REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 59 of 2012

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF: THE JUDGMENT OF THE RESIDENT MAGISTRATE COURT AT LIMURU IN CLAIM NO.7 OF 2007

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

THE RESIDENT MAGISTRATE'S COURT LIMURU.....1ST RESPONDENT

THE CHAIRMAN, LAND DISPUTE TRIBUNAL, LIMURU.....2ND RESPONDENT

THE REGISTRAR OF TITLES.....3RD RESPONDENT

NELSON NJUNGE NJOROGE.....4TH RESPONDENT

JUDGMENT

Pursuant to leave granted by this court on 8th June 2011, the Exparte applicant herein Elijah Karanja Muiruri moved this court by way of a Notice of Motion dated 24th June 2011 in which he sought the following orders;

1) That the Honourable court be pleased to issue an order of Certiorari to remove into this Honourable court and quash the award of the second Respondent and confirmed by the 1st Respondent as a Judgment of the court on 24th May 2011 in Land Case No. 2 of 2007.

2) That this Honourable court be pleased to issue an order of prohibition to prohibit the 4th Respondent and all the other Respondents from executing the judgment of the Resident Magistrate's court delivered on 24th May 2011 in Land Case 2. of 2007.

3) The Respondent be condemned to pay the cost of this application together with the costs of the application for leave to commence this motion.

The application was filed against the Resident Magistrate's Court Limuru, The Chairman Land Disputes

Tribunal Limuru, The Registrar of Titles and Nelson Njunge Njoroge who are named as the 1st, 2nd, 3rd and 4th Respondents respectively.

The application is supported by the statutory statement dated 3rd June 2011, the verifying affidavit and the supplementary affidavit sworn by the Applicant on 3rd June 2011 and 21st November 2011 respectively.

It is premised on four main grounds namely;

1)The Limuru District Land Disputes Tribunal acted in excess of its jurisdiction under Section 3 of the Land Dispute Tribunals Act in entertaining a land case that was time barred and bad in law.

2)THAT the Land Disputes Tribunal acted in excess of its jurisdiction under Section 3 of the Land Disputes Act No.18.

3)THAT the Award Award of the Land Disputes Tribunal was adopted as a judgment of the 1st Respondent on 24th May 2011 vide Land Case No.2 of 2007.

4)THAT the Resident Magistrate's Court adopted an unlawful finding, and Award.

The application is not opposed by the 1st, 2nd, and 3rd Respondents who were represented by the Hon Attorney General. The court record shows that on two different occasions namely on 20th March 2011 and 17th November 2011, the State Counsel instructed by the Hon Attorney General informed the court that the Respondents had chosen not to participate in the proceedings.

The application is however opposed by the 4th Respondent through a replying affidavit filed on 28th September 2011.

The facts of this case are basically uncontested except for the Applicant's claim that he had bought a parcel of land at Athi River jointly with the 4th Respondent's father one Njoroge Kiiru now deceased. According to the Applicant, he had at different times bought two parcels of land jointly with his long term friend the late Njoroge Kiiru being land known as L.R No.7757/5 Limuru (suit property) and another Parcel of land known as LR. No.9741 in Athi River (Athi River property). The suit property was purchased in 1964 and registered in their joint names as shown by the certificate of title annexed to the verifying affidavit marked as exhibit **"EKM1".** Njoroge Kiiru was in addition registered as the proprietor of the Athi River property in terms of a mutual agreement between the parties to the effect that Njoroge Kiiru will relinquish his share in the suit land in exchange of having exclusive possession and ownership of the Athi River land. The Applicant averred that he took possession of the suit property in 1965 and thereafter developed it without any contribution from his late friend as per terms of their agreement.

In his verifying affidavit, the Applicant deposed that he enjoyed quite possession of the property for 42 years till sometimes in Year 2007 when the 4th Respondent and his co-administrator forcefully invaded the suit property .When he resisted their invasion, the 4th Respondent and his late mother filed a claim with the Limuru District Land Disputes Tribunal (the Limuru Tribunal) seeking subdivision of L.R No.7757/5 Limuru.

It is the Applicant's case that the Limuru Tribunal in adjudicating on the dispute and reaching its determination acted without jurisdiction as the 4th Respondent's claim was based on the issue of ownership of the suit land as evidenced by its award which was delivered on 15th May 2007.

