



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION 162 OF 2007

LUKENYA RANCHING & FARMING CO-OPERATIVE LTD.....APPLICANT

Versus

MACHAKOS LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

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

KAVAE RESIDENT ORGANISATION.....INTERESTED PARTY

JUDGMENT

By a Notice of Motion dated 12th January 2007, the ex parte Applicant, Lukenya Ranching & Farming Co-operative Society Ltd. sought the following Judicial Review orders from the Respondents;

- 1) An order of certiorari removing for purposes of having quashed the proceedings of Machakos Land Disputes Tribunal in case No. 60/01 and the award made therein on 7th November 2006 for the same to be quashed;
- 2) An order of certiorari to remove into the court and quash the proceedings of the Machakos Chief Magistrate's Court dated 18th December 2006 in Civil Misc. 143 of 2006 confirming the award made in Machakos Land Disputes Tribunal Case No. 60/06;
- 3) An order of prohibition to bar the Chief Magistrate's Court from issuing a decree in Misc 143 of 2006 or allowing the execution of the decree in the case;
- 4) Costs of the proceedings.

The Respondents are the Machakos Land Disputes Tribunal and the Chief Magistrate's Court Machakos. The Application was premised on the statement dated 29th December 2007 and a Verifying Affidavit of the same date, sworn by Daniel Mulwa Kavithi. Mrs Nzei appeared for the Applicants.

The Application was opposed by the Interested Party Kivae Resident Organisation and a Replying Affidavit sworn by one Bosco Makau Mbondo who describes himself as the chairman of the said organisation. They were represented by Mr. Makundi, Advocate.

Mr. Waigi Kamau, litigation Counsel from the Attorney General's Office also filed grounds of

opposition on 21st May 2007 and on 30th April 2007, they are similar. Mr. Kamau Waigi did not attend the Court to argue the grounds.

The grounds upon which this Application is brought are that the award is ultra vires the Land Disputes Tribunal Act and hence a nullity and that the Chief Magistrate's Court would not have confirmed a nullity as there was nothing to confirm that the claim before the Tribunal was statute barred, the act complained of having been done in 1973; that the claimants before the Land Disputes Tribunal is not a legal body with capacity to sue or be sued; that the land claimed does not exist, that the Land Disputes Tribunal had no jurisdiction to award costs of Kshs.400,000/= to undisclosed members of the claimant and that the claim before the Tribunal was Res judicata in that Kivae Residents Organization are relatives of the defendants in Machakos **HCC 97/1997, Lukenya Ranching & Farming Co-operative Society v David Mutune & 21** others who were evicted from Plot LR 8529/4 following the courts order and lastly that in the year 2000 the land was surrendered to the Government, number allocated the land to the Applicant and its members were issued with titles.

It was deponed that the said land was bought by the Applicant from Rohet Sisal Ltd. in 1973, LR 8529/04 comprising 1021.6 Ha and 10501/2, 3081.5 Ha as per a sale agreement '**DMK 1**'. The sale was registered under the RTA as IR 14726/15 and IR 17168/10 (DMK 1) and a certificate was issued for 8521/04 as IR 26000 while 10501/2 became IR 259999 (DMK 2 & 3). In July 2000 the Applicant surrendered the land to the Government of Kenya to enable the Applicant share it out to its shareholders (DMK 4) and the same have been subdivided and allocated and several title deeds issued to the Co-operative members. That the Interested Party filed a claim in the Machakos Land Disputes Tribunal claiming that LR 339/4 had been taken from them by the Applicant and changed into LR 8529 and allocated to the members (DMK 6) but the deponent denies the existence of LR 339/4. That the Tribunal had no jurisdiction to deal with matters of title, though it went ahead to do so and ordered Applicants to be evicted and the same award was adopted the courts judgment on 15th December 2006 without notice to the Applicants and a decree issued.

