



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 5610 OF 1991 (OS)

FREDRICK WAMBARI CHEGE.....PLAINTIFF

VERSUS

JAMES KARUME WANJEMA.....1ST DEFENDANT

CLEMENT NJENGA WANJEMA.....2ND DEFENDANT

GEORGE NDICHU WANJEMA.....3RD DEFENDANT

RULING

This was an application by Notice of Motion, brought under Order XLIV, Rules 1 and 2 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act. It was brought by the Defendants and contained the following prayers: -

- (i) That the orders made on 14th June 1999 referring the suit to the Land Disputes Tribunal for hearing and determination, be reviewed and/or set aside upon such terms as the Court may deem fit and just;
- (ii) That the award of elders made on 6th February, 2002 in Kiambu Land Case No. 2 of 2001, and the execution of all the consequential orders, be stayed pending the hearing and determination of this application.
- (iii) That the costs of this application be provided for.

Counsel for the Defendants/Applicants argued that the subject matter of the dispute is not suitable for hearing and determination by elders under the Land Disputes Tribunal Act. He argued that the order made by the elders on 14th June 1999 was erroneous and was made without jurisdiction; and maintained that only the High Court has jurisdiction to entertain this matter. Counsel also cited bad faith in the original application that led to the matter being referred to the Land Disputes Tribunal.

The factual account to support the present application is set out in the Affidavit of the Third Applicant, George Ndichu Wanjema. The deponent states that the land in dispute, Gatamaiyo/Gachoiri 587 was the property of Samuel Wanjema, the father of the three Defendants, who died in 1973. The deponent is the administrator of the late Samuel Wanjema's estate. The Plaintiff, in his suit of 1991, is claiming the suit premises on the basis of the doctrine of adverse possession. All attempts to hear this old suit have not come to fruition, as there has been one adjournment after another.

The deponent has, in the proceedings, been represented by Mr. Geda, Advocate; but this advocate was declared bankrupt in October 1998. Then, less than a year later, on 14th June 1999, the Hon. Mr. Justice Mulwa in the High Court made an order on application by the Plaintiff, referring the dispute to the Land Disputes Tribunal for hearing and determination. This order was made *ex parte*, and the Third Defendant/Applicant (the deponent) was not served with notice. The Third Applicant asserts that the said Land Disputes Tribunal declined to accord him a hearing when it was holding its session. He states, further, that the Plaintiff has now applied at the Kiambu Magistrate's Court, to have the elders' award confirmed as a judgement of the Court and a decree issued embodying the decision. The Third Applicant states that he stands to suffer prejudice if the elders' award is confirmed as a judgement of the Court.

Counsel for the Applicants argued that the suit premises, since it is registered under the Registered Land Act (Cap. 300, Laws of Kenya), which is a statute self-contained in its design and operation, will be the subject of litigation in the High Court but not before the Land Disputes Tribunal. He argued that the circumstances in which the Hon. Justice Mulwa's order, referring the dispute to the Land Disputes Tribunal, was made placed his clients at a major disadvantage. Not only had the applicants just lost the services of their Advocate, Mr. Geda, but the Plaintiff's application was heard *ex parte* and with no service to the Applicants. There is evidence that the Applicants learned of the unavailability of Mr. Geda's services when letters addressed to this Advocate were returned as unclaimed items.

Counsel for the applicants argued that the Land Disputes Tribunal Act, at Section 3, sets out matters other than title and ownership, as the things within the remit of the tribunal; these matters are: division of land, boundaries, usufructuary rights, trespassory ingress, etc. In support of this submission, counsel cited the case *LEONIDA NEKESA v. MUSA WANJALA, CIVIL APPEAL NO. 23 OF 1985*. This case concerned land registered under the Registered Land Act (Cap. 300), a dispute relating to which had been referred to elders. The Court of Appeal held that elders had no jurisdiction in relation to land of this nature. To quote from the judgement of the Hon. Mr. Justice Gachuhi (p.3) –

“I quite agree...that the arbitration by the elders is not intended to deal with matters connected with the title to land or to reverse the provision of the law.”