Aggrieved by the Tribunal's decision as reflected in the award, the Applicant filed an appeal to the Nyeri Provincial Land Disputes Appeal Tribunal, where he complained that the Limuru Tribunal had completely disregarded his evidence and that it had solely relied on the evidence of the 4th Respondent and his witnesses in reaching its decision. He alleged that his objection to the 4th Respondent's claim that it was time barred having being instituted after 42 years was neither recorded nor considered by the Tribunal. The Applicant also alleged that he had raised the issue of adverse possession which was

similarly not recorded or considered by the Tribunal.

After hearing the appeal, the Nyeri Provincial Land Disputes Appeal Tribunal (Nyeri Tribunal) overturned the Limuru Tribunal's award and confirmed the Applicant as the owner of the suit land.

The 4th Respondent was aggrieved by the decision of the Nyeri Tribunal and he filed a Judicial Review application registered as JR.ELC 43 of 2010 which was heard and determined by this court (Musinga J.) In his judgement in JR.43 of 2010, Musinga J quashed the decision of the Nyeri Tribunal after finding that it did not have jurisdiction to make a decision regarding ownership of the suit land. The Nyeri Tribunal had in its award reinstated the Applicant as the sole proprietor of the suit land.

After the decision in JR.43 of 2010, the 4th Respondent started the process of executing the Limuru Tribunal's award by applying that the same be adopted as a judgment of the 1st Respondent. The award was so adopted on 24th May, 2011. This is what provoked the Applicant to commence the current judicial review proceedings.

The 4th Respondent in opposing the application asserted that the dispute adjudicated upon by the tribunal leading to the impugned award did not involve a determination of ownership of the suit land. It is the 4th Respondent's case that the claim was about a determination of boundaries which the tribunal ascertained after a site visit in the presence of the Applicant by ordering a subdivision of the land into two portions. It is however important to note that he contradicted this averment in paragraph 12 of his replying affidavit when he deposed that his claim was for 50% share of the suit land.

It is also the 4th Respondent's case that this matter is ***res judicata*** having been substantially in issue in JR. 43 of 2010 which was between the same parties and was determined on merit by a competent court. The 4th Respondent also brought in the issue of his late father and the Applicant having been tenants in common as reflected in title to the suit land and argued that in the circumstances, the Applicant's claim that he had acquired his father's portion of the land by adverse possession could not be legally sustained.

The court was invited to find that the Applicant's motion lacked merit and that it was an abuse of the court process. For the above reasons, the 4th Respondent urged the court to dismiss the Notice of Motion with costs.

To further advance their respective positions, counsel on record for the parties filed written submissions which they highlighted before me on 21st September, 2012. At this juncture, I wish to commend counsel appearing for both parties for their industry in bringing to the fore and ably articulating the issues that arise for determination by the court in this case. I thank them for their efforts.

I have carefully considered the rival submissions, both written and oral made by counsel for the parties and the affidavits on record.

I have noted that on behalf of the parties, counsel made extensive and elaborate submissions relating to the Applicant's claim that he was the sole proprietor of the suit land pursuant to a contract between him and the 4th Respondent's late father and by virtue of operation of the doctrine of adverse possession. It was argued on behalf of the Applicant that he had acquired ownership thereof by way of adverse possession after exclusively and continuously occupying the suit land for 42 years without any claim of ownership being made by the Late Njoroge Kiiru or his Estate. Mr Kirundi learned counsel for the 4th Respondent submitted that the doctrine of adverse possession was inapplicable in this case in view of the parties joint registration as co-owners of the suit property making them tenants in common.

It is however my finding that the issue of ownership of the suit land as between the parties however acquired is not an issue for determination by this court. What is before this court are judicial review proceedings commenced by the Applicant challenging the legality of the award made by the 2nd Respondent and the subsequent adoption of that award as a judgment of the court by the

1st Respondent. The issue of ownership as correctly submitted by Mr. Njoroge Regeru learned counsel for the Applicant cannot be determined within these proceedings given the limited scope of the Judicial Review jurisdiction. This is an issue that can only be determined in the High Court in the exercise of its civil jurisdiction.

