



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC APPLI 1 OF 2007

MUNGAI NJOROGE.....APPLICANT

Versus

GITHUNGURI LAND DISPUTES TRIBUNAL

& OTHERS.....RESPONDENT

JUDGMENT

Before me is the Notice of Motion dated 19th January 2007 in which the ex parte Applicant, Mungai Njoroge, seeks orders of Judicial Review against the Respondents, Githunguri Land Disputes Tribunal, the Senior Resident Magistrate Githunguri and Wanjiru Macharia. The orders sought are as follows:

- (1) An order of certiorari to remove into the High Court and quash the proceedings and order made by the Githunguri Land Disputes Tribunal on the 8th November 2006 in LD 16/20/64/2006 relating to title No. Komothai/Karatina/472 ordering the same to be subdivided into two portions of 3.8 acres and 2.00 acres;
- (2) An order of prohibition prohibiting the Senior Resident Magistrate Githunguri from proceeding to hearing the Tribunal case No. 26/06, Wanjiru Macharia v Mungai Njoroge;
- (3) Costs of the Application to the Applicant.

The Application is supported by a statutory statement dated 19th January 2007 and a Verifying Affidavit of the Applicant of the same date.

Mr. Mwangi urged the Application on behalf of the Applicant.

The 1st and 2nd Respondent was represented by Mrs. Mureithya of the Attorney General's office, while Mrs. Ng'ang'a appeared for the 3rd Respondent. The Respondents never filed any replies to the Application except skeleton arguments filed by Counsel for the 1st and 2nd Respondents.

The Applicant is the registered proprietor of KOMOTHAI/KARATINA/472 as evidenced by the freehold title issued on 22nd March 1965 in the names of the Applicant. A certified copy of the Green Card dated

17th November 2006 shows that the registration was done on 16th September 1958 (MN1) in the names of the Applicant. He claims to have occupied the land since the 1950s. That his father was polygamous and had another land plot 433 which was later subdivided into two, 787 and 788 as evidenced by the Green Card (MN3). That the Applicant then bought 3 acres and his father added him 2 acres. That the 3rd Respondent is his sister who is married but filed a dispute at Githunguri Land Disputes Tribunal claiming 2 acres of her late father's land. The Applicant's contention is that if she was entitled to any land, she should claim from Plot 433. The Tribunal issued an award on 8th November 2006, awarding 2 acres of the Applicant's land to the 3rd Respondent. The proceedings before the tribunal were exhibited as Ex 5. It is the Applicants contention that the Tribunal had no jurisdiction to hear and determine the matter as it relates to registered land and consequently there is no award that can be adopted by the court.

Mrs. Mureithya submitted that the Applicant should have appealed to the Appeals Committee and the Application is premature should be dismissed on that ground. I have seen the proceedings before the Githunguri Land Disputes Tribunal and the award which was read on 8th December 2006. The Ruling/award of the Tribunal was;

- (i) that the title deed KOMOTHAI/KARATINA/472 should be revoked and the land shared between Mungai Njoroge, 3.8 acres, and Wanjiru Macharia 2.00 acres;
- (ii) the Executive Officer of the court was ordered to sign all the documents to facilitate the transfer and any aggrieved party should file an appeal to the Provincial Appeals Committee.

The jurisdiction of the Land Disputes Tribunal is circumscribed by Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 which provides:-

“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 S. 4”

Already there is an Application before the Senior Resident Magistrate's Court at Githunguri No. 26/06, seeking the adoption of the Elders award. The implementation of the decision of the Tribunal entails the subdivision of the suit land into two parcels and opening a register in respect of each subdivision in accordance with S. 89 of the Registered Land Act. S. 89 Registered Land Act provide that no land that is registered can be transferred before the proprietor first subdivides it and new registers are opened in respect of each portion.

It is clear that the proceedings before the Tribunal related to title to land and to beneficial interest in the land since the 3rd Respondent claimed to have been given the said land by her father before he died. This dispute in my view does not fall within S.3(1) of the Land Disputes Tribunal Act. Such a dispute should be tried by the High Court or by the Resident Magistrate's court where the lower court has jurisdiction in terms of S. 159 of the Registered Land Act.

In the case of **MBUGUA THIGA v TERESIA WANGECHI MACHARIA CA 460** the tribunal dealt with registered land and Justice Aganyanya held that the Land Disputes Tribunal had no jurisdiction to entertain the said matter. I appreciate that this is a decision of persuasive value having been made by a judge of concurrent jurisdiction. In another case of **JOTHAM AMUNAVI V R KSM CA 256/2002**, the Court of Appeal held that the Land Disputes Tribunal had no jurisdiction to deal with proceedings relating to title to land or beneficial interest in land. So that even if it was a case of Succession, the 3rd

Respondent should have filed it in the High Court or a court which deals with Succession matters.

Was this Application filed prematurely as submitted by the Respondents? I do not agree with that contention. Judicial Review is concerned not with the merits of the decision but reviews the decision making process. On the other hand, an appeal strictly deals with the merits of the decision. In this case, the Applicant is challenging the process, that the Land Disputes Tribunal had no jurisdiction to deal with title to land, if the Land Disputes Tribunal had no jurisdiction whatever the Tribunal did was a nullity and there would be no need to go on appeal when there was nothing to challenge the merits of. On the other hand, Judicial Review process is different from an appeal and Judicial Review is not a bar to an alternative remedy. The process having been flawed, I find that the Application was properly before this court and not premature. The Applicant had an option to decide what procedure was more effective in the circumstances and adopt it.

Mrs Ng'ang'a only addressed the issue of costs. She said that costs should not be awarded against the 3rd Respondent because the 3rd Respondent is not a public body nor is she a Public Officer and that she did not make the impugned decision and should not have been sued as a Respondent. But that she should only have been enjoined to these proceedings as an Interested Party. It is true that it is the 1st Respondent who was charged with the decision making and fell into error by dealing with a matter where they had no jurisdiction that has resulted in these proceedings. It is therefore the Attorney General to bear costs if any.

The impugned decision was made on 8th November 2006. The Chamber Summons Application was filed in this court on 4th January 2007. I find that the Application was filed within time. In any event since the decision was a nullity the decision could still be impugned outside the 6 months period. **JUDICIAL ENQUIRY IN THE GOLDENBERG AFFAIR ex parte MWALULU H MISC 1279/04.** Nyamu, Ibrahim and Makhandia JJJ held that Order 53 rule 2 Civil Procedure Rules which prescribes that an Application for an order of certiorari be brought within 6 months, does not include anything covered by the principle of ultra vires, nullities or decisions made without jurisdiction. I am of the same view.

In conclusion having found that the tribunal had no jurisdiction to determine a dispute relating to title to land, the Tribunal acted outside its jurisdiction which renders the decision of the Land Dispute Tribunal null and void ab initio and an order of certiorari therefore issues to quash the decision of 8th November 2006. The decision of the Land Disputes Tribunal having been quashed, there is be nothing for the Githunguri Senior Resident Magistrate's court to adopt and the court would decline to grant the 2nd prayer of prohibition as there is nothing to prohibit.

The costs of the Notice of Motion to be borne by the Attorney General who appears for the 1st and 2nd Respondents.

Dated and delivered this 26th day of October 2007.

R.P.V. WENDOH

JUDGE

Read in the Presence of

Mrs. Ng'ang'a for 3rd Respondent

Mr. Madialo holding brief for Mrs. Mwangi

for Applicant

Mrs Mureithya for 1st and 2nd Respondents

Daniel: Court Clerk