



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISCELLANEOUS APPLICATION 17 OF 2009

1 ZOO L NIMJI.....1ST APPLICANT
2 PIONEER GENERAL ASSURANCE COMPANY LIMITED ...2ND APPLICANT

VERSUS

1. THE KISUMU DISTRICT DISPUTES TRIBUNAL.....1ST RESPONDENT

2. CHIEF MAGISTRATE KISUMU.....2ND RESPONDENT

CORAM

J. W. MWERA J.

PJO OTIENO FOR PLAINTIFF

MISS GATHAGU FOR THE DEFENDANT N/A

INTERESTED PARTIES IN PERSON

COURT CLERK DIANGA

INTERPRETER/ENGLISH/LUO/SWAHILI

RULING

By the notice of motion dated 27th January 2009 brought under Order 53 rule 2 Civil Procedure Rules the two applicants, the first being a director of the 2nd limited company prayed from the court orders of certiorari and prohibition.

Mr. P. J. Otieno urged this court to bring up and quash the decision of 1st respondent, Kisumu District Land Disputes Tribunal in Tribunal Case number 49/06 on account of having entertained it in excess of jurisdiction, contrary to the rules of natural justice and violation of the applicants' constitutional right to legal representation of their choice.

An order of prohibition was meant to be directed to the 2nd respondent, the Chief Magistrate Kisumu in that he should not issue a decree following the 1st respondent's decision which would otherwise be implemented probably to the detriment of the applicants. Reference was made to the verifying affidavit and statement of facts filed at the time of applying for leave under Order 53 Civil Procedure Rules.

The court was told that the Attorney General's office (Kisumu) was served with the notice of motion bearing the hearing date, on behalf of the two respondents. There was no appearance.

The two interested parties (Peter Ngeso Peter, John Ambili Ouya) filed a replying affidavit and were heard on the notice of motion, with references being made to the annexures particularly the proceedings before the land dispute tribunal dated 8th October 2008.

Mr. Otieno submitted that the dispute before the tribunal was based on sale of land parcel number with title KISUMU/KONYA/2238 in that it was fraudulently sold and transferred – a sort of claim that the tribunal had no power to entertain in accordance with section 3 Land Disputes Tribunal Act No.18/1990 the Act. That in the end the tribunal then ruled:

“Title deed was issued fraudulently and sale of land documents properly signed and payments lacking (sic).

.....land under dispute KISUMU/KONYA/2238 is awarded to the claimants.”

The claimants before the tribunal were the present interested parties while the present applicants were the objectors.

Counsel continued that the claim by the interested parties was not served on the applicants contrary to section 3(4) of the Act. Only a notice to attend the proceedings was and the 1st applicant did attend. But he was not aware of the claim in issue and accordingly the applicants were denied an opportunity to be fairly heard.

The court heard that the applicants intended/intimated that they desired to be represented by counsel at the subject tribunal proceedings but that was turned down citing Rule 19 of the Land Disputes Tribunals (Forms and Procedures) Rules, 1993 which shall be reverted to presently. That this was a breach of the applicants fundamental rights to be represented by counsel of one's choice in a dispute being adjudicated. Rule 19 was termed subsidiary legislation that could not be countenanced by the constitutional provision on this aspect.

Another point advanced, was that the tribunal was informed that there was KSM/HCCC/336/93 filed by the people including the 1st Interested party (Peter Ngeso as 3rd plaintiff), seeking similar orders like those the tribunal was being asked to issue. That case was still pending yet the tribunal went ahead to entertain the dispute, ignoring the pendency of the suit. It was thus a duplication of litigation, with the 2nd applicant as the 1st defendant in that court case.

Coming to the sale agreement being considered, it was made in 1989 while the tribunal was entertaining it 17 years later in 2006, without having regard to the Limitation of Actions Act – forming part of the law of the land.

And that although that sale of agreement was not in dispute, what was was the registration of title in the name of the 2nd applicant – a matter that did not feature in the tribunal proceedings.

On prohibition, Mr. Otieno posited that the Chief Magistrate at Kisumu should be stopped from making the tribunal decision a judgement of the court whereupon it would form a basis to register the two respondents over land number 2238.

In reply the 1st interested party (Peter) appeared to say that the sale agreement referred, to spoke of plot number 2338 while before the tribunal the land in question was number 2238. However on explanation, clarification and or admission by this party it transpired that plot number 2338 appearing in the sale agreement of 1st August 2008, which he signed, was a typing error. The subject plot was number 2238. Peter admitted that the tribunal was entertaining a dispute arising from fraudulent transfer and registration of plot 2238, which was not paid for yet the 2nd applicant took the whole of it as opposed to only a

portion as agreed.

This party submitting for the two, rightly said that he did not know that the tribunal, a government body, was not mandated to entertain the dispute they had before it.