The learned Judge further remarked:

“The Elders have no jurisdiction to arbitrate over this parcel of land as per Section 143(1) of the Registered Land Act (Cap. 300) and whatever proceeding was taken by them is a nullity” (p.3)

His Lordship repeated the same principle in another passage (p.4):

“As I have held that the elders had no jurisdiction for arbitration under the provision of the law, the arbitration proceedings are a nullity. I would dismiss this Appeal. The High Court should have ordered the setting aside of the proceedings before the elders and the judgement entered and orders made thereafter as a nullity...”

Agreeing with Gachuhi, Ag. JA, His Lordship A.R.W. Hancox, JA remarked:

“The arbitration proceedings were a nullity, there being no other valid reference under which the arbitrators could act.”

Final confirmation of this legal position came from H.G. Platt, JA of the three-judge Court of Appeal Bench:

“I agree with each of the conclusions reached by Gachuhi, Ag. J.A. and have nothing to add...”

Counsel for the Applicant submitted that, as the Plaintiff's suit before this Court is still pending, the Plaintiff stands to suffer no prejudice if the order made by the Land Disputes Tribunal is set aside. He

argued that, since the Plaintiff is in actual occupation he ought to look only to his suit as the instrument of justice that will protect his rights, if he has rights deserving of protection by judicial process.

Counsel for the Plaintiff/Respondent argued that the Court has no jurisdiction to give the order sought by the Defendants/Applicants. He maintained that the Land Disputes Tribunal Act, 1990 contains provisions under which an aggrieved party may seek redress, and the Act has its own appeal set-up. He argued that once the elders' tribunal made its order on 6th February, 2002, the Defendants ought to have pursued any remedies within the framework of the appellate system established under the Land Disputes Tribunal Act, 1990, and the Defendants' failure to do so within the prescribed time limits now deprives them of all redress, and their application ought to be dismissed.

Counsel for the Plaintiff/Respondent also challenged the format of the present application, especially its prosecution by Notice of Motion under Order XLIV, Rules 1 and 2, and its rubric of "Review". He argued that the Award of the Land Tribunal Elders in February, 2002 was not an order of the Court, and thus it could not be impugned within the concept of "Review". He maintained that the term "Order" is defined in the Civil Procedure Act, and an Order can be challenged only where it has been made by the Court. He argued that if the Order being challenged is the one made by Mulwa, J on 14th June 1999, then four years of waiting is too belated to justify an impugning Order such as is now being sought.

Counsel for the Defendants/Applicants in response, submitted that Order XLIV had clear provisions for a review jurisdiction, in relation to wrongly taken decisions, and this was applicable in particular where there was an error on the face of the record. He submitted that there existed precisely such an error, where a Land Disputes Tribunal purported to make orders affecting ownership of land that is registered under the Registered Land Act (Cap. 300).

Counsel further submitted that, in all the circumstances surrounding this matter, it should be borne in mind that the Court has an inherent jurisdiction to make any such orders, by virtue of Section 3A of the Civil Procedure Act (Cap.21), as will go towards fulfilling the ends of justice.

A careful review of the documents on file, taken together with the submissions of counsel, lead me to the following decisions and orders:

1. This application has been brought by the Defendants, against a Plaintiff who is in occupation and has a suit pending in Court, for the purpose of safeguarding his position in the occupancy of the suit premises. The Plaintiff should look to and prosecute the substantive suit with all due urgency.
2. In the meantime, any prayers for specific orders with a bearing on the determination of ownership of the suit premises, ought to be heard on their merits.
3. Prayer Number 2 in the applicants' Notice of Motion succeeds; and accordingly, I make the following Order: the Order made on 14th June, 1999 referring the dispute over the suit premises to the Land Disputes Tribunal for hearing and determination, is set aside.
4. As the elders had no authority to make the award they made, after the reference of the matter to them following the Court Order of 14th June, 1999, their decision is null and void, and no action may be taken to give implementation to such award. In particular, the elders' award read on 6th February, 2002 in Kiambu Land Case No. 2 of 2001 and the execution of all the consequential orders shall be nullified and shall not be implemented by any tribunal or authority.
5. Leave is granted to parties to make such applications to Court as may be necessary, pending prosecution of the substantive suit by the Plaintiff.
6. The costs of this application shall be in the cause.

DATED and DELIVERED at Nairobi this 20th day of November, 2003.

J. B. OJWANG

Ag. JUDGE