REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 60 OF 2009

REMJAS ABIRA NYIKAL (Suing as the Administrator of the Estate of:
AUGUSTINO NYIKAL OKWE ……PLAINTIFF
VERSUS
TOBIAS OYIEKO OMOLLO……..1ST RESPONDENT
MARICUS ABELE OMOLLO……..……2ND RESPONDENT

RULING

The applicants who are the defendants herein have moved to the seat of justice vide an application dated 10th day of November 2010 and filed on the 11th day of November 2011. Two reliefs are sought namely:-

1. That the Honourable Court be pleased to dismiss the plaintiffs suit with costs as the matter had been handled by the District land Tribunal which had jurisdiction to hear and determine the same.
2. That the costs of this application be borne by the plaintiff.

The grounds in the body of the application as well as the supporting affidavit are briefly:-

- **That the issue herein was determined by the Land Disputes Tribunal, on a moral mode and adopted as a judgment of the court and a decree issued.**

- **That by reason of what has been stated, the plaintiff is not being truthful and is not willing to bring this litigation to an end.**

The annextures annexed though not commissioned reveal the presence of proceedings from the Kisumu East/West District Land Disputes Tribunal case No. 30/2009. There is evidence that the defendants appear to have been the claimants or one of them was a claimant and the others a witness. While the plaintiff and other were the objectors. Indeed a verdict was given by the said elders on 27/9/2009 and it reads:-

"The land surveyor to go to the disputed land using the said maps to curve out parcel number 2451 from parcel number 381 so as to determine the correct boundary . The finding of the District surveyor will be the findings of the land Dispute Tribunal Elders. Right of appeal 30 days from the date of adoption to provincial Appeal Committee at Provincial Commission Nyanza."

It is apparent that the said proceedings were filed in the CMS court at Kisumu as land case number 78 of 2009, and the same was adopted as a Judgment of the court for enforcement purposes and it was adopted on the 27th day of January 2010.

It appears that before the conclusion of the said proceedings before the elders, the plaintiff/Respondent had moved to this court by way of a plaint dated 26th day of May 2009 and filed on the 27th day of May 2009. A perusal of the same reveals the following salient features:-

- That there is in existence land parcel number Kisumu/Wathorego /381.

- That the same is registered in the name of the plaintiff deceased father one Augustino Nyikal Okwe.
- That him plaintiff is the legal administrator to the said deceased estate.
- Vide paragraph 4 that it was not until 1995 when him plaintiff discovered that the defendants who are his neighbours had encroached on a portion of the said land and they have been in occupation thereof without the plaintiffs' or the said deceased fathers authority.
- That as a result of the said defendant's unlawful actions, the plaintiff and the deceased estate have suffered and if not restrained they will continue suffering.

In consequences thereof that plaintiff sought the following reliefs against the defendants:-

(a) An order directing the defendant to vacate the portion of the suit land forthwith.
(b) A permanent injunction restraining the defendants by themselves , their agents ,servants, employees or any one deriving their authority from encroaching, occupying, dealing with, interfering with the proprietary rights, interests and right of possession and occupation enjoyed by the plaintiff over all that land known as Kisumu/Wathorego/381.
(c) General damages
(d) Costs
(e) Interests on (c) and (d) above.

The court has also traced two defences on the record. That of the first defendant Tobias Oyieko Omollo is dated 2nd June 2009, and filed on 4th June 2009. Vide paragraph 3, 4, 5,6,7 and 8 that if they have occupied the said portion since 1995, then they have a right to the same so that it is the plaintiff who has encroached on their portion of land which was wrongly included in parcel number Kisumu/Wathorego/381 after the access road passed through parcel number 2451 and that the matter is purely a boundary dispute, that the plaintiff stands to suffer no loss as they have erected a house on the disputed portion.

- **That they have no claim over parcel number Kisumu/Wath orego/381 which the plaintiff uses.**
- **That they defendants have filed a case with the Land disputes tribunal which the plaintiff has ignored.**

The second defendants' defence is also dated and filed the same date as that of the first defendant and contains similar averments as the first one.

