REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Misc Civil Appli 62 of 2002

FRANCIS SHITANDAYI CHIETO ……...…… APPLICANT

V E R S U S

KAKAMEGA MUN. LAND DISPUTES TRIBUNAL …RESPONDENT

A N D

ADRIAN ALUSA LIYAYI ……...……INTERESTED PARTY

J U D G E M E N T

The proceedings before me were commenced by way of a Notice of Motion, pursuant to the provisions of ***Order 53 rule 3*** of the Civil Procedure Rules. It is an action fro judicial review.

Before commencing these proceedings, the applicant, **FRANCIS SHITANDAYI CHIETO**, sought and was granted leave to do so. The said leave was granted by Mr. Justice Waweru in **KAKAMEGA HIGH COURT MISCELLANEOUS CIVIL APPLICATION NO. 32 of 2002**.

It is the prayer of the applicant that the decision of the Land Disputes Tribunal, Kakamega Municipality, in respect of L. R. NO. ISUKHA/LUBAO/745 be quashed.

The applicant submitted that the Tribunal lacked Jurisdiction to hear and determine the case that had been placed before it.

Miss Akala, learned advocate for the applicant, submitted that the Tribunal had acted ultra vires its powers, when it dealt with a case which involved issues pertaining to the existence or non-existence of a contract.

The applicant believes that the Tribunal contravened section 3 of the Land Disputes Tribunals Act, which spells out the jurisdiction of Land Disputes Tribunals.

In the applicant's view, the Tribunal herein made reference to a contract of sale, in its decision. That was said to be proof of the tribunal's engagement in the determination of a contractual issue.

The second issue raised by the applicant was that the Tribunal was improperly constituted, because it was made up of the chairman, the secretary and one member.

It was the understanding of the applicant that by virtue of the provisions of section 4 of the Land

Disputes Tribunals Act, a tribunal ought to have either 3 or 5 members.

It was the applicant's further understanding that the chairman of any such tribunal ought not to be one of the 3 or 5 elders.

Therefore, in the understanding of the applicant, the tribunal herein had only 2 elders, which was one person less than the stipulated minimum number.

Another shortcoming, in the opinion of the applicant was the fact that only the chairman signed the decision, whereas it should have been signed by all the members.

The applicant's most serious contention was that the tribunal had erred by adjudicating over a matter which was already Res Judicata; as the matter had been previously determined in **KAKAMEGA PMCC NO.645 of 1990**.

The applicant provided this court with a copy of the proceedings in that case, which show that the Principal Magistrate's Court had ordered that the interested party herein be evicted from the suit land.

Following the judgement of the Principal Magistrate's court, the Interested Party was duly evicted from the suit land, as he never challenged the judgement before an appellate court or body.

Instead, the Interested Party instituted proceedings before the Kakamega Municipality Land Disputes Tribunal, which thereafter gave the award which is now being challenged.

It is the applicant's submission that the tribunal lacked jurisdiction to adjudicate on the dispute, because it was not an appellate body, which could revisit the dispute that had already been determined by the court.

For all those reasons, this court was invited to hold that the proceedings before the tribunal were a nullity ab initio.

This court was further invited to hold that the decision of the Provincial Appeals Committee, which upheld the decision of the Tribunal, should also be quashed.

In answer to the case, Mr. Kiveu, learned advocate for the Interested Party, **ADRIAN ALUSA LIYAYI**, submitted that courts of law cannot act in vain.

His submission was founded upon the fact that the decision of the Tribunal had already been upheld by the Provincial Appeals Committee. And as the application before me did not seek to also quash the decision of the Provincial Appeals Committee, the Interested Party is of the view that even if the decision of the tribunal were to be upset, the decision of the Appeals Committee would remain in place.

I am not entirely sure how the decision of the Appeals Committee would remain in place, if the decision which it had upheld was overturned. From a purely logical perspective, once the carpet was pulled from under the tribunal's award, the decision should come tumbling down, as it would otherwise be upholding something that was non-existent .