In my view, the primary issue for determination by this court is whether the Limuru Land Disputes Tribunal acted within or outside its jurisdiction in entertaining and determining the dispute filed before it by the 4th Respondent and his late mother.

Other issues which emerge for determination arise from the 4th Respondent's technical objections on the competence of the Notice of Motion.

These are:-

(1) Whether the application is ***res judicata*** or precluded by the doctrine of estoppel by record in view of the determination in JR.43 of 2010

(2) Whether the Applicant is entitled to the reliefs sought.

I wish to start with the issue regarding whether the doctrine of ***res judicata*** or estoppel by record applies in this case.

Regarding the claim that the current proceedings were bad in law as they were precluded by the principle of ***res judicata*** and estoppel, Mr. Kirundi submitted that the matters in issue in these proceedings had been the subject of litigation in JR.43 of 2010 in which the Applicant was an active participant and that the same were finally determined on merit by a court of competent jurisdiction. Mr. Kirundi in addition submitted that the Applicant ought to have attacked the award of the 2nd Respondent in those proceedings instead of filing fresh proceedings. It was further argued that as no appeal was lodged against Musinga J's decision in JR.43/2010, the judgment therein remained final and issues determined therein could not be re-opened and litigated afresh in subsequent proceedings. Counsel further argued that the record in JR.43/2010 estopped the Applicant from disputing the legal validity of the Limuru Land Disputes Tribunal's award. To support his submissions on this point, Mr. Kirundi relied on the decision by the Court of Appeal in **Pop-In (Kenya Ltd.) & 3 Others -Vs- Habib Bank AG Zurich eKLR 1990**.

In his response to the 4th Respondent's submissions, Mr. Regeru for the Applicant submitted that the claim that these proceedings were ***res judicata*** was misconceived. He submitted that the principle of ***res judicata*** did not apply in this case since in JR.43 of 2010, the subject of litigation was entirely different from the subject matter of litigation in this case. The two cases were essentially different in that in JR.43 of 2010, what was sought to be quashed was the award of the Nyeri Tribunal and the order of the subordinate court adopting it as a judgment of the court. Counsel further submitted and in my view rightly so that the award of the Limuru Tribunal was never raised in the proceedings before Musinga, J and its legality or otherwise was not therefore an issue for determination in that case. That consequently no final finding was made in that respect by Musinga J.

I would like to begin my findings on this issue by making reference to Section 7 of the Civil Procedure Act which prescribes instances when the principle of ***res judicata*** would apply.

Section 7 states:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".

According to Kuloba J (as he then was) in his text ***"Judicial Hints to Civil Procedure"***, the expression

'***Res judicata'***means a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. ***Res judicata*** is essentially a bar to subsequent proceedings involving the same issues which had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

In our case, a reading of the prayers in JR.43 of 2010 shows clearly that what was challenged in that case was the award of the Nyeri Tribunal and not the award of the Limuru Tribunal. A reading of the judgment of Musinga J delivered on 17th December 2010 leaves no doubt that the issue of the legality or otherwise of the award by the Limuru Tribunal was not addressed by the Judge and no specific findings were made in that regard in his judgment. It may also be important to note that one of the parties in this case namely the Chairman of the Limuru Land Disputes Tribunal (2nd Respondent) was not a party to JR.43 of 2010.

It is therefore my finding and conclusion that the objection to the Applicant's motion on grounds that it was ***res judicata*** is with due respect to counsel for the 4th Respondent without legal basis and it is hereby overruled.

The same reasoning applies to the 4th Respondent's claim that in view of the judgment by Musinga J in JR.43/2010, this court was now ***functus official*** as it cannot sit on appeal over its own judgment. The issues for determination in this case were not the subject of adjudication in JR.43 of 2010 and were not covered in the judgment in that case. This court is not for that reason ***functus official*** as alleged by the 4th Respondent and the principle of estoppel by record is not therefore applicable in this case.

Turning now to the issue of jurisdiction, Mr. Regeru submitted that the Limuru Tribunal did not have jurisdiction to hear and determine the claim filed by the 4th Respondent since it was centered on a dispute involving ownership of the suit land. Counsel further submitted that the Tribunal's jurisdiction was limited by Section 3(1) of the Repealed Land Disputes Tribunals Act to a determination of civil disputes concerning delimitation of boundaries, claims to occupy or work on land and trespass to land.