The plaintiff replying affidavit to the application was deponed by the plaintiff on the 16th day of November 2010, and filed on the 16th and the salient features of the same are as follows:-

- Vide paragraphs 2,3,4,5,6,7,8,9,10,11,12,13,14,15,16,17,18 that the content of the plaint is reiterated , that issues in dispute are not boundary issues but ownership of land issues by reason of the defendants having lived off a portion of his late father's land claiming that it belongs to them, that he was not served to attend the tribunal proceedings or the adoption proceedings.

- That there is a land Registrars' decision on the boundary issue between the late mother of the plaintiff and the defendants late father which has not been upset and lastly that the land disputes tribunal decision is a nullity as the issue in controversy is not a pure boundary dispute but ownership of a portion of land.

The applicant filed statements which are to be taken as submissions. Which is a reiteration of the content of the defence save that there is an assertion that the boundary had been altered , that the matter had been adjudicated before, that surveyor have visited the land before but could not re establish the boundary between parcel No. 2451 and 381 because they were threatened.

The second defendants statement also dated and filed the same date contains the same information and lastly that the plaintiff moved to court after he had altered the boundary.

The plaintiff on the other hand also filed written submissions filed on the 14th day of July 2011. The following have been highlighted:-

- The reason why the suit is sought to be dismissed is because the matter had allegedly been determined by the land disputes tribunal.
- They rely on the deponements in the replying affidavit to the effect that the issue in dispute is not a pure boundary dispute, but ownership of land.
- That pursuant to the said land disputes award the applicants have alleged lived off a portion of the plaintiffs land.
- If the applicants' claim that the suit is improperly before court, then what they should do is to apply to have the suit struck out and not dismissed.
- That the hearing of this suit is being delayed by the interim applications.

- That proof that the matter is not a pure boundary dispute is borne out by the pleadings of both sides which clearly show that what is in disputes is not a purely boundary dispute but ownership of land involving demarcation of land evidenced by a letter from the land Registrar Kisumu which has been annexed by the applicants themselves.

- The court is invited to note that if this court were to uphold the adoption of the decree by the lower court, then in essence that decree would go a long way to alter the registers of the two parcels of land which in essence would be beyond the scope and mandate of the Land Disputes Tribunal.

The court is invited to be guided by the decision by Nambuye J in the case **of MUNICIPAL COUNCIL OF LIMURU VERSUS GEORGE MBURU MUCHINA (2007) EKLR** where the court was invited to fault the application because it sought to dismiss the appeal instead of seeking to have it struck out since it was alleged that the appeal was incompetent. At page 3 the court quoted with approval the following decisions. The case of **SARAH HERSI ALI VERSUS KENYA COMMERCIAL BANK CIVIL APPLCIATION NO. NAI 165/1999** whose central theme is that "**rules are hand maidens of this court which court is called upon to ensure that the hand maidens do not become bad masters".**

The case of **D. WACHIRA VERSUS RICARDA WANJIKU NDANJERU (1982) IKAR** whose holding number 7 is to the effect that "**Where breach of the rules is not fundamental, the proceedings will not be set aside".**

The case of **CONSOLATA NDUNDA OWIRA AND 4 OTHERS VERSUS BANUEL BOUIS OMAMBIA NAIROBI HCCC NO. 2050/93** at page 6 where Kubo J as he then was stated:-" **At all events it seems to me that the appellant is merely standing on technicalities. Nobody has vested rights in procedure and a court must at least at the present day structure to do substantial justice to the parties undeterred by technical procedures."**

The case of **JOSEPH MWESERI IGWETA VERSUS MUKIRA M.E. CA 270/2001** where Shah JA as he then was (now rtd) had this to say:- **" If I were to dismiss this application, there would be one bonafide litigant who will blame the system for relying on procedural technicality if. If I deny him justice whilst I do not condone errors on the part of counsel, I must consider the interests of Kenyans seeking justice in our courts. "He is bewildered at the twists and turns the hearing of appeal takes".**