The Respondents filed grounds of opposition to the effect that the proceedings and award of the Land Disputes Tribunal do not exist as the same were adopted as judgment of the court; that the Applicant has not exhausted other available remedies; that the actions have taken place and prohibition cannot issue and lastly that the Application is an abuse of the court process. The Interested Party's representative deponed that their grandfather entered the land LR 339/4 in 1945, they occupied it and left the Interested Party's settled therein, the Interested Party being the 3rd generation. That in 1973 the Applicant bought LR 8529 from Rohet Sisal Ltd. but not 8529/4 '**BMM1**'. That in 2000, the Applicant sold some portions of LR 339/4 to unknown people ie 1288 acres. That the Interested Party make over 300 residents and have acquired the land by adverse possession. That they were given the land in 1976 by the Government and the Applicant illegally changed it to LR 8520/4 (PMM 3). That the Interested Party is duly registered under Ministry of Lands and Sports, Culture & Social Services and has the legal capacity to represent its members. It is denied that the case is Res judicata as verdicts were given on 11th December 2006 and denied the existence of HCC 97 of 1997 where the Interested Party were allegedly evicted from the land. According to the Interested Party, this Application is meant to delay registration, is defective in that the notice to Registrar was not served.

The decision that is impugned was made on 7th November 2006. In its decision, the Land Disputes Tribunal ordered the Land Registrar Machakos to amend and/or rectify all numbers LR 8529/4 and Mavoko Town Block 3/2312 and all that land sold and allocated by the objector to non members of claimants and transfer 1,258 acres to LR 339/4 deed plan No. 558/04 to the original owner Kivae Resident Organization.

It is evident from a reading of the proceedings of the Land Disputes Tribunal that the Tribunal was dealing with ownership or title to land. Section 3 of Land Disputes Tribunal limits the mandate of the Tribunal to adjudicating on disputes relating to division of or determination of boundaries to land including land held in common, a claim to occupy or work land or trespass to land. It is obvious that the Tribunal did not have jurisdiction to determine disputes relating to title to land yet it purported to do so. The Applicants have by their Exhibits DMK 1 demonstrated that the land 8529/4 comprising 4021.6 and

10501/2 comprising 3091.5 Ha were purchased from Rohet Sisal Ltd. on 16th May 1973 and they were issued with a certificate of title DMK 2 & 3. The said land was surrendered to the Government (DMK 4) and after the said surrender the same was then subdivided and titles issued to the various members of the Co-operative Society as per the abstracts of Register exhibited. It is therefore evident that the members of Lukenya Ranching were the registered owners of the disputed land. The land being registered, land the Land Disputes Tribunal had no jurisdiction to entertain any dispute pertaining to title and the proceedings are therefore a nullity. In the case of **JOTHAM AMUNAVI V THE CHAIRMAN SABATIA DIV CA 256/02** which the Land Disputes Tribunal purported to subdivide land into two parcels and ordered its registration in different names, under S.89 of the Registered Land Act, the Court of Appeal held that the Tribunal had no jurisdiction to deal and such dispute could only be tried by the High Court under S. 159 of Registered Land Act or the Magistrate's Court Act where such had jurisdiction. In **R V KAJIADO LAND DISPUTES TRIBUNAL ex parte LILIAN MURANJA MISC APPLICATION 689/01**, Justice Nyamu held that under Section 3 of the Land Disputes Tribunal Act, the Tribunal had no jurisdiction to adjudicate on ownership of registered land and whatever the Tribunal did was a nullity. Similarly in **NYANDARUA DISTRICT LAND DISPUTES TRIBUNAL ex parte NAFTALI MWATHI MWANGI MISC APPLICATION 314/04** Justice Kimaru found that the Land disputes Tribunal had no jurisdiction to adjudicate on registered land and the Tribunal therefore exceeded its jurisdiction and acted ultra vires the Land Disputes Tribunal Act. I am satisfied that the Machakos Land Disputes Tribunal Act had no jurisdiction to adjudicate on the registered land belonging to the shareholders of Lukenya Ranching Co-operative Society. The Tribunals action is ultra vires the Act.

The Tribunal's decision was adopted and made the judgment of the court on 18th December 2006. Under S. 7(2) of the Land Disputes Tribunal Act, the jurisdiction of the court is Limited to adoption of the award without questioning it. That is what the Chief Magistrate's Court did and issued a decree of same date. As held by Justice Nyamu in the **KAJIADO LAND DISPUTES TRIBUNAL CASE**, out of nothing comes nothing. Since the proceedings and award of the Land Disputes Tribunal were a nullity there is no award that the Resident Magistrate's Court could adopt or confirm.