It is the Applicant's case that ownership of the suit land was disputed and when the Tribunal gave directions on subdivision of the property and delimitation of boundaries, it purported to make a decision on ownership of the suit land in favour of the 4th Respondent and his late mother which was outside its jurisdiction.

On behalf of the 4th Respondent, Mr. Kirundi contended that the tribunal had jurisdiction to make the impugned award as it only made a finding on where the boundary of the two portions owned by each of the parties to the dispute should lie. The 4th Respondent's position was that the dispute before the tribunal and its determination did not involve issues of ownership of the suit land. Mr. Kirundi submitted that the issue of ownership could not arise since it had already been determined by Registration of the Applicant and the deceased as joint proprietors.

After taking into account the pleadings and submissions made by the parties, I am persuaded to concur with the Applicant's position that the dispute before the tribunal revolved around a claim of ownership and subdivision of the suit land. It is clear from a reading of the replying affidavit filed by the 4th Respondent and the proceedings before the tribunal that the dispute required a determination of whether the Applicant owned the entire land exclusively or a half portion thereof. The award read on 15th May 2007 was a determination that the Applicant owned a half share of the suit land. The award shows that the tribunal proceeded to order a subdivision of the suit land into two portions and ordered that two separate titles be processed for each portion. The proceedings and award of the tribunal are annexed to the Applicant's verifying affidavit and marked as exhibits EKM 2.

In paragraph 11 of his verifying affidavit, the Applicant deposed that he had made claims of having acquired the half portion that would have belonged to the Late Kiiru by virtue of the doctrine of adverse possession but that the tribunal members refused to record that part of his evidence and his cross-examination of the witnesses who testified on behalf of the 4th Respondent and his late mother. The 4th Respondent did not dispute this averment in his replying affidavit. The said deposition by the Applicant was therefore not controverted. In law what is not disputed is deemed to be admitted. This

undisputed claim by the Applicant goes to lend credence to his contention that the matter before the tribunal revolved around ownership of the suit land. I am satisfied that the dispute before the tribunal and its determination was about whether the Applicant owned the suit land exclusively or as a tenant in common with the late Kiiru and that its award was an answer to that question. That is why the award required a subdivision of the suit land.

The further order in the award that two separate titles be processed according to the ordered subdivision is a clear manifestation that the tribunal had decided who among the protagonists should own which part of the suit land. It also effectively changed the nature of ownership of the said land since each party was now to be registered as a sole proprietor of the half share allocated after subdivision as opposed to the joint registration as tenants in common as was previously the case.

As stated earlier, the jurisdiction enjoyed by Land Disputes Tribunals when they were legally in existence before the enabling law was repealed was donated by Section 3(1) of the Repealed Land Disputes Tribunals Act (the Act) which was in the following terms:

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,

shall be heard and determined by a Tribunal established under Section 4.

It is clear from the above provisions of the law that the tribunal in this case did not have jurisdiction to hear and determine disputes related to ownership of registered land. In **Amunavi -Vs- The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No.256 of 2005** the Court of Appeal had occasion to deal with an almost similar matter and in its holding, it expressed itself as follows:

"The implementation of the decision of the tribunal entails the sub- division of the suit land into two parcels and opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre to Kenyani (see Section 89 of the RLA).

It is clear that the proceedings before the tribunal related both to title to land and to beneficial interest in the suit land. Such a dispute is not, in our view, within the provisions of Section 3(1) of the Land Disputes Tribunal Act. By Section 159 of the Registered Land Act such a dispute can only be tried by the High Court or by the Resident Magistrates' Court in cases where such latter court has jurisdiction".

From the foregoing, I have no doubt in my mind that the tribunal in hearing and making its award in the claim filed by the 4th Respondent acted ultra vires Section 3(1) of the Act. Its decision was therefore null and void ***abinitio*** and had no legal effect. For this reason, even without considering the Applicant's allegations of procedural impropriety in the manner in which the tribunal conducted its hearing, I find that the Applicant has demonstrated that he is deserving of the order of Certiorari.