Also the case of **CA NAI 12 OF 1997 MACHAKOS COMPANY LIMITED VERSUS**

JOSEPH KYALO MUTISO CONSOLIDATED WITH NAI CA 123/1997 MACHAKOS RANCHING COMPANY LIMITED VERSUS WAEMA ITUMO MUOKA. The learned Appeal judge A.B. Shah as he then was had this to say:-

"I am of the view that when no prejudice is caused to the objector, the application ought to be sustained and heard. it did appear to be that the Respondent was standing on technicality, want of compliance with procedural rules unless fundamental and going to the jurisdiction of this court, I do not and cannot call for striking out of the kind that is before me. It is the duty of the court to strive to do justice between the parties on deterred by technical procedural rules. Rules of procedure are good servants but bad masters"

After due consideration of the said case law Nambuye J declined to dismiss the appeal because room existed for extending time for filing, the same, went ahead to extend the time for filing and deemed the appeal to be duly filed but gave costs to the Respondent to the appeal.

The court was also referred to the case of **MUNGAI NJOROGE VERSUS GITHIUGURI LAND DISPUTES TRIBUNAL AND OTHERS NAIROBI MISC APPLCIATION NO. 1 OF 2007** decided by R.P.V Wendoh J on the 26th day of October 2007. At page 3 thereof, the learned judge quoted with approval section 3 of the land Disputes Tribunal Act No. 1 of 1990 thus:-

"Section 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 boundary to land including land held in common.
(b) A claim to occupy or work and, or
(c) Trespass to land shall be heard and determined by a tribunal established under section 4.

At the same page 3 the learned judge quoted with approval the case of **MBUGUA VERSUS TERESA WANGECHI MACHARIA CA 460** where the tribunal dealt with registered land and justice Aganyanya J as he then was now J A held that "**the land disputes tribunal had no jurisdiction to entertain the said matter. Also the case of JONATHAN AMUNAVI VERSUS RKSM CA 256/2002 where the CA held that the land Disputes tribunal had no jurisdiction to deal with proceedings relating to title to land or beneficial interest in land. So that even if it was a case of succession, the 3rd respondent should have filed it in the right court or a court which deals with succession."**

At page 4 quoted with approval the case of **JUDICIAL ENQUIRY IN THE GOLDEN BERG AFFAIR EXPARTE MWALULU H.MISC APPIATION 1279/2004** where the learned judges Nyamu, Ibrahim and Makhandia JJJ held that **"order 53 rule 2 which prescribes that an application for an order of certiorari be brought within 6 months does not include anything covered by the principles of ultra vires, nullity or decisions made without jurisdiction"** In the final result the learned judge ruled that the tribunal had no jurisdiction to determine a dispute relating to Registered land.

This court has duly considered the rival pleadings, submissions advanced by both sides and the same considered in the light of principles of case law cited to court and the court proceeds to make the following findings on the same:-

1. It is not disputed that indeed there are two parcels of land adjacent to each other namely parcel number Kisumu/Wathorego/2451 and Kisumu/Wathorego/381.

2. Parcel number Kisumu /Wathorego /381 is said to have belonged to the late father of the plaintiff who is the Respondent to the application subject of this ruling. It has been deponed that the plaintiff /Respondent is the holder of a grant of representation to the said estate of his late father but it appears succession has not been completed. Whereas the defendants who are the applicants in the application subject of this ruling own parcel number Kisumu/Wathorego/2451. The plaintiff /Respondent has mentioned in his affidavit that the parcel 2451 is registered in the names of the father of the Applicants. It is not clear as to whether the said applicants are holders of a grant of representation to the estate of their late father, but it is apparent that title has not changed to them.

3. It has come out clearly from deponements of both sides that both titles are registered. What is in contest is a boundary dispute.

4. It has also come out clearly that the deceased title holders have litigated over the said issue before the Kisumu land Registrar and a verdict given. Apparently the verdict was not enforced on the ground or it was subsequently frustrated.

