



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
MISCELLANEOUS CIVIL CASE 1117 OF 2007

WAINAINA KIMANI.....APPLICANT

VERSUS

LAND DISPUTE TRIBUNAL GATANGA.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT THIKA.....2ND RESPONDENT

AND

RAPHAEL KIMANI WAINAINA.....INTERESTED PARTY

R U L I N G

Before me is an application by way of Notice of Motion dated 25th October 2007 and expressed to be brought under Order LIII rule 3 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act Cap 18 Laws of Kenya in which the Applicant seeks:

- (1) An order of **Prohibition** prohibiting the Chief Magistrate's court at Thika from proceeding to issue any further orders in D.O's case No 52 of 2006 and Gatanga Land Disputes Tribunal from entertaining similar proceedings affecting Title to land and ownership of **LR No LOC 1/THUITA/248**.
- (2) An order of **Certiorari** to bring to High Court and quash the proceedings and award of the Gatanga Land Disputes Tribunal Claim No 36 of 2005 in respect of land parcel **LOC 1/THUITA/248** and the subsequent proceedings and order of L. M Wachira Senior Resident Magistrate at Thika made on 5th September 2006, adopting the said award as judgment of the court and any other order issued thereafter in LDT Case No 20 of 2004 at the Chief Magistrate's Court Thika.
- (3) That costs of the application be provided for.

This application is made pursuant to leave granted on 11th October 2007 by Justice Nyamu. Briefly the facts that gave rise to this litigation may be stated.

The Applicant who was the Objector before the Tribunal and the interested party who was the claimant are son and father. They had a dispute over the suit land. The interested party filed a reference before the Thika Land Disputes Tribunal. Both parties appeared before the Tribunal and testified and called witnesses who also gave evidence and were subjected to rigorous cross-examination. The elders after listening to the evidence of both sides gave an award in favour of the interested party and ordered the

Applicant to subdivide the suit land being **LR No LOCK./THUITA/248** and transfer the portion the interested party has been occupying and has developed to him.

The Applicant was aggrieved by that decision and hence this Judicial Review Application.

The application is based on the provisions of the Law and the grounds in the grounds in the statement of facts verified by the affidavit of **WAINAINA KIMANI** sworn on 8th October 2007. The grounds upon which relief is sought are:-

- (1) The matter brought before Gatanga Land Disputes Tribunal by the Interested Party involved matters affecting title to the suit land and ownership and Gatanga Land Disputes Tribunal does not have power and jurisdiction to deal with such matter.
- (2) The decision of Gatanga Land Disputes Tribunal to hear and determine matters affecting title and ownership of land was outside its power under Section 3(1) of the Land Disputes Tribunal Act (Act No 18 of 1990) and hence the decision made was outside its powers and jurisdiction and therefore it was ultra vires and null abinito.
- (3) The Chief Magistrate's court at Thika has no right, power or jurisdiction to adopt the illegal award made by the said Tribunal as in adopting the same as its judgment and giving further order emanating from the said award which is a nullity is tantamount to permitting a nullity and anything out of a nullity is a nullity. This is so because the maxim *ex-nihilo nihil fit* applies "out of nothing comes nothing."
- (4) The Thika Chief Magistrate's court in allowing the said award to be read and further confirming the same as its judgment was illegal, irregular and contrary to public policy as this will allow the interested party to abuse the process of the court and due process of the law and the High Court have supervisory role to play over inferior Tribunals and Courts hence this application.
- (5) The Applicant's land is in eminent danger of being subdivided and register rectified from a decision that is irregular, illegal null and void abinitio and if this happens the applicant will suffer greatly at the hand of interested party who will misuse the due process of the law
- (6) The Chief Magistrate's Court therefore ought to be prohibited from proceeding, entertaining and or issuing further orders in DO Case No 52 of 2006 as the same was null and to restore justice.

It is the Applicant's contention that being registered as the registered proprietor of the suit land he can do or deal with it as he wished. While the interested party contends that the Applicant having participated in the proceedings, testified and called witnesses who gave evidence without raising the issue of jurisdiction he is estopped from raising the same at this stage.

There is no dispute that the parties appeared before the Gatanga Land Disputes Tribunal on 30th June 2006 where each party testified and called witnesses who gave evidence and were subjected to cross-examination. The Elders after listening to the evidence of the claimant and the objector made an award in favour of the claimant.

The Land Disputes Tribunal Act No 18 of 1990 provides that the Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call, and their submissions if any, and each party shall be afforded an opportunity to question the other party's witness or witnesses.

The Tribunal shall give reasons for its decision. Any party who is aggrieved by the decision of the Tribunal may within thirty days of the decision, appeal to the Appeals Committee constituted for the province in which the land, the subject matter of the dispute is situated.

Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of.

Provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law other than customary law, is involved. **Section 8 (a) of the Act provides that any question of customary law shall for all purposes under this Act be deemed to be a question of fact.**

To the extent that the dispute was filed before the Tribunal and the Applicant submitted to its jurisdiction, presented evidence called witnesses who testified and were subjected to cross-examination and failed to raise the issue of jurisdiction to the Tribunal to handle the matter, he is estopped from raising the issue at this stage.

Once a party has surrendered to the jurisdiction and that jurisdiction provides a right to access the High Court through appeal, he ought to comply with the rules of procedure as provided and laid down in that jurisdiction and access the High Court on appeal rather than abandon that jurisdiction for the alternative jurisdiction which would become costly. The Act provides a very simplified mode of procedure which is less costly and affordable by even a lowly peasant without necessarily being compelled to seek the services of a lawyer.

This application is based on the ground that the Elders have no jurisdiction over registered land. But registration of titles are a creation of the law and one must look into the consideration surrounding the registration of titles ie if the registration is based on customary law trust.

Customary Law trust was considered in the case of **Mwangi and Another vs Mwangi 1986 KLR 328** at p. 332 where the court said:

“Kikuyu Customary Law recognizes the law of trusts and so does Registered Land Act under which this suit falls.”

The Lands Disputes Tribunal Act No 18 of 1990 provides that a question of customary law shall for all purposes under this act be deemed to be a question of fact so that if it is established that a person is so registered as a trustee under the custom, the Elders have jurisdiction to deal with the dispute.

For the reasons stated above I am not persuaded that the Applicant has placed before this court sufficient material to enable me to exercise my discretion in his favour.

Accordingly the Applicant's notice of Motion dated 25th October 2007 is dismissed with costs.

Dated and delivered at Nairobi this 23rd day of June 2009.

J. L. A. OSIEMO

JUDGE