



REPUBLIC OF KENYA
THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Miscellaneous Application 710 of 2005

JOSEPH KANIU WAKABA.....1ST APPLICANT

PAUL NJANGA WAKABA.....2ND APPLICANT

VERSUS

THE LAND TRIBUNAL DISPUTES

TRIBUNAL SOUTH KANANGOP.....1ST RESPONDENT

THE SENIOR RESIDENT

MAGISTRATE'S COURT NYAHURURU.....2ND RESPONDENT

JOHN KARANJA MACHARIA.....INTERESTED PARTY.

RULING:

Before me is a Notice of Motion dated 22nd June 2005 filed by M/s R W Muhuhu & Company Advocates for the ex-parte applicants named as *JOSEPH KANIU WAKABA* and *PAUL NJENGA WAKABA*. The respondents are named as the *LAND DISPUTES TRIBUNAL SOUTH KINANGOP* (1st Respondent) and the *SENIRO RESIDENT MAGISTRATES COURT NYAHURURU* (2ND Respondent). The application was filed under Order LII (should be Order LIII) rule 3 and 4 of the Civil Procedure Rules. The orders sought are as follows:

1. An order for certiorari to remove into this Honorable Court and to quash an award made by the south Kinangop Land Disputes Tribunal case No. 198 of 2004 concerning *L R No. NYANDARUA / SOUTH KINANGOP/1708*
2. An order prohibiting the Senior Resident Magistrate's Court Nyahururu from reading or confirming the award of south Kinangop Land Disputes Tribunal No. 19 pf 2004.
3. Costs of this application.

The application was grounded on the STATEMENT dated 16th May 2005 filed with the chamber summons for leave as well as the verifying affidavit sworn on 14th May 2005 jointly by the applicants. The applicants also filed an affidavit sworn jointly by them on 23.5.2005 deposing that they were administrators of the estate of *WAKABA KANIU NJENGA*.

The grounds of the application were as follows:-

- a) The south Kinangop land Disputes Tribunal exceeded its jurisdiction is awarding 1 acre as *L. R No. NYANDARUA / SOUTH KINANGOP / 1708 to JOHN KARANJA MACHARIA* which it had no powers and or jurisdiction to do so under section 3 of the Land Disputes Tribunal Act No 18 of 1990 and also failed to be guided by the provisions of section 27 and 28 of the Registered land Act Cap. 300 Laws of Kenya.
- b) The south Kinangop Land Disputes Tribunal award aforesaid is contrary to law and inconsistent with the said land Disputes Tribunal Act No. 18 of 1990.

A copy of the proceedings of the land Dispute Tribunal No. 198 of 2004, and the decision dated 14th April 2005 was in the following terms:-

The Tribunal is satisfied that a land sale agreement had been made between *JOHN KARANJA MACHARIA* and the late *WAKABA KANIU NJENGA* for one (1.0) acre at Ksh.70,000.

The Tribunal has therefore decided that Mr John Karanja Macharia is entitled to one (1.0) acre of land *L R No. NYA/So KINANGOP / 1708*.

- The objectors Joseph Kaniu Wakaba and Paul Njenga Wakaba may appeal within thirty days from the date of this Judgment to the Provincial Land Disputes Tribunal Court.

When leave was granted, the court also gave an order staying all proceedings and matters in the above land Disputes Tribunal matter until further orders of the Court.

When the Notice of motion was filed on 23rd June 2005, it was filed with jointly supporting affidavit sworn by ex- parte applicants on 22nd June 2005.

Ms. Kaburu Miriti & Company Advocates came on record for the interested party *JOHN KARANJA MACHARIA* on 1st November 2005.

The respondents were represented by the Attorney – General. Ex – parte applicants filed written submissions on 12th July 2006. The main contention was that the land Disputes went beyond to outside this jurisdiction in the matter. It was contended that the jurisdiction of the Tribunal was owned by section 3 of the Land Disputes Tribunal Act 1990 which restrict the said jurisdiction to matters relating to :-

- (i) *The division or determination of boundaries to land including land hold in common.*
- (ii) *A claim to ware or occupy land.*

A number of authorities were relied upon. These were the asset of *MUNYU KAHUHA Versus NGANGA KAHUHA NRB HCCA NO. 502 of 2000*; and the case of *JACINTAH MUGURE KAGECHE versus DAVID NGANGA KIOI* Nairobi Civil Appeal No. 252 of 2004. Reliance was also placed on the law of succession Act (Cap 160).

The interested party filed a replying affidavit sworn by himself on 13th December 2005. It was deposed on the said replying affidavit, inter-alia, that the Tribunal had jurisdiction to grant the orders, it granted with regard to the 1 acre.

