



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 39 OF 2010

REPUBLIC.....APPLICANT
VERSUS
THE NAKURU DISTRICT LAND
DISPUTES TRIBUNAL.....1ST RESPONDENT
THE CHIEF MAGISTRATE NAKURU.....2ND RESPONDENT
AND
JEREMIAH N. NJUGUNA.....INTERESTED PARTY

JUDGMENT

The ex-parte applicants herein are Clement Ndichu Kimani, Susan Njeri Nduati, Shadrack Mureithi and Jedida Wanjiru Muringu. They filed this Notice of Motion dated 24/3/2010, seeking an order of certiorari to issue to remove the proceedings and verdict of the Nakuru Dispute Tribunal, Case No. 5/09 for purposes of being quashed. The application is premised on the verifying affidavit sworn by Shadrack Mureithi on his own behalf and that of the other applicants, dated 11/3/2010 and the statutory statement of the same date. Miss Njoroge, counsel for the applicants filed submissions dated 30/3/2010.

The application was opposed and Jeremiah Njoroge Njuguna, the Interested Party herein filed a replying affidavit dated 22/4/2010. He was represented by Ms Omwenyo Advocate who also filed skeleton arguments on 23/4/2010.

The applicants' case is that they bought their plots MITI MINGI BLOCK 1/185 (NDEGE) 1/186, 1/196 and 1/188 from Francis Kabugi Njuguna, an agent of Jeremiah Njoroge, the Interested Party herein and they obtained titles in respect of their plots after making payments for the plots. They exhibited the titles issued to them (SM1). Later, the Interested Party approached them claiming Kshs.145,000/- from each of them and alleged that his agent had not paid him that sum. The Interested Party sued the applicants in the Tribunal instead of pursuing the agent. The Tribunal rendered an award on 22/12/09 to the effect that each of the applicants had to pay Kshs.145,000/- to compensate the Interested Party from the period they had occupied the land and the said award was awaiting adoption by the Chief Magistrate's court Nakuru. It is the applicants' contention that the Tribunal had no jurisdiction to entertain a matter of a contract between a principle and the agent.

In opposing the application, the Interested Party deponed that he was the registered proprietor of parcel known as MITI MINGI/MBARUK BLOCK 1/3 (NDEGE) measuring about 0.73 Ha ((1.8 acres) as per exhibited title (Ex A). In 1996, he had it subdivided into 13 plots (EX B) and asked one Francis Kabugi Njuguna, then trading as BASCO COMMERCIAL AGENCY, to look for buyers. The said agent did not introduce to him any buyers nor did the Interested Party give him power to negotiate or enter into contracts with anybody. However, 5 years ago, he asked the said agent what was happening with the land when the agent gave him some money and informed him that interested buyers were paying by

instalments. The agent was arrested for criminal offences and in 2007 the Interested Party saw developments coming up on his land. Upon conducting a search at the Land's office, he found that the applicants were the registered owners of the plots and he wrote to the applicants asking to know how they came to be registered (D-5) and two of the buyers wrote back explaining that it is the agent who sold the land to them. He re-negotiated with the two and entered into agreements. According to the Interested Party, the applicants were trespassers on his land and that is why he approached the Tribunal for redress. He contends that there was no contractual relationship between the parties and that the applicants have come to court with unclean hands as they do accept that they never transacted with him and this court should not sanction an illegality.

It does not seem to be in dispute that MITI MINGI/MBARUK BLOCK 113(NDEGE) was registered in the name of NJOROGE NJUGUNA. It was subdivided and the title was closed on 14/4/1997 and the new numbers were issued, that is 185 to 198. The new plots comprise the titles issued to the applicants.

The applicants challenge the decision of the Nakuru Land Disputes Tribunal which purported to enforce a contract between the applicants and the Interested Party's agent as being ultra vires the Tribunal's mandate or that it was made outside the Tribunal's jurisdiction. **Section 3(1)** of the **Land Disputes Tribunal Act** donates jurisdiction to the Tribunal. The **Section** reads as follows:-

“S.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,**

According to the Interested Party, there was no evidence of transfer of the land to the applicants as the provisions of the **Registered Land Act Cap 300** were not followed. **Section 38** of the **Registered Land Act** provides that no land shall be disposed of except in accordance with the **Act**. **Section 109** of the **Registered Land Act** provides that every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and all parties to the instruments. In the instant case, there is evidence that the applicants have already been registered as the proprietors of the plots as a result of the subdivision of the Interested Party's land.

His title is no more the same having been closed on 14/4/97 (EXB) Titles already having been issued to the applicants, it is only a court of law that could have determined how they were issued, whether fraudulently or otherwise. In the decision of the Tribunal, it was observed that the applicants had to pay Kshs.145,000/- per plot for use of the plots and that the Interested Party would then issue titles to the beneficiaries by 30/4/2010. It is obvious that the Tribunal was not just dealing with an issue of trespass. It was dealing with an issue of sale of land and whether the applicants had paid for the disputed plots. That issue is the preserve of the courts of law to deal. As to whether the titles were regularly issued, again it is only a court of law that can determine that issue. The Tribunal observed that the applicants who were objectors in the Tribunal had an obligation to complete the balance of the purchase price. It is obvious that the Tribunal dealt with issues of contract. If there is need to determine whether or not the agent had authority to sell the parcels of land, or that he actually sold them, it is for a court of law to determine such dispute. I do find that the Tribunal lacked the jurisdiction to entertain the dispute before it and acted outside its powers. That brings that decision under the purview of Judicial Review and is liable to be quashed by an order of certiorari.

Is the application defective? Ms Omwenyo urged that the Interested Party was not served with the statutory statement and hence the application is defective. **Order 53 Rule 4(1)** of the **Civil Procedure Rules** requires that copies of the statutory statement and the verifying affidavit be served with the Notice of Motion. I have noted that there is a statement on record. It was filed with the Chamber Summons as required by **Order 53 Rule 1(2)** of the **Civil Procedure Rules**. Although in his reply the Interested Party alleged that the application was defective, the nature of the defect was not disclosed. The statement is one of the main documents that must be served on the opposite party in a Judicial Review application. The

Interested Party has not shown why he did not raise the issue of want of service earlier or indicate it in his replying affidavit or request to be supplied with that statement. Since the statement is on record, it is difficult to establish at this stage whether it was served or not. There is not even a letter of request for the statement addressed to the applicants' counsel. I have seen the affidavit of service filed in court on 14/2/2011 and at paragraph 3 thereof, it indicates that the Interested Party was served with the Notice of Motion and the court order in the presence of Ms Omwenyo. If one document was missing, counsel should have noted. The court will find that the applicant was duly served with all documents and that is why the Interested Party was able to reply and ably respond to the application.

In sum I do find that the applicants are deserving of the order of certiorari as prayed and hereby call up and quash the proceedings and award of the Nakuru District Land

Disputes Tribunal No. 5/09. costs to the applicants.

DATED and DELIVERED this 30th day of September, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Wachira holding brief for Ms Njoroge for the applicants.

Mr. Rabera holding brief for Ms Omwenyo for the respondents/Interested Party.

Kennedy Court Clerk.