But law is not just about logic. And, to my mind, the applicant herein fully appreciated the fact that it was not sufficient for this court quash only the decision of the Tribunal.

I say so because on 26th November 2002 the applicant asked for an adjournment, so that he could have an opportunity to apply for an amendment to the substantive Notice of Motion. The applicant explained that the intended amendment was for incorporating into the case, a prayer that had not yet been made in the then existing substantive case,.

Although the applicant had expressed a desire to amend the Notice of Motion, and although both

parties said to me, that leave to amend was granted, (which leave I failed to trace in the court records), the applicant failed to amend the Motion.

In effect, the only issue for determination before me is with regard to the quashing or otherwise of the tribunal's decision. There is no prayer for the annulment, revocation, reversal or quashing of the decision which was made by the Provincial Appeals Committee.

That implies that if this court were to quash the decision of the tribunal, whilst there is still in place the decision of the Appeals Committee, there would end up being two inconsistent decisions by bodies which had jurisdiction to revisit the decision of the tribunal. Such a situation would be wholly untenable.

I had earlier said that from a logical perspective, the decision by the Appeals Committee could not purport to uphold something that had been overturned. But in the same vein, courts of law do not make decisions through implication. The decisions are supposed to be specific. It is for that reason that if an appellate court were to quash a conviction, that would not, by itself, imply that the appellant should be set at liberty. The court would have to make an express order for the appellant to be set free.

In the same vein, notwithstanding logic, unless there was a prayer to quash the decision of the Provincial Appeals Committee and unless the court did grant that prayer, the decision of the Appeals committee would remain in force even if the decision of the tribunal were to be quashed.

To that extent, I do accept as accurate, the Interested Party's submission that it would amount to acting in vain if this court were to simply quash the decision of the tribunal.

As regards the constitution of the Land Disputes Tribunal, the same is supposed to have a chairman and either 2 or 4 elders. Pursuant to section 4 (2) of the Land Disputes Tribunals Act;

"***Each Tribunal shall consist of –***

(a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and

(b) either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5."

Therefore, as the Tribunal herein had a chairman and two elders, it was properly constituted.

As regards the decision of the tribunal, there is no doubt that it was only signed by the chairman, Andrew Ong'ayo. Neither the secretary, Washington Ambani, nor the member, Wilson Ogotu, signed the decision.

According to the respondent herein, the failure by the 2 members to sign the decision was an excusable mistake. This court was therefore urged to hold that the said failure did not render the decision void.

By virtue of the provisions of ***section 6 (2)*** of the Land Disputes Tribunal Act;

"***Whenever a dispute is being dealt with by the Tribunal-***

(a) the chairman shall preside at the hearing; and

(b) the decision of the Tribunal shall be that of the majority of the

(c) members hearing the dispute.

As the decision of the tribunal is supposed to be that of the majority of the members hearing the dispute, it

would be prudent to have such decision signed by the said majority.

However, in this case it is evident that the decision, although signed by the chairman alone, did not reflect his personal views. I say so because the decision the decision is worded in the first-person plural.

In my considered view, as there were only three members of the tribunal, the moment that the decision was made by more than one person, (hence the use of the word "we"), that constituted the majority of the members who had heard the dispute. In the event, the decision was not void, simply because the 2 members who had sat with the chairman, did not sign it.

As to whether or not the dispute before the tribunal was founded on contract, the respondent said that that was not so. In his view, the dispute was about trespass.

A reading of the verdict handed down by the tribunal indicates that the tribunal;

"***heard from the claimant that he bought a piece of land from Indeche Simani (deceased) at a consideration of KShs.7,400/=…***

Francis Shitandayi Chieto (Objector) said Indeche Simani Chieto (deceased) said he bought the same land Isukha/Lubao/745 at KShs.20,000/=…

In my considered view, the tribunal did not adjudicate on an issue of trespass. The tribunal appears to have given consideration to issues appertaining to the purchase of the land in question. I believe that that is why the Tribunal asked the Objector to produce the agreement for the sale of the land.

