



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC JR NO. 21 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN, MAUCHE LAND DISPUTE TRIBUNAL..1ST RESPONDENT

THE CHIEF MAGISTRATE, NAKURU LAW COURTS.....2ND RESPONDENT

AND

CHRISTOPHER K. KOECH.....INTERESTED PARTY

ELISHA K. ROTICH.....EX PARTE APPLICANT

JUDGMENT

1. By Notice of Motion dated 17th March 2011, the ex parte applicant seeks the following orders:

1. *THAT this Honourable Court be pleased to issue an order of certiorari to bring to the High Court for purposes of being quashed the decision of the 1st Respondent dated 25th August 2006 in claim No. 31 of 2006, ordering the Applicants Land parcel No. Nakuru/Sururu/203 belongs to the interested party and therefore the Applicant is in possession of the illegal title deed of the said land.*
2. *THAT this Honourable Court be pleased to issue an order of certiorari to bring to the High Court for purposes of being quashed the judgement which was adopted from the decision of the 1st Respondent by the 2nd Respondent on 10th March, 2011 being land Dispute case No. 5 of 2011.*
3. *THAT the subject be awarded the costs of this application in any event.*

2. The application is supported by a statement of facts and a verifying affidavit sworn by Elisha Rotich, the ex parte applicant. He deposed that he is the registered proprietor of land parcel No. Nakuru/Sururu/203 and that the interested party instituted Claim No. 31 of 2006 at the Mauche Land Dispute Tribunal in respect of the said property but failed to notify him of the proceedings. He deposed further that the 1st respondent heard the claim and made a decision against him thereby breaching the rules of natural justice by not giving him an opportunity to present his case and that the 1st respondent acted ultra vires by making a decision to allocate the interested party the suit land which is private property.

3. The interested party responded to the application through a replying affidavit in which he deposed that he was allocated the suit property in 1996 by the government and that he was issued with a title deed in the year 1997. He further deposed that he started using the suit property until 2006 when the ex parte applicant entered upon the land and that he later came to learn that the ex parte applicant had also obtained a title deed dated the same date as his. That he therefore lodged a claim with the Mauche Land Disputes Tribunal and that despite being summoned the ex parte applicant failed to show up as a result of which the tribunal heard the case in his absence and made a decision which was adopted by the Chief Magistrate's Court. That even during the proceedings before the Chief Magistrate's Court the ex parte applicant was served severally but he yet again failed to attend.

4. The application was canvassed through written submissions. The ex parte applicant argued that the 1st respondent breached his right to fair administrative action by refusing to grant him a fair hearing and that he only became aware of the interested party's claim on the suit property after he was served with the mention notice which emanated from the 2nd respondent. He relied on **Article 47 and 48** of the **Constitution of Kenya**, as well as **Sections 4 (1), (2) and (3)** of the **Fair Administrative Action Act**, the cases of **Onyango Oloo vs. Attorney General (1986-1989) EA 456** and **Msagha vs Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 [2006] 2 KLR 553**,

among others and argued that he was deprived of his right to a hearing.

5. He further relied on **Section 3** of the **Land Disputes Tribunal Act No. 18 of 1990 (repealed)** and the case of **Republic v Land Dispute Tribunal, Mauche Ex-Parte Dishon Nyutu Muiru & Another [2015] eKLR** and submitted that the 1st respondent overstepped its mandate by making a decision on the ownership of the suit property which had a title. He relied on **Republic v Land Dispute Tribunal, Mauche Ex-Parte Dishon Nyutu Muiru & another [2015] eKLR** and argued that the relief sought should issue.

6. The interested party agreed with the ex parte applicant on the issue that the tribunal lacked jurisdiction to determine the matter and prayed that the tribunal's decision be declared null and void so that the substantive dispute over ownership of the suit property can be determined **Nakuru ELC No. 165 of 2012** which is pending. He relied *inter alia* on **Section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990 (repealed)** and the cases of **Joseph Karobia Gicheru vs Michael Gachoki Gicheru [2013] eKLR** and **Owners of the Motor Vessel Lilian S vs Caltex Oil (Kenya Ltd) 1989 KLR**.

7. The respondents neither filed a response to the application nor submissions.

8. I have considered the application, the affidavits and respective submissions. Ultimately, this matter turns on one issue only: whether the 1st respondent acted in excess of its jurisdiction. If the respondent acted in excess of its jurisdiction, its decision and its ensuing adoption by the 2nd respondent will be nullities and it will matter not whether the ex parte applicant was accorded a fair hearing.

9. Land Dispute Tribunal was established pursuant to **Section 4** of the **Land Disputes Tribunals Act, 1990**. The Act has since been repealed by **Section 31** of the **Environment and Land Court Act, 2011**. Jurisdiction of the tribunal was provided for at **Section 3 (1)** of the **Land Disputes Tribunals Act, 1990** to determine cases of a civil nature involving disputes as to the division of land, the determination of boundaries to land, including land held in common and claims to occupy or work land or trespass to land. The tribunal's jurisdiction did not include determination of title to or ownership of registered land.

10. In **Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR** the Court of Appeal restated the law relating to jurisdiction of Land Disputes Tribunal when it comes to ownership of registered land as follows:

On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:

“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 on in common,

(b) A claim to occupy, or work land or

(c) Trespass to land.”

Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land... Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity....

11. From the material placed before the court, it is apparent that both the ex parte applicant and the interested party have a title in respect the parcel of land parcel known as Nakuru/Sururu/203. Both titles are claimed to have been issued on 16th July 1997 under the **Registered Land Act** (now repealed). Indeed, they have separate litigation in **Nakuru ELC No. 165 of 2012** over issues of proprietorship of the suit property. There was evidence before the 1st respondent that both the ex parte applicant and the interested party claimed the suit property pursuant to titles that they had. In essence, the dispute before the 1st respondent was one of ownership of registered land. In its decision dated 25th August 2006, the 1st respondent purported to determine ownership of the suit property in favour of the interested party. Clearly, it did so in excess of its jurisdiction thereby rendering its proceedings and the said decision null and void.

12. As Lord Denning famously stated in **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**, a void act is a nullity in law and every proceeding founded on it is incurably defective. It follows therefore that the proceedings before the 2nd respondent in Land Dispute Case No. 5 of 2011 including the adoption of the 1st respondent's award on 10th March 2011 were incurably defective and equally void. I commend the interested party for honourably acknowledging that correct legal position. The orders sought are thus merited.

13. In the end, I make the following orders:

a) An order of certiorari is hereby issued removing into this court and quashing the decision of the 1st respondent dated 25th August 2006 in Claim No. 31 of 2006.

b) An order of certiorari is hereby issued removing into this court and quashing the judgement of the 2nd respondent dated 10th March 2011 pursuant to which the aforesaid decision of the 1st respondent was adopted.

c) Considering that the interested party has readily conceded that the 1st respondent acted without jurisdiction and further taking into account that the parties are engaged in litigation in another matter over the substantive dispute, I order that each party bears own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF MARCH 2021.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the ex parte applicant

No appearance for the respondents

Ms Cherono for the interested party

Court Assistants: B. Jelimo & J. Lotkomoi