



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

JUDICIAL REVIEW NO. 23 OF 2010

VITALIS OCHIENG SUBA.....APPLICANT

VERSUS

NYANDO SRM.....1ST RESPONDENT

NYANDO DISTRICT LAND REGISTRAR.....2ND RESPONDENT

J U D G M E N T

The applicant herein approached the seat of justice by way of an application for leave to apply for judicial review by way of chamber summons, dated 12th day of May 2010, and filed the same date. It is brought under order L III rule 1 (1,2,3, & 4), 2 CPR. It sought leave to apply for an order of certiorari, prohibition costs and for the order of leave to operate as a stay. The leave was granted on the 12-5-2010. The substantive application is dated 18th May 2010, and filed on the 31-5-2010 and the following reliefs were sought:-

- (1) An order of certiorari to issue removing into this honourable court for the purposes of it being quashed, the award of Nyando District Land Disputes Tribunal dated 13-11-2009 and adopted by the 1st Respondent as its judgment on 16-12-2009 in Nyando Misc. App. No. 26 of 2009.**
- (2) An order of prohibition prohibiting the 2nd Respondent from effecting transfer of land parcel No. Kisumu/Wawidhi A11/1095 from the name of Vitalis Ochieng Suba to the names of the interested party as contained in the grounds by Nyando District Land Disputes Tribunal dated 13-11-2009 and adopted as a judgment by the first respondent on 16-12-2009 in Nyando Misc. Case No. 26 of 2009.**
- (3) Costs of this application be borne by the interested party.**

The application is grounded on the content of the statement of facts, verifying affidavit and annexures. The features stressed are as follows:-

- The applicant is the rightful proprietor of land parcel number Kisumu/Wawidhi A11/1095 as per the annexed title document.
- The applicant admits having sold a portion of the said land to the interested party but the said sold portion was not surveyed and clearly marked on the ground.
- That the interested party took the dispute to the land disputes tribunal and instead of seeking of the portion sold, sought the entire portion whereby the tribunal ordered that the applicant be divested of the title and the same be registered in the name of the interested party. It is his stand that the land disputes tribunal had no jurisdiction to cause the title to be divested from the applicant to the interested party.
- That he has genuine complaints which should be vindicated.
The court makes observation that though the annexed exhibits are signed they are not marked.

In opposition there is a replying affidavit by one Michael Oluoch Shiranda the interested party deponed on the 20th day of July 2010, and filed on the 21st day of July 2010. The salient features are as follows:-

- Concedes as having purchased portion of land parcel number Kisumu/Wawidhi A11/749 in 1991, 1996 and 1997.
- These were consolidated into one parcel and an agreement to that effect annexure MOS-1 entered into.
- In acknowledgement of the sale transaction the land was sub-divided into two resulting into namely parcel number 1094 and 1095 with parcel number 1095 being earmarked for the interested party, but the *ex-parte* applicant declined to transfer the said portion to the *ex-parte* applicant triggering the proceedings complained.
- It is his stand that since he had occupied and was living on the said land the, the tribunal had jurisdiction to deal with the said complaint and competently gave the award complained of.
- That he has established a home on land parcel number 1095, and all that the applicant is doing is that he is acting in bad faith by reneging on the agreement and if the orders sought are granted then the interested party will be greatly prejudiced.
- The state filed no papers. The applicant filed written submissions reiterating the grounds setout above and then added that:-
- The mandate of the land disputes tribunal is clearly set out in section 3 (1) of the Land Disputes Tribunals Act and these are:-

(a) The division of or the determination of boundaries to land including land held in common.

(b) A claim to work or occupy land or

(c) Trespass to land.

- Contends that the dispute brought to the land disputes tribunal did not fall into the above category and in support of this, the court is urged to be guided by the case law on the subject cited to court.

There is the case of Nyeri CA No. 259 of 2000 between Beatrice M. Marete

Appellant –VS- 1. Republic

2. The District Commissioner

3. The Meru disputes tribunal ex-parte.

4. John Gitonga Mbui

being an appeal from Misc. App. No. 927 of 1999. It was decided by the court of appeal on the 5th day November 2004. At page 5 line 6 from the bottom, the law lords of the court of appeal had this to say:-

“We have considered the rival submissions in this appeal and it would appear to us that the main issue relates to whether the land disputes tribunal of central Meru had jurisdiction to determine the dispute before it. We have already set out at the commencement of this judgment, the final decision of the tribunal. It was to the effect that the panel of elders awarded the parcels of land Nos. Nyaki/Mulathankiri/1680 and 1681 to the claimant (Beatrice) who is the appellant before us. These pieces of land were registered under the Registered Land Act CAP 300 Laws of Kenya. Awarding land to the claimant meant she acquired an interest in it by virtue of that award in order to put that ruling into effect, the appellant would have to effect it by rectifying or canceling the title. The issue is whether the tribunal had jurisdiction to do so. Section 3 (1) of the Land Disputes Tribunals Act 1990 provides:-

(1) Subject to this act all cases of a civil nature involving a dispute as to:-

(a) The division 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”.

In our view, the dispute before the tribunal did not relate to boundary or a claim to occupy or work the land, but a claim to ownership. Taking into account the provision of section 3 of the Act what was before the tribunal, we are of the view that the tribunal went beyond its jurisdiction when it purported to award parcels of land registered under the Registered Land Act to the appellant.