It is the Applicants contention that the Interested Parties who were the claimants before the Tribunal were non suited. The Interested Party, Kivae Resident Organisation is a self help group registered under the Ministry of Gender Sports and Social Services. It is not a legal entity. I do agree with the Applicants that for the said group to purport to institute any proceedings, it could only do so through its officials but not in its name as it has no legal status. It does not exist as a legal person and it could not have filed a claim before the Tribunal or the Resident Magistrate's Court as it purported to and those proceedings were a non starter and no binding orders can flow from an application made by a non existent party.

It was also the Applicants contention that the proceedings before the Tribunal were Res judicata because the matter had been dealt with by the High Court and the court had ordered that the Interested Parties be evicted. Mr. Makundi argued that the matter was not Res judicata because the parties in Case No. 97/1997 were different and it was in respect of different land. The Applicant annexed an order issued by the High Court on 5th March 2004 in which the court ordered the Defendants who were David Mutune and 21 others to be evicted from LR 10501/2 and 8529/4 Machakos District. The Plaintiff was the Applicant therein. Whereas the land and the Plaintiffs are same as in the present case, the Defendants are not the same as the Interested Parties and it cannot be ascertained from the pleadings who the Interested Parties include, as it is not disclosed anywhere who the members of Kivae Resident Organisation are. Besides, the matter cannot be said to be Res judicata because this is a Judicial Review Application and whereas the matter before the High Court Machakos may have dealt with merits of the case relating to the 2 parcels, Judicial Review deals with the process by which a decision was arrived at. Even if the parties were the same, the nature of the relief sought in a Judicial Review Application is different from an ordinary suit. The question of this matter being Res judicata would not arise.

Were the proceedings before the Land Disputes Tribunal time barred? It was the Applicants case that the cause of action arose in 1973. By their claim at the Land Disputes Tribunal the Interested Parties indicated that the Applicant acquired the land fraudulently. They filed their claim before the Land Disputes Tribunal in 2006, 33 years after the cause of action arose. S. 13(3) of the Land Disputes Tribunal provides that the Tribunal should not entertain proceedings in respect of which the time for

bringing such proceedings is barred under any law relating to the limitation of actions. In land matters a suit relating to land should be filed within 12 years of the cause of action. In this case the claim before the Tribunal was time barred and should not have been adjudicated upon by the Tribunal.

The Interested Party raised objection to the Application on grounds that the notice to the Registrar was not served and the Application should therefore be struck out. In the chamber Summons, the Applicant sought to be excused from serving the notice on the Registrar and on 21st January 2007 Justice Visram granted the prayer (prayer 1) allowing the Applicant to proceed without serving the notice. Order 53 Rule 1 (3) Civil Procedure Rules gives the court a discretion to excuse the failure to serve the notice as required. The court having excused the serving of the notice on the Registrar this Application is regularly before the court and that objection must fail.

Can the orders of Judicial Review issue?

The 1st and 2nd prayers are for an order of certiorari to quash the decision of Machakos Land Disputes Tribunal No.60/06, made on 7th November 2006 and the Chief Magistrate's decision in Civil Misc No. 143/06 where the Tribunal's award was made a judgment of the court. Certiorari is a discretionary remedy. It lies to quash decisions of an authority made without or in excess of jurisdiction or where rules of natural justice have been breached. In the instant case the decision of the Tribunal was made without or in excess of jurisdiction, it is a nullity and is hereby called up to be quashed by an order of certiorari. Prayers 1 and 2 of the Notice of Motion are granted.

As regards prayer 3, seeking an order of prohibition to bar the Chief Magistrate's Court from issuing an order in Misc Application 143/06, an order of prohibition issues from the High Court to stop a decision that has not yet been made. In this case the Chief Magistrate has already given a decree in the case and an order of prohibition is powerless in the circumstances and cannot lie. In sum, prayer 1 & 2 of the Notice of Motion dated 12th January 2007 are granted with costs to the Applicant.

Dated and delivered this 14th day of December 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr. Waigi Kamau for Respondent

Daniel: Court Clerk