



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCC NO. 215 OF 2007

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN SIAYA LAND DISPUTES TRIBUNAL & OTHERS.....RESPONDENT

AND

APONDI ATIENO ODHIAMBO.....SUBJECT

J U D G M E N T

The applicant approached the seat of justice by way of a chamber summons dated the 7th day of December 2007, and filed the same date seeking leave of court to apply for an order of certiorari to remove into this court for purposes of quashing the decision of Siaya land disputes tribunal and dated 21st day of June 2006, and which was subsequently adopted as a judgment of the court on the 27th day of September 2007, as Siaya Principal Magistrate's court award No. 87 of 2006, and that the said leave do operate as stay of execution or dealings what so ever in land Ref No. North Ugenya/Nyalenda/179 (original) sub-division 747 until further order of the court, further directions and costs.

The leave sought was granted by Mugo judge on 10-12-2007. The substantive application is dated 8th day of January 2008, and filed on the 10th day of March 2008. The reliefs sought are as follows:-

1) This honourable court be pleased and do issue grant of an order of certiorari removing into this honourable court, for purposes of quashing forthwith the decision of Siaya Land Disputes Tribunal award dated 21st June 2006 and which was subsequently adopted as judgment of the court on 27th September as Siaya Principal Magistrate's court award No. 87 of 2006.

2) Costs of this application be provided for.

The grounds in support are set out in the statement of facts, content of the verifying affidavit and annexure as well as submissions. In a summary these are the following:-

- The applicant is the registered owner of land parcel number Ugenya/Nyalenya/179 (original).
- That the interested parties colluded to fraudulently sub-divide the said original land into parcel North Ugenya/Nyalenya/746, 747, 748,749 and 750 and thereafter parcel number 747 was registered in the name of the 3rd Respondent.
- Contends that the tribunal had no jurisdiction to adjudicate over issues relating to registered land.
- In addition to lack of jurisdiction, the applicant contends that the tribunal was biased against him and he was not made a party to the magistrate's court's proceedings where the award was adopted as a judgment of the court.
- Regarding land parcel number North Ugenya/Nyalenya/747, he recalls the 3rd Respondent approaching him in the year 1993 expressing a wish to buy a portion of his land near a road to put up a posho mill, but no sale agreement was executed and money changed hands and later on the 3rd Respondent used tricks and caused the original land to be sub-divided into five parcels and allocated the subject property to himself.
- A dispute arose because the 3rd Respondent who had been staying away came back in the year 2004, wanting to put up structure and that is when him, applicant took the issue to the land tribunal for a resolution whose proceedings eventually led to the proceedings subject of this ruling.
- That he now had information from his counsel that the tribunal had no jurisdiction to entertain disputes relating to registered land Act.
- He relies on the annexed documents showing that the original title deed Ugenya/ Nyalenya/179 was used on sub-division and giving birth to resulting titles Nos. 746, 747, 748, 749 and 750 whose titles are exhibited.
- He is a stranger to the alleged sale agreement alleged to have been executed between him and the 3rd respondent also exhibited.
- The proceedings in Siaya land disputes tribunal case No. 114 of 2005, annexure AAD7 reveals that the applicant was the claimant and the findings in a summary form are that it is the father of the claimant who sold the plot to the 3rd respondent and that it is the same father who is alive who caused the sub-divisions to be made and had the subsequent portion of land registered in the names of his five sons which transaction was witnessed by the eldest son of the claimant and brothers. That the land was fully paid for and both parties visited the lands registry to execute papers to effect the sub-divisions and transfers whose costs were shared by both sides, further that the buyer had been in occupation of the land for 12 years and had put up two shops on the land on the basis of the above reasoning, the land disputes tribunal upheld the

sale.

- The said award was filed in the PMCC Siaya as LDT case No. 87 of 2006 and the record of the proceedings annexure 9 shows that the award was adopted by consent.

There is traced on record a replying affidavit deponed by one Thomas Onyango Apondi deponed on the 6th day of June 2008, and filed on the 9th day of June 2008, comprising 23 paragraphs and in a summary form the points stressed are as follows:-

- That he purchased the subject land in 1993 and he became the registered owner on 23-2-1993 and has carried out developments on the same for the last 12 years.
- That he fully paid for the land to the knowledge of the applicant.
- That he has knowledge from advise from his counsel that the tribunal had no jurisdiction to adjudicate over a dispute relating to cancellation of title to his land notwithstanding that the decision was in his favour.

Those of the applicant parties decided to proceed by way of submissions and are dated 1st March 2011 and filed on the 2-3-2011 and the following have been stressed:-

- The proceedings seek to challenge an award of the land disputes tribunal awarding ownership of the subject property to the 3rd respondent.
- Reiterates the content of the applicants' deponement relation to the sale transaction, going to the land registrar for sub-division, execution of transfer documents and subsequent issuance of separate titles.
- Contends the tribunal over stepped its mandate by adjudicating over issues relating to land and adds that the tribunal's action to award the subject land to the 3rd respondent is a nullity and the entire proceedings *ultra vires*.
- Besides lack of jurisdiction on the part of the tribunal the proceedings were irregular.
- Contends the evidence on the record reveals that the 3rd respondent did not acquire the said land properly because there is no evidence of payment and that sub-division of the land was done illegally.
- Contends that the transaction leading to the sub-division and issuance of titles is irregular as all the transactions were done on the same date.

