



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Appli 1409 of 2005

SAMUEL KIBARA WAINAINA.....
.....PLAINTIFF

Versus

**LAND DISPUTES TRIBUNAL; KIENI WEST DIVISION C/O ATTORNEY
GENERAL.....RESPONDENT**

**PERIS NJOKI KIBIRIO.....INTERESTED
PARTY**

JUDGMENT

This is an application for Judicial Review. It is brought by way of Notice of motion dated 26th October 2005 in which the applicant seeks an order of certiorari to quash the decision of the respondent to order sub-division of the land parcel No. Kieni/West/LDT/28/04 issued on 10th April 2005 into two and the transfer of the same to the Interested Party. The applicant also prays for costs.

The application is supported by a statutory statement dated 28th September 2005 and a verifying affidavit sworn by the ex parte applicant, Samuel Kibara Wainaina.

Though served neither the interested party nor the respondents have filed any replies to his application nor did they attend the hearing. The hearing proceeded ex parte.

It is the applicants case that he is the registered owner of Land parcel No. Nyeri/Endarasha/386 and that he appointed his late brother Charles Kibiro Wainaina to take care of the said plot for him; gave him cattle for milk, pyrethrum and wheat and instructed him to use the proceeds for payment of the acquisition of the parcel of land.

In 1981 he allowed the late brother's wife Peris Njoki Kibiro to be allowed by the co-operative to be getting proceeds of milk for payment of the necessities. He then instructed the couple to use the proceeds from the sale of cattle and sheep to buy shares from Mahiga Settlement Scheme so that they could buy their own farm and they did so. After that the proceeds from the farm declined and he got a demand that he owed Kshs.11,834/= for the farm. After his brothers' death in 1996, the brother's wife Peris Njoki filed a dispute before the Land Disputes Tribunal which was heard ex parte and on 9th February 2005 he received a letter from the respondent informing him that he had been summoned by the Land Disputes Tribunal Kieni West division and that the 4th hearing would be on 15th March 2005. The applicant

attended the tribunal on 15th March 2005 but the tribunal refused to listen to him. On 6th April 2005 he handed over the documents in respect of the land to the Land Disputes Tribunal as requested and the tribunal ruled that the land be divided into two and that the applicant had to pay court expenses.

It is therefore the applicants contention that the tribunal exceeded its powers by ordering a subdivision and that he had also been condemned unheard.

I have seen the proceedings before the Land Disputes Tribunal, the exhibits to this applicant and there is no doubt that the applicant is the registered owner of the subject land Nyeri/Enderasha/386. The title was exhibited and the Land Dispute Tribunal found that as a fact.

S. 3 of the Land Disputes Tribunal Act No. 18 of 1990 reads as follows;

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 a occupy or work land or
- (c) trespass to land,

shall be heard and determined by a tribunal established under Section 4.

The question is whether the plaintiffs claim before the tribunal falls within the tribunal's jurisdiction.

The claim before that Land Disputes Tribunal seemed to be based on adverse possession and therefore ownership to the said land.

In my considered view, a claim to land is not covered in Section 3 of Land Dispute Tribunal Act and does not fall within the jurisdiction of the tribunal.

The Land Disputes Tribunal specifically ordered for the division of the land into two equal parts meaning that the applicants title would be cancelled. Under S. 159 of RL Act, such a dispute relating to title can only be tried by the High Court or Resident Magistrate's Court where such courts have jurisdiction.

The applicants counsel referred me to the Court of Appeal decision in CA 256/02 **JOTHAM AMUNAVI V THE CHAIRMAN SABATIA DIVISION L.D.T.** where the court held that the LDT did not have jurisdiction in disputes relating to title.

I do find that the respondent acted in excess of their jurisdiction by deciding on an issue that they did not have jurisdiction in.

Can the prayers sought be granted?

The court can only grant the orders sought in the Notice of Motion which must tally with those in the statutory statement.

The order sought in prayer 2 of the Notice of Motion reads;

“the Hon. court do issue the order of certiorari to quash the decision of the respondent to order subdivision of land parcel No. Kieni West/LDT 28/04 issued on 6th April 2005 into two and transfer the same to interested party”.

In the statutory statement, the applicant seeks for **“an order of certiorari directed at the respondent to quash its decision in Mweiga Civil Case 28/04**

b) a declaration that the applicant is fully protected from the interference by land Nyeri/Enderasha/386.”

I wish to state firstly that an order of declaration is not available in Judicial Review and cannot be granted. Besides that prayer was not clear as to its meaning.

In respect of prayer (a) I do notice that the land parcel referred to in the Notice of Motion is different from that which applicant refers to in the statutory statement. The proceedings before the LDT was in respect of Nyeri/Endarasha/386. In the Notice of Motion the applicant refers to Land No. Kieni West/LDT and the court has no idea where that comes from. We were not told that Kieni West is same as Nyeri/Endarasha/386. The prayer in the Notice of Motion differs from that in statutory statement and that court cannot therefore call for the quashing of any order and the court will accordingly strike out the application dated 26th October 2005 with applicant bearing their own costs.

Dated and delivered this 15th day of June 2006.

R.P.V. WENDO

JUDGE

Read in presence of Mrs. Mwikya holding brief for Ndegwa for Applicant

Ojijo: Court Clerk