Lastly, I now turn to consider whether the Applicant is entitled to the reliefs sought in this case. The Applicant has sought for orders of **Certiorari** to quash the determination made by the tribunal and the orders adopting it as a judgment of the court by the 1st Respondent on 24th May 2011. He also seeks an order of prohibition to stop the Respondents from proceeding with execution of the judgment entered by the 1st Respondent on 24th May 2011.

Mr. Kirundi submitted that the Applicant was not entitled to the reliefs sought since the impugned award had been adopted as a judgment of the court and that there was nothing to quash. He also claimed that the

Applicant ought not to have proceeded by way of Judicial Review but should have filed an appeal against the orders of the subordinate court adopting the impugned award as a judgment of the court.

I do not need to say much in answer to these submissions since it is obvious that the impugned award was part of the record of the tribunal and would obviously remain so until and unless it was quashed by orders of the High Court in its supervisory jurisdiction.

Its adoption as a judgment of the subordinate court did not mean that it literally ceased to exist. It could only cease to exist if it was removed to the High Court and quashed by orders of certiorari. This had not happened by the time the current proceedings were filed. It is my finding that the impugned award is still available for quashing by this court if the court was satisfied that the Applicant had established a case warranting issuance of the remedy of certiorari.

The other argument raised by the 4th Respondent that Judicial Review remedies are not available to the Applicant as the Applicant ought to have appealed against the decision of the subordinate court is also not merited.

It is trite law that the existence of alternative remedies is not a bar to the issuance of Judicial Review remedies. This was the holding by the Court of Appeal in **David Mugo t/a Manyatta Auctioneers -Vs- Republic, Civil App. No.265 of 1997** which was subsequently reiterated in the more recent case of **Republic -Vs- National Environment Management Tribunal, Exparte Sound Equipment Ltd., Civil Appeal No.84 of 2010.**

In my opinion, nothing precluded the Applicant from commencing judicial review proceedings if he was of the view that the remedy of judicial review was more efficacious than an appeal.

On the prayer for an order of prohibition, having found that the tribunal's award was a nullity, I find that it was not, legally speaking capable of adoption as a judgment of the court. This is because it amounted to no decision at all. It was basically nothing. To demonstrate this point further, I wish to borrow the words of **L. Denning in Macfoy -Vs- United Africa Limited [1961] 3 All ER 1169** when he said:

"If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there it will collapse".

In view of the foregoing, there was nothing that the subordinate court could have converted into a judgment of the court in Land Case No.2 of 2007. The said judgment was illegally entered and cannot be allowed to stand.

In the premises, I find that this is an appropriate case for issuance of orders of prohibition to prohibit the execution of a judgment entered by a court on the basis of an illegality.

In the end, I have come to the conclusion that the Applicant's Notice of Motion dated 24th June 2011 is merited and it is hereby allowed in terms of Prayer 1 and 2 but Prayer 2 is allowed only against the 1st & 3rd Respondents. I decline to grant an order of prohibition against the 4th Respondent since having been sued in his individual capacity, he is not amenable to Judicial Review.

Judicial Review is a challenge on administrative action. Remedies in Judicial Review can only be issued against public or statutory bodies, subordinate courts or inferior tribunals or public officers where it is proved that any of them has either abused its or their powers by acting either arbitrary, unreasonably, illegally, in excess of their jurisdiction or where they have failed to perform their public duties. Put another way, Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who have a duty to act fairly. Private citizens or entries are outside the purview of judicial review.

It is clear from the foregoing that the 4th Respondent ought not to have been enjoined in these proceedings as a Respondent. He ought to have been enjoined as an Interested Party. However, the misjoinder of the 4th Respondent did not in any way affect the Applicant's case.

On the issue of costs, since costs follow the event and the Applicant has been successful in his application, he is awarded costs of the suit to be borne by the 4th Respondent.

Dated, Deliveredand**Signed**by me at Nairobi this 6th day of December 2012.

C.W. GITHUA

JUDGE

In the presence of:

Florence - Court Clerk

Mr. Thuo holding brief for Njoroge Regeru for Applicant

No appearance for 1st, 2nd and 3rd Respondents

Mr. Owang Holding brief for Mr. Kirundi for 4th Respondent