The 3rd respondent's submission's are dated 14th day of February 2011, and a perusal of the same reveals that they stress the content of the replying affidavit and findings of the tribunal setout herein above but for purpose of the record the following have been stressed:-

- Reiterates the assertion that there was a valid sale purchase price paid, sub-division carried out and transfer effected and titles issued and developments carried out on the said land.
- There had been previous proceedings between the 3rd respondent and a son of the subject claiming that the father sold the land without their consent and knowledge.
- With regard to the reliefs sought it is their stand that the same is not available to the subject applicant because:-

(a) He was not party to the proceedings before the tribunal but his son.

(b) The notice of motion is incurably defective and incompetent as the same was presented outside the 21 days granted without leave of court.

(c) There is no way the applicant could be the registered owner of land parcel number North Ugenya/Nyalenya/179 as at the time of deponing because the said title became extinct in 1993 upon sub-division.

(d) The tribunal's decision is *ultra vires* since the tribunal had no jurisdiction to adjudicate over title to registered land Act.

(e) The applicants own exhibits counter his deponement on the issue of absence of sale agreements and payment of purchase price.

(f) The proceedings were not regularly instituted as the notice to the registrar was not issued.

On case law the court was referred to the case of **Joseph Okwomi Okwendo-VS- Sofia Keya Aguka, Kakamega HCC No. 25 of 2004** decided by G.B.M Kariuki on the 30th day of November 2006, in which the subject matter was registered land and the learned judge held that both the land disputes tribunal and the provincial appeal committee acted outside their mandate and for this reason the decision could not stand.

The case of **Republic –VS- Josphat Mbugua Kiumu, Chairman Lari Division Land Disputes Tribunal** and one **Mr. Kariuki Kamau Nairobi HCC Misc App. No. 310 of 2006** decided by Kasanga Mulwajudge as he then was on the 17th day of July 2000 where his lordship as he then was held that “**the land disputes tribunal exceeded its mandate by adjudicating over registered land**”.

The case of **Republic-VS- Laikipia Land Disputes Tribunal And David Karamo Kihoro ex-parte Thumbi Kihoria Nyeri HCCC Misc. App. 181/2003** decided by Okwengu judge on the 28th day of July 2005 in which the learned judge upheld complaint that the tribunal had no mandate over title to registered land.

The respondent's counsel relied on the case of **Republic-VS- Funyula Land Disputes Tribunal & 3 other [2004] 5** decided by Serگون judge, where the learned judge held *inter alia* that under order 53 CPR the court has mandate to issue the order of judicial review on only issue after a notice of motion had been

filed in another separate file.

The case **of Harun Ngunyai-VS- Mwangi Ngunyai & three others Nairobi HCCC Misc. App. No. 953 of 2007** decided by Wendoh judge on the 30th day of June 2008. At page 4 of the ruling, the learned judge made observation that the pre –requisites for judicial review under order 53 rule 1 (2) of the CPR are:-

- (a) **A statement stating the relief and the grounds on which the relief is anchored.**
- (b) **Affidavits verifying the facts relied on.**

The case of **Republic –VS- Mwea Land Disputes Tribunal Resident Magistrate Wanguru and Genesio Kubunya Njagi. Embu HCCC Misc. App. No. 32 of 2007** decided by Khaminwa judge on the 2nd day of May 2008, in which the learned judge held *inter alia* that the “**rules require that notice of the application for leave should be given a day before the preceding date on which the application is presented**”.

This court has given due consideration to the above rival submissions, case law relied upon, and applied them to the rival arguments here in and in this court’s opinion it is clear that the respondents attack on the application is on two fronts namely, the merit front and the technical front. The merit front arises from the argument that the application has no merit as it does not propose to right any thing wrong in the proceeding sought to be quashed whereas the technical aspect arises from the assertion that the application is irregular by reason of failure to file a notice to the registrar in the first instance and in the second instance, that the substantive motion was filed beyond the 21 days granted without leave after 90 days.