In our view, the tribunal acted in excess of its jurisdiction. In view of the foregoing we are in agreement with the ruling of the learned judge to the effect that the tribunal went beyond its jurisdiction. It therefore follows that the superior court cannot be faulted for having allowed. I leave the application and granting the reliefs sought by the application consequently, we find no merit in this appeal, and we order the same be and is hereby dismissed. Considering that it was the tribunal that acted without jurisdiction and the dispute relates to family land, we exercise our discretion on costs by making an order that each party bear its own costs here and in the court below we so order”.

In the case of Bungoma Misc. Application No. 116 of 2009. Elphas Nyambaka Cosma and Tobias Mutai, Jenipher Simiyu, Moses Mwinja, Emmanuel Kiketi and Dina Khayota as Tongaren Land Division Tribunal and SRM Kimilili Law Court and Charles Angucho Suchia delivered by Muchemi Judge on the 31st day of October 2010. The salient features of the ruling are that:-

- The ex-parte application sought to quash the award of Tongeren Division Land Disputes Tribunal.
- The decision had been adopted by Kimilili SRM LDTII of 2007 on 10-7-2007.
- The main ground supporting the application that the tribunal exceeded its jurisdiction.
- The applicant was the registered owner of land parcel number Bungoma/Maitivi/506.
- The interested party went to the tribunal claiming land he had purchased in 1991 from one Mzee Nyambaka.
- The tribunal had ordered the transfer of the land to the interested party’s sister Doris Anindo.
- That the mandate of the tribunal envisaged under the Act deals with the division of, or the determination of boundaries to land surrounding land held in common, a claims to occupy or work

land or trespass to land.

- That the land in issue is registered under the Registered Land Act Cap 300 which requires that any person claiming ownership of land registered under the Act shall file his claim either in the high court or the Resident Magistrate's court depending on the value of the subject matter as per the prescription in section 59 of the Act.

- That the applicant had established that the tribunal acted in excess of its jurisdiction.

The case of Eldoret HCCC Misc. App. No. 25 of 2002 Republic (Applicant-VS- Kapsabet Land Disputes Tribunal (Respondent) And Keter Kipchoge Miso (Interested Party) Ex-parte Christine Jepkosgei Ngetich decided by M.K Ibrahim on the 30th day of January 2009. At page 2 of line 2 from the bottom the learned judge held this to say:-

“The land in question is registered in the name of the applicant. This is not a disputed fact. The award confirms this. The applicant became registered as the proprietor of the land on 7-11-1998, and the title deed was issued on 16-11-1989”.

At page 3 line 10 from the top the learned judge went on:-

“In any case the Land Disputes Tribunal under the Act clearly has no jurisdiction to determine claims of precription or adverse possession such course of action can only be heard and determined by the high court. On this ground the Tribunal did not have jurisdiction to deal with the disputed.....”

The interested party also filed written submissions dated 9th day of February 2011 and filed on the 10th day of February 2011, and the following have been stressed:-

- It is not in dispute that the applicant sold the suit parcel No. Kisumu/Wawidhi A11/1095 to the interested party.

- The ex-parte applicant applied for transfer from the land control board on 4-3-2009 to subdivide the land into two parcels.

- Thereafter the interested party commenced occupation of the said premises in 1991 and has continuously worked and occupied the said land since then.

- It is his stand that by reason of working and occupying the land, his claim is within the mandate of the tribunal under the Act.

This court has given due consideration to the rival arguments herein as well as the rival submissions and principles of case law relied upon and applied them to the facts herein, and in this court's opinion the following are the findings made by this court namely:-

(1) It is agreed on both sides that the land subject of these proceedings is registered land.

- (2) That the interested party's claim stems from purchase and occupation of the said land.
- (3) There is no dispute that the interested party directed his claim to the land disputes tribunal, which claim was duly adjudicated upon and the tribunal gave an award which was filed in the court at Siaya and adopted as a judgment of the court.
- (4) That the applicant became aggrieved and moved to this court seeking the reliefs being sought.
- (5) There is no doubt that the mandate of the tribunal is clearly set out in section 3 (1) of the relevant Act No. 18 of 1990 which is simply to deal with claims of the right to work or occupy the land, boundary disputes and trespass to land.
- (6) A perusal of the proceedings before the tribunal as well as deponements relied upon by the parties reserved that the ex-parte applicants claim simply centres on the complainant that he purchased the portion of land he was claiming from the applicant. The said portion of land is clearly specified and it is evidently clear that it is registered land.
- (7) That case law on the subject decided by both the superior court, and the court of appeal are in agreement on what comprises the mandate of the land disputes tribunal. The decisions of the superior court are not binding on this court where as those of the court of appeal are binding on this court.
- (8) Both courts are in agreement that the land disputes tribunal has no jurisdiction to adjudicate over registered land. This court has revisited the relevant provision both in the Act and as set out in the case law cited and it is in agreement that the correct position is that land disputes tribunals have no mandate to adjudicate over title to land and since the interested party claim to the tribunal clearly mentions the claim of the purchased property which is registered land, the tribunal had no jurisdiction to try the same. The application has merit.

For the reasons given above the court proceeds to make the following orders:-

- (1) An order of certiorari be and is hereby issued to quash the award of Nyando District Land Disputes Tribunal dated 13-11-2009 and adopted by Nyando SRM on 16-12-2009 as Nyando Misc. Case No. 26 of 2009.
- (2) An order of prohibition be and is hereby made and issued prohibiting the 2nd Respondent Nyando District Land Registrar from effecting transfer of land No. Kisumu/Wawidhi "A"11/1095 from the names of Vitalis Ochieng Suchia.
- (3) Each party to bear own costs.

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

ROSELYN N. NAMBUYE

JUDGE

RNN/va