But then again, it cannot be overlooked that when the Interested Party moved the tribunal, he asserted that the applicant herein had trespassed upon his land and demolished his houses.

How does that position reconcile with the finding that the issue which the tribunal dealt with was contractual?

To my mind, trespass connotes entry onto the property of someone without their authority or permission. Therefore, trespass would only occur when the question as to ownership of the property is settled. In other words, if two parties were contesting the ownership of the property, neither of them can be said to be trespassing until and unless it was first determined who was the owner of the said property.

In this instance, each of the parties before the tribunal was laying claim to ownership, through purchase. I believe that it was because of that fact that the tribunal asked that it be provided with a sale agreement, to prove the assertions of purchase.

In the event, the fact that the claimant before the tribunal asserted that his claim was that the respondent had trespassed upon his land, cannot be reason enough to conclude that the claim was simply for trespass. In real terms, the dispute between the parties was founded on contract, even though the alleged contracts were not as between the said parties. Each of them was laying claim to ownership by virtue of a contract that they had signed with the original proprietor of the land.

In so far as Land Disputes Tribunals are not mandated to adjudicate on contractual matters, the Tribunal herein acted ultra vires its powers.

Finally, there is no dispute about the fact that prior to the matter being placed before the tribunal, the parties had had a case before the magistrate's court at Kakamega. The said case was **FRANCIS SHITANDAYI CHIETO VS ADRIANO LIVAGI ALUDA, KAKAMEGA SPMCC NO.645 OF 1990.**

In that case the learned trial magistrate held that the plaintiff had bought the suit land, i.e. **NO.KAKAMEGA/LUBAO/745**, and had obtained the title thereto in 1988.

Being satisfied that the plaintiff had proved ownership of the land, and also that the defendant had moved onto a portion of that land (where he not only built a house but also cultivated crops), but without the consent of the plaintiff, the learned trial magistrate ordered that the defendant be forcibly evicted from the suit land, if he had not vacated the said land within 3 months.

The Interested Party herein was the defendant in the case before the magistrate's court at Kakamega.

He did not lodge any appeal to challenge the decision of that court. That therefore means that the decision in that case remains valid.

As at the time when the tribunal visited the suit land, the members thereof were shown the houses which had been;

"demolished by the court order."

In other words, the tribunal was well aware that the suit land had already been the subject matter of a court case. The Tribunal was clearly aware that the orders made by the court had already been executed.

Therefore, by purporting to give orders that negated the orders earlier given by the magistrate's court, the tribunal was, effectively, sitting on an appeal over the decision of the learned magistrate.

However, the tribunal lacked jurisdiction to sit on appeal over the magistrate's court. Any attempt to reverse the decision of the learned trial magistrate, through the tribunal was an action in vain.

Had the Interested Party herein felt aggrieved by the decision of the magistrate's court, his only recourse would have been to file an appeal to the High Court.

As the tribunal lacked jurisdiction to overturn, vary, review or reverse the decision of the magistrate's court, its decision was a nullity ab initio.

For that reason alone the case before me must succeed. Accordingly, I order that the decision of the Kakamega Municipality Land Disputes Tribunal, in relation to **L. R. NO. ISUKHA/LUBAO/745** be removed and brought before this, and that it then be quashed.

In the circumstances of this case, following the quashing of that decision, on the grounds that it was null and void ab initio for want of jurisdiction, it follows that although the Provincial Appeals Committee's decision remains in force, it is nonetheless meaningless, as it upholds a nullity.

The costs are awarded to the applicant, and the same shall be paid by the Interested Party.

Dated, Signed and Delivered at Kakamega, this 14th day of October 2008

FRED A. OCHIENG

J U D G E