before the Tribunal.

Apart from the particulars of the Interested Party, who is described as the claimant, and reference to her Statement on how the road has been squeezed to a very small path, and a recent map showing the proper boundaries, neither the Statement nor the map showing such boundaries was attached to the application to adopt the award of the Tribunal. The Objector is described as **Alfred Mabeya-Title Deed No. SUBUKIA/SUBUKIA/ BLOCK 3/14.** No copy of the Title Deed was attached.

Although members of the Tribunal visited the area of two plots, reference is only made to one plot, the suit land. What happened to Plots 13 and 15? Do these belong to the Interested Party? Unfortunately, the Interested Party does not throw any light on this aspect. It is a sad omission that Counsel for the *Ex-parte* Applicants made no effort to obtain such statement from the Tribunal's records.

Conventional wisdom and procedure suggests that a subordinate court should not ask these questions that it should merely act like a clerk in a ticketing office, and merely make an entry, and pass the ledger to the next clerk. I do not with respect think that that is the position of Section 7(2) of the Land Disputes Tribunal Act- **that the court shall enter judgment in accordance with the decision of the Tribunal**. In

my humble view, the court ought before entering judgment look at the dispositions or documents which have been taken or proved before the tribunal. I think these are conditions precedent to the subordinate courts entering judgment following an award by the Land Disputes Tribunal. The subordinate court would otherwise act merely as a rubber stamp which it is not.

Although the court had jurisdiction to enter such judgment, there was no legal basis for doing so. There were no dispositions or documents upon which a judgment could be entered. There were no reasons; a Tribunal must give reasons for its decision. That is the requirements of Section 4 of the Land Disputes Tribunals Act. The award could as such be described as unreasonable.

The Applicants' **second** reason is that their land was visited without their being advised of the basis of such visit. They say the suit land belonged to their deceased mother whose estate they are the Administrators. Who is or was the Respondent Alfred Mabeya? Again the Tribunal was not helpful. He was merely referred to as the objector- **Title Number SUBUKIA/SUBUKIA/BLOCK 3/14?** What was the basis of his objection? This is neither disclosed nor recorded, another reason for making the decision of the Tribunal, quite unreasonable.

Thirdly, Counsel for the Interested Party has argued that the Judicial Review application herein was brought outside the limitation period of six months prescribed under S 9 (2) of the Law Reform Act, *(Cap 26, Laws of Kenya)* and the rules made thereunder. I agree. However, where a Tribunal, a court or other person or body of persons acted it out of, or without jurisdiction, the court will be perpetuating an illegality if it shuts its eyes to such acts of illegality.

The Interested Party's complaint was that access to her plot (which was not disclosed to the Tribunal) and is not clarified in her Replying Affidavit of 4th May 2011, had been narrowed into a path, and not a road. As soon as the issue became one of a road, it was no longer a question of boundary as to land. It is a matter in which the Tribunal had no jurisdiction. It is a matter for the Registrar of Lands under Sections 21 and 22 of the Registered Land Act *(Cap 300 Laws of Kenya) "upon the application of any interested party and notice to all parties"* concerned,to consider all relevant evidence and to determine the position of the uncertain or disputed boundary. Consequently, the Tribunal had no jurisdiction to entertain the dispute herein.

Fourthly, the rules of natural justice demand that every person whom a decision is likely to impact or more unfortunately to adversely affect shall be informed and be heard. This rule is sometimes put in the negative that no person shall be condemned unheard.

It is strange that the interest of the Objector Alfred Mabeya was never disclosed before the Tribunal. From the Applicants' Affidavit in Verification of the Facts, the said objector appears to be a total stranger to the suit land. If he were an interested party together with the applicants, some disclosure ought to have been made. There is none.

Lastly, it has been argued for the interested party that an order by this court to quash the decision of the Learned Resident Magistrate would not affect the award by the Tribunal. This is because there was no application to quash the decision of the Tribunal.

This argument is only partially correct in the sense that there was no application to quash the decision of the Tribunal. The argument is however, incorrect or not sustainable in the legal sense because once the judgment of the court is set aside, there would be no basis for implementing the decision of the Tribunal. It is the judgment of the court and not the decision or award by the Tribunal which is turned into a decree of court. In the absence of such decree, the Tribunal's award becomes an airless balloon which must inevitably burst on the site of some cloudy mountain and disintegrate into small useless pieces of their rubber, unusable to anyone including children.

In any event, this court is vested with supervisory powers over any subordinate courts, any person, body or authority exercising judicial or quasi-judicial function. This is the mandate granted to this court under Article 165 (6) and (7) of the Constitution of Kenya 2010, that this court may call for the record of any

proceedings before any subordinate court or person, body or authority and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Taking the above matters into consideration including arguments for and against the grant of the orders of certiorari in this matter, the proper conclusion and order to make is **firstly** that, there shall issue an order of certiorari to quash the decision of the Learned Resident Magistrate adopting as judgment of the court the decision of the Mbogoini Land Dispute Tribunal, made on the 5th May 2009 in breach of the rules of natural justice and without jurisdiction.

Secondly, in exercise of the court's jurisdiction under Article 165 (6) of the Constitution, I do direct that both the Applicants and the Interested Party do jointly within the next 90 days apply to the Land Registrar of their District to ascertain and fix the proper boundaries for the respective parcels of land. The costs therefore and for this application to be borne by each party.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of October, 2012

M. J. ANYARA EMUKULE
JUDGE