The interested party also filed written submissions. In the submissions it was contended inter alia, that the applicants were hiding under legal loopholes to deny the applicant what was legally his, and that the interested part will suffer heavy financial losses since he lost

money and land.

The respondent, through the Attorney General filed grounds of opposition and written submissions. It was contended that inter alia that under section 159 of the Registered Land Act (Cap 300) as read with section 12 of the Registered land Disputes Tribunals Act (1990) the Tribunal can jurisdiction to deal with matters of title. It was also contended that the affidavit filed with the application was of no evident value. The further affidavit filed, without leave of the court has to be expunged.

At the hearing Mrs Muhuhu for the ex-parte applicants addressed me . Mr Warioma for the respondent addressed me. The interested party did not appear nor was he represented.

I have considered the application, documents filed, as well as the submissions of counsel and the authorities relied upon.

The first issue that I have to deal with is on the affidavit to be relied upon in the proceedings. Order 53 rule 4 of the Civil Procedure Rules deals with the matter, and it provides:-

- (4) *(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion and copies if any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall subject as hereafter in this rule provides, be relied upon or any relief sought after hearing of the motion except the grounds and relief set out in the said statement.*
- (2) *The High Court may on the hearing of the motion allow the said statement to be amended and may allow further affidavits to be used if they deal with new matter arising out of the affidavits if any of the other party to the application, and where the applicant intends to be asked to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and if any proposed amendment of his statement, and shall supply on demand and copies if any affidavits.*
- (3) *Every party to the proceedings shall supply to any other party, on demand, copies of affidavits which he proposes to use at the hearing.*

It is clear from the above provisions of the law that the affidavits and statement to be used are those filed with the application for leave, unless the court otherwise allows.

The court has not granted consent for the use of another affidavit herein; therefore the affidavit filed with the Notice of motion is incomplete and cannot be used in these proceedings. I strike it out.

What remains therefore is the affidavit filed with the Chamber Summons for leave.

It is contended by the defendant and interested party that the said affidavit is of no evidentiary value.

I disagree. The affidavit though brief, annexed the proceedings and decision of the Tribunal. Those are the facts and evidence to be relied upon, and which the ex – parte applicant relies upon. In my view, the said affidavit complies with the requirements of order 53 rules 1 (2) of the civil procedure Rules in that it discloses and contains the facts, or evidence relied upon. I dismiss the objection.

The 3rd issue relates to the merits the application that is whether the Tribunal had jurisdiction to make the decision it made. On this, I agree with counsel for the ex – parte did not have jurisdiction to award one (1) acre to the interested party. In my view, once the Tribunal did so, it was exercising to the land or title part of the subject land. The respondent claims that the land dispute Tribunal Act section 12 amends section 159 of the Registered land Act (Cap 300) and confers jurisdiction on the Tribunal. Section 159 of the Registered Land Act deals with the jurisdiction of the High Court and the Resident Magistrates court in civil proceedings relating to title, or possessing of land, or to the title to a lease or charge registered under the Act, or to any interest in the land, lease, or charge being an interest which is registered or registrable under the act, or which is expressed by the Act not to require registration. In my view , section 12 of the land Disputes Tribunal Act 1990 amends section 159 of the Registered land Act only to the extend that it confers jurisdiction on the Tribunal to deal with land matters in circumstances that fall within section 3 of the land Disputes Tribunal Act. Therefore the Tribunal acted ultra vires in determining a matter relating to the sale or title to land or a parcel of land. Their decision is therefore null and void, and has to be quashed.

This court has been asked to grant an order prohibiting the Senior Resident Magistrate Nyahururu from reading or confirming the award. That order is in my view is superfluous. However, I will also grant that order.

Consequently, and for the above reasons. I order as follows:-

1. *An order of certiorari is hereby issued to remove into this court and quash the award made by the South Kinangop Land Disputes Tribunal case No. 19 of 2004 concerning LR No. NYANDARUA / SOUTH KINANGOP/ 1708, and the same, is hereby quashed forthwith.*
2. *An order of prohibition is hereby issued prohibiting the Senior Resident Magistrates' Court Nyahururu from reading or confirming the award of south Kinangop Land Disputes Tribunal case No. 19 of 2004.*
3. *The ex – parte applicants are awarded the costs of these proceedings against the Respondents and the interested parties, jointly and severally.*

It is so ordered.

Dated and Delivered at Nairobi this 15th day of February 2010.

George Dulu

Judge.

In the presence of :-

Mr Ogwe holding brief for Mrs.Muhuhu for the applicant.

David Mutisya Court Clerk.