5. It is the failure to effect the land Registrars' resolution of the boundary disputes that led to the defendant/applicants taking the dispute to the land dispute tribunal, which tribunal deliberated on the issue and gave a verdict which appears inconclusive because they left it open for the survey to determine the boundary between the two disputing plots and that would be the final record of the tribunal.

6. It is not disputed that the said verdict was indeed taken to a magistrates' court for adoption and the same was adopted in the condition in which it was.

7. It is the conclusion of the tribunal proceedings that the defendant/applicants have relied upon to move the court to seek dismissal of the plaint.

8. It is also evident that a portion of parcel number 381 is purported to have been lived off and included in parcel number 2451.

9. There is no dispute that the law on the mandate of the Land Disputes Tribunal is now crystallized that they have no mandate to deal with issues relating to registered land.

10.It is undisputed that the assertion of the applicant is that the proceedings before the tribunal and its subsequent adoption should be upheld as the same has brought the matter to rest as it deal with the right to work on land and a boundary any dispute. Whereas the stand of the Respondent is that what the tribunal was dealing with was infact ownership to a portion of the registered land.

This court has given due consideration to the a fore set out common grounds and or un disputed facts, and in its opinion the major questions for determination by this court are the following:-

1. What are this courts general observations of the entire proceedings?
2. What relief is the applicant seeking from the seat of justice?
3. What ingredients are the defendants/applicants required to establish before earning the said reliefs?
4. What strong points have each side put forward for and against the said reliefs?
5. Have the applicants brought themselves within the ambit of the said ingredients or have their assertions been ousted by the Respondents assertions?.
6. What are this courts final orders that are to be made in the disposal of this matter?

In response to own framed question 1, the court s response is as set out in the common grounds already reflected as number 1-10 above.

In response to own framed question 2,3,4 it is clear from the content of the application that it seeks dismissal of the plaint for the reasons given. Indeed it is correctly asserted that the plaint was filed before the conclusion of the tribunal proceedings and a verdict given. It therefore follows that in order for the applicants to succeed, they have to demonstrate that what they are urging the court to uphold is within the mandate of the tribunal and that a revisit by this court to those issues would now be a trespass.

The mandate of the tribunal is well known. The tribunal as a creature of the statute can only deal with that which is within the power donated to it by statute. This has been set out by Wendoh J in the **MUNGAI NJOROGE VERSUS GITHUNGURI LAND DISPUTES TRIBUNAL AND OTHERS (SUPRA**). The mandate is confined to right to work land, boundary disputes and beneficial interests not touching on ownership of registered land or a portion thereof. Herein although the dispute was a boundary issue on the face of it, in reality it deals with ownership of a portion of registered land alleged to be

belonging to parcel number 2451 which had allegedly been encroached upon by parcel number 381. The moment the issue touched on the ownership of a portion of the land, the same ceased being a pure boundary issue but an issue of ownership.

Further, the boundary dispute anticipated by the Land Disputes Tribunal are those relating to unregistered land. Because jurisdiction on boundary disputes relating to registered land is vested in the land Registrar under the Registered Land Act Cap 300 Law of Kenya.

This is no doubt the main reason as to why the tribunal did not proceed to determine the boundary on the ground before passing its verdict. It left the matter to the surveyor. By leaving the matter to the surveyor, the tribunal did not give a verdict capable of being enforced because it left one procedural step to be undertaken by another authority not party to the proceedings, hence the verdict is inconclusive and by being in conclusive it is of no consequence as the same cannot be enforced.

The ingredients to be established by applicants before earning the reliefs sought are that the disputes is within the ambit of the land disputes tribunal which this court has ruled that it was not. Secondly, that the decision was sound in nature and that it was capable of enforcement which this court has ruled that it was not capable of enforcement because it is inclusive.