He admitted that they filed HCCC 336/93 but did not pay their lawyer to proceed with it. So without serving due notice to withdraw that suit, the plaintiffs merely considered it abandoned, and proceeded before the tribunal. Peter was not again, rightly by a layman, aware that the tribunal had rules not to be addressed by an advocate. And that land was the source of life – a matter they had been pursuing since 1991 when it was discovered that plot number 2238 had been registered in the name of the 2nd applicant. It had not paid for it.

Having heard the parties that appeared to be heard and after due perusal of the tribunal proceedings up to the decision, it is without doubt found that the tribunal was dealing with a dispute rooted in a sale agreement with a title held by the 2nd applicant (buyer). The tribunal went on to decide that the title was issued fraudulently and payment was not made for the plot no.2238. It was then directed that the land registrar do formalize the arrangements giving title of the subject land to the claimants/interested parties. Thus the tribunal was ordering rectification of the land register.

As per section 3 of the Act the tribunal had no jurisdiction to adjudicate over land sale agreements whether current or time-barred. It had no mandate to decide an ownership of registered land or order rectification of a land register. These are matters for regular courts. Its mandate is limited in section 3 of Act no.18/90:

“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 shall be heard and determined by a Tribunal established under section 4;**
- (2).....(10).....”**

The dispute before the tribunal, decided on 8/10/08 fell far outside the above

mandate and so the proceedings thereto are found to be a nullity. Accordingly, they are brought up and quashed.

And this is not the only basis to make such an order. The 1st Interested party (Peter Ngeso) with others filed civil case 336/93 in the High Court pursuing same reliefs as the ones they litigated before the tribunal. When the 1st applicant drew the tribunal’s attention to this fact, he was ignored in that a court order had not been furnished to support that. True, the 1st applicant (Zool) may not have placed the proceedings before the tribunal to demonstrate his plea. But by simply ignoring that position and not requiring Zool to prove his claim, ended in the dispute of Plot 2238 being litigated in two fora at the same time. Peter Ngeso admitted that they just abandoned that case. They did not formally withdraw it. It is not clear how the tribunal ignored that case even after Peter Ngeso answered them when asked whether they had sued Zool Nimji anywhere over this parcel he had said:

“A. At the Chief’s office and then Lands Registrar and lastly through Advocate Aboge, where the case did not take off,”

From the intimation of the 1st applicant and the answer of Peter Ngeso (Mr. Aboge Advocate filed HCCC 336/93) the tribunal ought to have stopped at that point on the basis that it is contrary to public policy, interest of justice and an abuse of the process of litigation for parties to approach more than one forum

with the same disputes and same or parties claiming through others. It was thus untenable for the tribunal to decide case number 49/06 even after learning that there was a pending case in the High Court over the same parcel of land.

On the issue of denial of legal representation before a land disputes tribunal Rule 19(above) says:

“19. No party to or other person interested therein shall be entitled to appear by or to be represented by an advocate in any proceedings unless the Tribunal or an Appeals Committee directs otherwise.”

This does not necessarily mean that an advocate cannot appear in tribunal proceedings. Only that on representation to the tribunal, it should direct that an advocate appear or he/she does not. Such direction should ordinarily be recorded with reasons. Not merely to state:

“The objector, Zool Nimji, explained to the parcel that he had instructed his advocate to appear on his behalf, the Tribunal had turned down, the request citing the law.”

This cannot be in accordance with the law. The proper cause is the party intending to be represented by counsel, to place that intimation before the Tribunal. The opposing side should say the same also being recorded, whether it agrees or does not. The applicant may respond and the tribunal is obliged to record its decision whether it agrees or not and with reasons especially where the plea is turned down.

That cause was not followed by the tribunal. So it can be said that it turned down Zool’s plea to be represented by a lawyer off-hand and without reasons. That was a wrong decision and the applicants rightly claimed here that their right to be represented by counsel was improperly and prejudicially refused by the tribunal.

As for the service of the claim, this was put forth but not rebutted by the interested parties. They did not deny or place before this court evidence that they served their claim on the applicants as per section 3(4) of the Act. But it appears that Zool was conversant with that claim, since he fully participated in the proceedings asking questions of the interested parties and putting the case of the applicants. So even as it was a flaw not to comply with section 3(4) – serving the claim, the applicants did effectively participate in the proceedings seemingly without prejudice befalling them.

As for the prohibition against the Chief Magistrate, this court understands section 7 to say that the chairman of the tribunal on filing the decision in the magistrate’s court:

“7(2). The court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

The court procedurally and without option, must enter judgment as per the tribunal’s decision. The execution of it will follow subject to the Civil Procedure Act. And there, there is the provision for stay in the normal manner or leave sought under Order 53 Civil Procedure Rules to operate as stay. There appears to be no need to issue an order of prohibition against the Court. Quite probably against the land registrar who may, as the case was here, was directed to “formalize changes,” in his land register. But be that as it may.

All in all the order for certiorari is granted and one of prohibition is directed to the land registrar not to rectify his register. The tribunal had no powers to make such order/direction.

Costs to the applicants

Ruling delivered on 22nd June 2009

J. W. MWERA

JUDGE

JWM/mk