This court has given due consideration to the aforeset arguments and applied them to the facts herein and this court proceeds to make the following findings on the same:-

- (1) **This court has traced a notice to the registrar presented simultaneously with the presentation of the chamber summons on 7-12-2007 instead of it being presented on the previous day.**
- (2) **There is a statement of facts giving a description of the name of the applicant, grounds on which the relief is sought and the relief.**
- (3) **There is a brief verifying affidavit which does not refer to the exhibits accompanying it.**
- (4) **It is correct that leave to apply for judicial review was granted on 10-12-2007 by Mugo judge who gave the applicant 21 days within which to file the substantive motion.**
- (5) **A perusal of the record reads, that the fact of failure to file the substantive motion within 21 days was brought to the attention of Mwera judge on 10-3-2007 and reasons given for the delay and the applicant was given 14 days from 10-3-2008 within which to file the substantive motion. 14 days from 10-3-2008 would have expired on the 24-3-2008 but the application was presented on the 10th day of March 2008 within the 14 days granted. In fact the same date.**
- (6) **It is noted that the substantive motion introduced a supporting affidavit which introduced the exhibits which had been filed as an appendage to the brief, verifying affidavit and it contains**

the facts.

(7) There are supporting affidavits filed simultaneously with the substantive motion but there is no order allowing the applicant to file a further affidavit.

This court has considered these procedural defects in line with the provision of order 53 CPR and finds that indeed there is a requirement that the notice be filed a day before the presentation of the chamber summons. Failure to comply is an irregularity but under the old rules it was not fatal as the court could waive the requirement. Herein there was no mention of this irregularity by the court and so it can be deemed to have been waived.

As for the further affidavit as Wendoh judge observed in the cited case, the accompanying documents are the statement and the evidence in the verifying affidavit. Inadequacy of the evidence in the verifying affidavit invites the applicant to seek leave of court to introduce further affidavits in line with the relevant rules. It means that the introduction of the supporting affidavit to the substantive application was irregular and is a proper candidate for striking out. If struck out then the substantive application has no alternative but to fall back on to the statement and a verifying affidavit without evidence. If the basic verifying affidavit is ignored, it means that the applicants' substantive application cannot stand on the bases of a bare statement, as a statement has to be supported by evidence in the verifying affidavit. For reasons given in the assessment on the technical point relied, the court is satisfied that the substantive application stands faulted.

Turning to the merits which is being gone into for purposes of the record only, the findings of the court is as follows:-

(1) The original tribunals proceedings annexure 7 which led to the magistrate's court case sought to be quashed reveals clearly that the claimant therein was Fredrick Owino Apondi whereas the objector was Thomas Onyango Apondi. The same details appear in the magistrate's court case. The subject herein is indicated as Apondi Atieno Odhiambo. There is no deponement either in the brief.

(2) Verifying affidavit to the application by way of chamber summons as well as the supporting affidavit to the substantive application stating how the subject came to be aggrieved by those orders. This court has judicial notice of the provision of the land disputes tribunal act as well as the order 53 CPR procedures and this court does not find any provision which permits a stranger to hijack proceedings and prosecute them.

The only time under order 53 where a party not party to the grieving proceedings can become involved is after the same have been filed and that is when the rule allows a party affected by the proceedings and who wishes to be heard can be heard either orally or through the filing of deponements. For these reasons the proceedings also stand faulted.

Faulting notwithstanding, the entire proceedings by the original claimant were a nullity *abinitio* and this being the case, the contention of the award also stands tainted. By reason of this tainting it matters not that the award conferred benefits on to the 3rd respondent. Those benefits were nullities.

For the reason given in the assessment the plaintiffs substantive application by way of notice of motion filed on the 10-3-2008 stands faulted and it is a proper candidate for dismissal for the following reasons:-

(1) The notice to the registrar was filed simultaneously with the chamber summons instead of it

preceeding the presentation of the chamber summons. This is an irregularity which could be waived and although there is no note of this waiver on the record it can be deemed to have been waived as the court went ahead to grant leave.

(2) The chamber summons is not properly anchored as the verifying affidavit does not comply with the rules in that it is brief and does not contain the evidential value on the basis of which the statement could be supported.

(3) The exhibits forming the evidence were just a mere appendage on the file as the brief or bear verifying affidavit does not introduce them.

(4) It is to be noted that indeed the substantive application was not filed within the 21 days granted but it is noted from the content of the record that

leave to file the same out of time was sought and obtained.

(5) It is observed that that substantive application in accompanied by a supporting affidavit which is evidentiary in nature and which introduce the exhibits which had formed the basis of appendages to the chamber summons. However, this supporting affidavit is irregular on two fronts, namely it was filed without leave of court and secondly the rule do not require the substantive application to be supported by a supporting affidavit.

(6) Once the chamber summons stand faulted, then the substantive application cannot stand on its own.

(7) The foregoing in number 1-6 not withstanding the entire proceedings stand faulted because the claimant in the land disputes tribunal as well as the confirmation proceedings in the magistrate's court bear names of a different claimant other than the subject herein. This means that the said subject had no capacity to initiate the current proceedings.

(8) For purposes of the record only, the court is in agreement that the proceedings before the land disputes tribunal were a nullity and they could not pass any beneficial interest to any party as the tribunal had no mandate to adjudicate over issues relating to title to land and for this reason there is no need to interrogate the merits of those proceedings and the resultant findings.

(9) The 3rd respondent who was dragged to court by a party with no *locus standi* will have cost of the application.

Dated, signed and delivered at Kisumu this 8th day of July 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/va