Lastly it is clear that the proceedings are at their infancy as no hearing has taken place, no pre trials have taken place. It follows that before the court makes a decision in one way or another, it has to bear in mind its call to do justice to litigants in terms of the provisions of article 22 (3) (d) and 159 (2) (d) of the current Kenyan constitution. These read:- " **Article 22 (3) (d) the courts while observing the rules of natural justice shall not be unreasonably restricted by procedural technicality.**

159 (2) (d) Justice shall be administered without undue regard to procedural technicalities"

Applying these two provisions to the rival arguments herein, the court is of the opinion that if the plaint is faulted in the manner sought by the applicants, this court would have upheld a technicality by reason of it upholding a land disputes tribunal verdict arrived at without jurisdiction on account of it having related to registered land on the one hand and on the other hand the same is inconclusive and incapable of giving an effective remedy as it left the final decision to be taken on to some other authority not party to the proceedings. The tribunal had no right to shift this burden on to an authority which was not party to the proceedings and without jurisdiction as under the powers donated to it by the creating Act, there is no jurisdiction for the tribunal to refer any aspect of the proceedings to another authority. The best it could have done would have been to call for the surveyors report and then have it incorporated in its verdict after it has been testified upon within the same proceedings before it the tribunal.

There was issue also raised by the Respondent on the procedurally of the application by reason of it having been brought by way of seeking a dismissal instead of striking out. Case law on procedural technicality were cited and these have been Reflected on the record. It is clear that dismissal arises where the merits of the subject matter are to be interrogated. Where faulting is to be based on technicality then the best approach should have been striking out. This court has revisited the said authorities arising from an own decision and it is satisfied that indeed what the applicants are relying on are not the merits but a technicality, that the subject or substratum of the suit no longer exists by reason of it having been fully adjudicated upon by the tribunal whose verdict had been adopted foreclosing all future deliberations on the issue.

For the reasons given in the assessment, the applicants application dated 10th day of November 2010 and filed on the 11/11/2010 stands refused and dismissed for the following reasons:-

(1) Since it sought to fault the suit on points of technicality it should have sought striking out as opposed to dismissal as the court was not being invited to fault the plaint on its merit, but on account of the subject matter being non existent.

(2) The proceedings before the tribunal cannot be relied upon to shield the applicants because in effect

they are a nullity in so far as they touched on ownership of a portion of land competed over by the ownership from parcel number Kisumu /Wathorego/2451 and 381. These are properties registered under the registered land Act Cap 300 Laws of Kenya.

(3) The adoption by the subordinate court of the resultant tribunal, award not withstanding, a reading of the purported award is clear proof that the same is inconclusive and it is not in a position to give an effective remedy to the applicants as it donated power to the land survey or to establish the boundary on the ground though without jurisdiction and added that the findings of the surveyor would be the findings of the tribunal. A proper procedure should have been for the tribunal to call for that report from the surveyor have it tested on, cross examination allowed to be done by the opposite party then incorporate the said testimony and findings it into the verdict. In the absence of such a procedure having been taken the verdicts remain in conclusive and in enforceable on the ground and for this reason it cannot be shielded.

(4) By reason of what has been stated in number 3 above, the adopted award is an empty shell but since it was done by the court, the plaintiff will have to amend the plaint to seek a declaration to have it declared annulity.

(5) Allowing the application will also be against the spirit of Article 22 (3) (d) and 159 2 (d) of the current Kenyan Constitution which enjoins courts of law to avoid denying audience on technicality and instead dispose off disputes on the basis of substantive justice. The issue raised by the applicants relate to substantive justice and not procedural justice. These will be best handled in a trial where both sides will be heard fully, surveyors' reports tendered, a decision capable of enforcement and resolving the dispute made and then dispute finally resolved.

(6) The issue of the locus standi of the applicants before court considering the fact that the beneficiary parcel of land is registered in the name of deceased father of the applicant also has to be addressed. It has not been stated by them that they hold a grant to that estate. It therefore follows that their locus standi to sue and be sued has to be established first as they will determine the legality of both their being sued and their presentation of the application subject of this ruling. This can only done in the present proceedings.

(7) By reason of the uncertainty on the locus standi of the defendants/applicants in these proceedings, both on account of their being defendants and applicants, each party will bear own costs.

Dated, signed and delivered this 29th day of September 2011.

R.N. NAMBUYE
JUDGE

RNN/aao