



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
Misc Civ Appli 112 of 2002

REPUBLIC APPLICANT

VERSUS

CHAIRMAN MAKUENI DISTRICT

LAND DISPUTES TRIBUNAL RESPONDENT

AND

TUKUMI MULUVA MUTWETHAU INTERESTED PARTY

R U L I N G

The ex parte applicant by an application dated 7.8.2003 filed this application under Order 53 Rule 3, 4 5, 6 and 7 of Civil Procedure Rules seeking an order of certiorari to remove to the High court and quash the decision of Makueni District Land Disputes Tribunal Case No. 4 of 2001 and read to the parties on 19.2.2002 in the Resident Magistrate's Court Makueni.

Leave to bring this application for Judicial Review was ordered to operate as stay. The notice to the Registrar had been filed on 16.7.2002 and so was the statement of facts as required by the law.

The applicant filed the various affidavits, supplementary affidavit with various annexures which include proceedings before the Land Disputes Tribunal, its decision and the court's award. It is argued on behalf of the applicants that the decision of the Tribunal is illegal and ultra vires because it contravened Section 143 (1) of Registered Land Act Section 6 of Land Control Act and Section 13 (a) of Land Disputes Tribunal Act and Section 3 of Law of Contract Act.

The applicant is the registered owner of land parcels Kathonzweni/Muusini/446 and 552 whereas the second applicant is the registered proprietor of Kathonzweni/Muusini/447. The Interested party filed a case in the Makueni District Land Disputes Tribunal and that the tribunal ordered cancellation of the registration and amendment of the register in respect of the three parcels of land and the award as filed in court on 19.2.2002. It is contended that the said tribunal acted ultra vires and contravened the various statutes quoted earlier.

Grounds of opposition were filed in response to the application. The first ground is that the court has no jurisdiction to grant the prayers sought because orders can only be granted under Section 8 (2) of Law Reform Act where rules of natural justice have been breached and there is no evidence that there was such breach by Land Disputes Tribunal. The second limb of the objection is that the proceedings are non existent because Land Disputes Tribunal case No. 4/2001 became Land Disputes Tribunal case 2/2002 and it is not the one sought to be quashed and that the only remedy available to the applicant is an appeal.

Before I go into the merits of this application I wish to point out some irregularity in the proceedings

before court. In the Notice of Motion, the applicant has included grounds upon which the application is brought. This is irregular because that would be complying with Order 50 Rule 3 Civil Procedure Rules which provides that every notice of motion shall state in general terms the grounds upon which the application is brought. However Order 50 does not apply to proceedings under Order 53 Civil Procedure Rules. The court exercises special jurisdiction under Order 53 Civil Procedure Rules and other provisions of Civil Procedure Rules cannot be invoked when proceedings are under Order 53 Civil Procedure Rules. Under Order 53 Rule 1 (2) the grounds upon which the application is brought should be stated. In the present case the applicant included grounds in the body of the Notice of Motion as well as the statement of facts which in this court's view is irregular. However such irregularity will not be considered to be detrimental to the application but counsel should note the irregularity.

By counsel stating that the Land Disputes Tribunal contravened Section 6 of the Land Control Act, his argument was that tribunal recognised the sale agreement between the parties and yet there was no Land Control Board consent. He also argued that Section 3 of the Law of Contract Act was breached because the agreement relied upon by the parties was not in writing as is required by that section. In submitting that Section 143 (1) of the Land Registered Act being breached it was the applicants argument that the applicants being the first registered proprietors of the land the register can not be rectified or cancelled and the applicants contend that because of all these breaches the decision of the Land Disputes Tribunal of 19.7.2002 is illegal null and void.

The question is whether the remedy of certiorari is available to the applicant under the circumstances. In other words what is the scope of the remedy of certiorari?

Before I consider the scope of certiorari, I will consider the scope of Judicial Review. The SUPREME COURT PRACTICE 1997 VOL. 53/1-14/6 states

: “The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or the individual judge’s for that of the authority constituted by law to decide the matters in question.”

The court's function is to decide whether the process leading to the decision of the Land Disputed Tribunal was proper but it is not to adjudicate on the merits of the decision.

In the case of **KENYA NATIONAL EXAMINATIONS COUNCIL V. REPUBLIC C.A. 266/1996**, The Court of Appeal observed as follows:- “Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

The jurisdiction of the Land Disputes Tribunal is derived from Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990. Its jurisdiction is limited to division of; or determination of boundaries to land, including those held in common; a claim to occupy or work land or trespass to land. The claim before the Tribunal arose from a contract of sale of land as revealed from the sworn statement of the complainant. In their award the tribunal awarded to the claimant the land which he purchased Land parcel No. Makueni/Muusini/446 and 552. It is apparent that the tribunal was dealing with issue of ownership of land arising out of a contract of sale which was beyond the jurisdiction and they therefore acted ultra vires their powers. However as regards plot No. 447 the tribunal dealt with issue of boundaries which is within its docket. If the applicant was dissatisfied with that decision regarding boundaries, he should have appealed.

What decision can the court be called upon to quash? In the Notice of Motion of 7.8.2002 the decision of the Land Disputes Tribunal of 19.2.2002 and made the judgement of the court files is sought to be quashed. Mr. Mathuva for the respondent asks that Land Disputes Tribunal Case No. 4/2001 is non

existent as it was made judgement on the court Makueni Land Disputes case 2/2002. This is only his description of what decision should be quashed. Ideally the decision of the Land Disputes Tribunal which is made judgement of the court was to be quashed and there is nothing wrong with that description. After all the court merely adopted an award.

The Land Disputes Tribunal acted ultra vires in respect of first appellants Land Kathonzweni/Muusini/446 and 552 and that decision is brought before this court by authority of certiorari to be quashed and it is hereby quashed. The Land Disputes Tribunal decision as regards plot 447 stands. Interested party and second applicant to share costs of the application.

Dated at Machakos this 27th day of October 2004.

R. V. WENDOH

JUDGE