



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Miscellaneous Civil Application 81 of 2009

SAMUEL KANJA KINUNU.....APPLICANT

VERSUS

NDORO RITHO Alias NDORO NJINJO.....RESPONDENT

RULING

This is the Notice of Motion dated 16/10/2009 filed by Exparte Applicant for an order of certiorari to remove into the High Court the decision of **Wang'uru Land Disputes Tribunal case No. D26/Vol.5/379 of 2009** and the subsequent judgment in **Wang'uru Senior Resident Magistrate Arbitration case No.10 of 2009** for the purpose of being quashed.

The grounds raised are:

- 1. The Tribunal acted ultra vires its jurisdiction making its award illegal.***
- 2. The Tribunal breached the rules of natural justice by condemning the Applicant unheard.***

It is supported by the Applicant's Affidavit in which he says he is the registered owner of land parcel No. **MWEA/MUTITHI/SCHEME/121** (certificate of search SKK1). The Land Disputes Tribunal reversed his title vide its proceedings and award (SKK11). He was never given chance to defend himself.

M/s Kamwenji for the exparte applicant submitted that when the matter concerning the suit land parcel No. **Mwea/Mutithi/Scheme/121** was presented to the Land Disputes Tribunal on 22/5/2009 matter was between 1st Respondent and Thomas Kamau Macharia. The Applicant though the registered owner was not a party to the proceedings. Kamau Macharia had also transferred the land to his wife who was not a party to the proceedings (SKK11). It's Mrs. Kamau who transferred the land to the exparte Applicant. The Tribunal then ordered that the land be transferred to the 1st Respondent.

- He submitted that the 1st Respondent was condemned unheard.
- The 2nd Respondent listened and dealt with a matter outside its jurisdiction.
- The Replying Affidavit does not raise any opposition to the orders sought in the Notice of Motion.

And the Preliminary Objection raised by the Respondent was disallowed. And that the Applicant says the

1st Respondent was served with orders of stay but went ahead to sell the land to 3rd parties. He further says its only the orders in HCCC MISC NO. 42 of 2009 which lapsed. The 2nd and 3rd Respondents never opposed the notice of Motion. They filed Preliminary Objection but did not prosecute it.

M/s Kiguru Kahiga for the 1st Respondent submitted that prior to instituting HCC MISC. 81/09 the applicant had instituted HCC MISC APP. NO. 42/09 and on 5/10/99 the orders of 23/7/99 in that matter were set aside and the 1st Respondent proceeded to execute the decree from SRM's court at Wang'uru. This High Court Misc. Application No. 81/2009 was filed long after orders in No. 42/09 had been discharged.

He challenges the legality of the current application before court. He has referred this court to the Ruling by Hon. Justice Karanja on 5/10/2009. He submits that the matter is *res judicata* under Section 7 of the Civil Procedure Act. He states that since the Applicant sought leave through our unknown procedure the same should not be allowed. The leave granted is a nullity and the Notice of Motion filed thereafter is a nullity.

And that pursuant to the orders of 5/10/2009 the suit land was sold to third parties who have not been joined as parties herein. He has referred the court to:

(i) ***Mburu Kinyua Vs Gachini Tuti [1978] KLR 69***

(ii) ***HCCC No. 79 of 2009 – Embu, Namu Murigo Vs Nyaga Cingano***

From the presentations before this court it is not disputed that:

- The Applicant herein instituted proceedings for Judicial Review vide ***Embu HCCMISC. 42/09*** where he was granted leave to file the substantive motion on 23/7/2009.
- The same was to be filed within 21 days. The leave was to operate as stay.

The Applicant did not file the motion and the 1st Respondent applied to have the orders of 23/7/09 to be set aside, on 5/10/2009 the orders of 23/7/09 were set aside and the 1st Respondent was granted leave to proceed and execute the decree of SRM Wang'uru.

Meanwhile on 29/9/09 even before the Ruling of 5/10/09 was pronounced, the Applicant had appeared before the Honourable Judge with a similar Application and obtained leave to file the order of Certiorari to quash the same orders in respect of this land. Counsel for the 1st Respondent says this was irregular as the matter had been determined. A preliminary objection was raised along this line but Hon. Justice Okwengu disallowed it.

In HCC Misc. No. 42/09 the only issue dealt with was leave and its operation as stay. That was set aside when the Applicant did not comply. So what could have been contested herein was the issue of Leave and its operating as stay. It cannot be said that the substantive Motion was heard and determined. And if it has not been determined, what is *res judicata* about it? I find none.

This can be distinguished from the authorities cited. In the *Mburu Kinyua Case* the Appeal had been dismissed because it lacked merit not because of want of form. In HCC Misc. No. 42/09 the orders granted on 23/7/2011 were set aside for non compliant with the order to file and serve within 21 days and not because of lack of merit.

This court on 29/9/09 granted leave which she also allowed to operate as stay. She has also given the reasons which made her do so. Since no substantive motion had been filed in HCC Misc. 42/2009, I find the motion before this court to be properly before court and I proceed to deal with it.

The award complained of was made by the Land Disputes Tribunal and adopted by the Wang'uru

SRM's court as a matter of procedure. The main decision began with the Land Disputes Tribunal and was confirmed by the court. The Land Disputes Tribunal derives its jurisdiction from the Land Disputes Tribunals Act No. 18/90. Its jurisdiction is to deal with boundary disputes, trespass to land, right to occupy and work land.

In the case of ***WAMWEA VS CATHOLIC DIOCESE OF MURANG'A REGISTERED TRUSTEES [2003] KLR 389***, the court held that Tribunals and Land Disputes Appeals Committees do not have jurisdiction to hear disputes over titles to land. Disputes over contracts are also not under that jurisdiction. The land involved here had been registered in the names of the 1st Respondent i.e. MWEA/MUTITHI/SCHEME/121. And on 29/9/2009 when court granted leave which was to operate as stay of any further proceedings related to the stated land, the title was still intact.

The 1st Respondent applied for transfer on 30/10/2009 and approval was on 5/11/2009. This was long after the order of 29/9/2009 forbidding any further transactions on the said land. The 1st Respondent has not denied having been served. Even when the Ruling of 5/10/2009 was delivered in HCC Misc. 42/2009 the 1st Respondent was aware of the orders of 29/9/2009 in this case. But he went ahead to sell the land to 3rd parties and transferred the same to them. The issue of the 3rd parties has arisen in the submissions which were agreed on by both counsels before I even came to this station.

In any event the basis of the transactions and transfers were on illegality as the Tribunal went beyond its jurisdiction making the award it did i.e. cancelling title and deciding to transfer the interest to another party. It's only the High Court which has the jurisdiction to that under the relevant provisions of the Act.

I therefore grant the Applicant's prayers and remove into the High Court the decision of Wang'uru Land Disputes Tribunal Case No. D26/Vol.5/379 and the subsequent judgment in Wang'uru SRM's Arbitration Case No. 10/009 and quash both the award and the resultant judgment/decree.

The 1st respondent's title should be restored forthwith. Each party to bear his own costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 16TH DAY OF NOVEMBER 2011.

**H.I. ONG'UDI
JUDGE**