



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO 77 OF 2010

ELIJAH NGUJIRI

MWENENIA.....APPLICANT

VERSUS

NYAHURURU DISTRICT L.D.T &

OTHERS.....DEFENDANTS

RULING

By a Notice of Motion dated 12/7/2010, the Ex parte Applicant, Elijah Ngunjiri Mwenenia moved this court for an order of prohibition to issue against the 1st Respondent, Nyahururu Land Dispute Tribunal (LDT), and the Interested Party, Kirichu Ndegwa prohibiting them from implementing the decision made on 24/7/2008 by the 1st Respondent in LDT, claim no. 71/06; an order of prohibition do issue against the Principal Magistrate Nyahururu, prohibiting it from executing its decree made on 18/8/09 in Land Dispute case no 35/08. The motion was based on the undated statutory statement filed in court on 6/7/2010 and a verifying affidavit sworn by the applicant on 6/7/2010 .

The applicant was authorized to file this application by a power of attorney dated 15/9/2009, donated to him by Tabitha Wangechi, Murigu, Mary Wangui Murigu, John Mutahi Murigu, Jane Wamuyu Murigu and Charles Gichuki Murigu who are the owners of Lakipia/Salama/Mukuru Block 1/828. He deponed that the land measures about 11.34Ha. (see certificate of search and title deed- ENM 2, 3 & 4,) while the Interested Party is the registered owner of Laikipia/Salama/Mukuru/Block 1/1993, measuring about 12.955 Ha. The plots are adjacent to each other. The Interested Party filed a claim before the LDT claiming to have purchased part of plot 828 . The 1st respondent made an award directing the surveyor to resurvey the 2 plots, 828 and 193, make the necessary amendments and alter the title . (the award is ENM6. The award was adopted on 18/8/09 by the 2nd respondent(ENM7).The applicant therefore contends that the 1st respondent acted ultra vines its jurisdiction and the decision is void. For fear that the judgement of the court could be executed, this application was filed.

When the application came up for hearing , the applicants' counsel was not heard for failure to pay the Court Adjournment Fees. The 1st and 2nd respondent's counsel Mr Njuguna and Mr Karanja

who appeared for the Interested Party argued the preliminary Objection which had been filed by the Interested Party on 16/11/2010. Counsel for the interested party urged that the application is against a person who is not party to these proceedings because the decision sought to be quashed and which attached to the application (ENM) is from Laikipia West District Rumuruti Land Disputes Tribunal. A perusal of the proceedings in Claim No.1/06, before the Land Disputes Tribunal reveal that the parties were Kiruchu ndegwa, the claimant Agnes Muthoni Maingi, Charles Gichuki Murigu, Grace Wairimu Wamuthuni and John Mutahi were objectors, the tribunal is named as **“LAIKIPIA WEST DISTRICT RUMURUTI DIVISIONAL LAND DISPUTES TRIBUNAL”** which is not party to these proceedings. The 1st respondent herein **“NYANDARUA DISTRICT LAND DISPUTE TRIBUNAL”** It is true that the 1st defendant is non – suited and the orders sought can not issue against the 1st respondent who has not made any decision that is subject to challenge.

Secondly, it was urged that the 2nd respondent does not make any decisions but merely adopts the award of the LDT Tribunal. Section 7 of the LDT provides for adoption of the Tribunal’s decision by the court. It reads as follows: -

“section 7(1) . The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate’s Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered, a decree shall issue and shall be enforceable in the matter as provided for under the Civil Procedure Act”.

Under the above section, the Magistrate can not question or amend or reject the Tribunal’s award. The Magistrate’s duty is limited to adopting the award be it correct or erroneous. It then issues a decree for purposes of execution .The 2nd Respondent can therefore not be faulted for adopting the award of the Tribunal. Cannot be deemed to have acted ultra vires its powers. I do agree with the findings of the court in **DAVID CHELUGET VRS KIPSAN CHEPKWONY ELDORET HCC 151 OF 2000** which held that the Magistrate has no discretion to question the decision of the Tribunal.

It was also counsel’s submission that a decision has already been made and adopted by the PM’s Court Nyahururu and there is nothing that can be prohibited.

In the **KENYA NATIONAL EXAMINATION COUNCIL VRS REPUBLIC Ex parte GEOFFREY GITHINJI CA 266/1996**, the Court of Appeal discussed the efficacy and scope of an order of prohibition . The court said:-

“ what does an ORDER OF PROHIBITION do and when will issue? It is an order from the High Court directed to an inferior Tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its Jurisdiction or in contravention of the laws of the land. It lies not only in excess of jurisdiction or absence of it, but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice and procedure of an inferior tribunal or a wrong decision on the merits of the proceedings(see Halsbury’s Laws of England 4th Edition vol 1 at page 37 paragraph 128) .”

The LDT having already made the decision, can not be prohibited by an order of prohibition. The proceedings are complete and it would be an order in futility.

As regards the 2nd Respondent, it has adopted the order for purposes of the execution. Prohibition on issued to be but after it is prohibited, what happens next? An order of prohibition can not issue against the 2nd respondent from proceeding with execution, and be left in abeyance. It could only be effective if an order of certiorari had been sought. Since none was sought, it would be futile for the court to grant the said order.

The applicant had also sought an order of prohibition against the Interested party. Judicial review is a public law remedy and cannot issue against a private individual in their private capacity.

In sum I do find that the Notice of Motion dated 12/7/2010 is incompetent, bad in law and I do uphold the Interested parties the objection. The Notice of motion is hereby struck out with costs to the Interested Party and respondent.

DATED AND DELIVERED THIS 24th DAY OF JUNE 2011

R.P.V WENDOH

JUDGE

PRESENT

Mr Kibelion for applicant
Keroya holding brief for Mr Mwangi for Interested Party
CC: Kennedy Oguma