



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC JUDICIAL REVIEW NO. 8 OF 2019

REPUBLIC.....APPLICANT

-VERSUS-

RICHARD MUKITI MBINDYO.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR MAKUENI.....2ND RESPONDENT

-AND-

RUTH KATUNI KAMUT.....EX-PARTE APPLICANT

JUDGMENT

1. Before this Court for determination is the Notice of Motion dated 30th September, 2019 and filed on 3rd October, 2019. It is brought under **Order 53 Rules 1(1), (2) and (4) of the Civil Procedure Rules** and all other enabling provisions of the Law.

2. The Applicant seeks judicial review orders as follows: -

i) THAT the Court be pleased to grant leave to apply for Orders of judicial review by way of certiorari to remove into this Honourable Court and quash the purported unsigned decision of the alleged Nzau Location Land Dispute Tribunal filed in Makueni LDTC No. 2 of 2001 in Court and filed on 20/3/2001 adopted on 18/7/2001 by the Principal Magistrates Court over LR. No. Mbitini/Ngetha/117 and an order of prohibition against the Respondent and or his agents, employees, representatives and or any other persons acting on his order, direction and or instructions from implementing/effecting the said purported decision.

ii) THAT the Court be pleased to issue an order an order of mandamus compelling the Registrar of Land Makueni County to cancel the title illegally issued to the Respondent.

iii) THAT an order of prohibition against the 1st Respondent and or his agents be issued to prohibit the 1st Respondent from entering and or interfering with LR. No. Mbitini/Ngetha/117 threatening, trespassing and issuing eviction notices to the Applicant.

iv) THAT grant of leave to operate as a stay of the decision of the Land Dispute Tribunal and stay of the execution of the warrants of arrest in LDTC No. 2 of 2001.

v) THAT the costs of this application.

3. The application is based on the statutory statement, the verifying and supporting affidavit of Ruth Katuni Kamuti sworn on the 30th September, 2019. It is deposed therein that the ex-parte Applicant is the widow of Kamuti Nthiw'a (Deceased) who was the registered owner of all that parcel of land known as Mbitini/Ngetha/117. That the Land Disputes Tribunal sitting in Nzau Location purported to award all that parcel of land known as Mbitini/Ngetha/117 to the 1st Respondent without according the ex-parte Applicant's late husband a fair hearing and without giving specific reasons as to why. That the Land Disputes Tribunal did not have such jurisdiction to entertain the case and thus exceeded its jurisdiction and acted in violation of the Constitution. That the subordinate court herein adopted a non-existent order as the Land Disputes Tribunal lacked jurisdiction to award land to the 1st Respondent therefore acting ultra vires.

4. She further deposed that in 2015, she was advised by her advocate that in 2013, her late husband had filed judicial review proceedings in Machakos being Machakos Misc. Application No. 72 of 2013 but the court file has been missing since then. That her late husband's title has never been challenged in court and thus the 1st Respondent cannot purport to take out warrants of arrest against her when there is a pending suit against him before the Machakos High Court.

5. Opposing the application, the 1st Respondent filed a replying affidavit sworn by Richard Mukiti Mbindyo on 13th November, 2019. He deposed therein that the decision sought to be quashed by the ex-parte Applicant had not been annexed to the application. That the present application has been made so as to delay implementation of the said decision which was adopted by the subordinate court as judgment on 18th July, 2001. He averred that that it was him who had filed the land dispute claim at the Matiliku Land Disputes Tribunal on 19th January, 1999 against the ex-parte Applicant's husband, Kamuti Nthiw'a. That the claim was fixed for hearing on 6th September, 2000 and Kamuti Nthiw'a was duly served with a hearing notice. That all the parties attended the hearing together with their witnesses. That Kamuti Nthiw'a was accorded time to give his evidence and to also cross-examine the witnesses. That at the next hearing date which date was taken in Kamuti Nthiwa's presence, he did not attend nor did he avail his witnesses. That in a letter availed to the Chairman of the Tribunal, Kamuti Nthiw'a admitted the claim also explaining reasons behind the absence of his witnesses.

6. He stated further that the Tribunal subsequently made its decision which was thereafter filed in Court in accordance with the law. That being dissatisfied with the said decision, the late Kamuti Nthiw'a filed an appeal to the High Court vide Appeal No. 92 of 2001. That the Appeal was heard and determined on 11th April, 2013. That the High Court appeal was taxed and a certificate of costs issued and while at the execution stage, these Judicial Review proceedings were filed. That Kamuti Nthiw'a opted to appeal the decision of the Tribunal because he was time barred in the filing of judicial review proceedings in the first instance. That the decree of the lower court has already been implemented and the 1st Respondent is settled at Makueni/Ngetha/117 as the registered owner. That these proceedings are aimed at reviving a land dispute which the late Kamuti Nthiw'a lost in 2013. Lastly, it was deposed that the application lacked merit since the ex-parte Applicant failed to demonstrate in what manner Kamuti Nthiw'a had been denied a fair hearing or that the Tribunal had acted in excess of its jurisdiction.

7. The ex-parte Applicant filed her submissions on support of the application on 15th June, 2021. Four issues were identified for determination. In opposing that these proceedings are not caught by the doctrine of *res judicata*, it was submitted that the ex-parte Applicant was not party to the previous proceedings before the Land Disputes Tribunal and the High Court Appeal. That *res judicata* only applied to issues which have been fully determined by the court and where the same parties were involved. Defending the ex-parte Applicant's failure to annex the decision which is sought to be quashed, it was submitted that such failure is not fatal and that where there was no dispute behind the existence of the decision, then the court could waive the requirement for production in the spirit of Article 159(2) of the Constitution. On the application being time barred, the ex-parte Applicant submitted that time does not run against a decision which is made without jurisdiction and the same could be challenged at any time.

8. Lastly, in challenging the Land Disputes Tribunal's jurisdiction to revoke the ex-parte Applicant's title deed for the suit property, it was submitted that Section 3(1) of the Land Disputes Tribunal Act, 1990 (now repealed) only granted the Tribunal power to determine issues of land division and boundary determination et al. Ownership of land was outside of its jurisdiction and thus the decision was a nullity. The ex-parte Applicant relied on the following authorities: -

i) **Kenya Hotel Properties Limited v Willisden Investments Limited & 6 others [2013] eKLR;**

ii) **Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others [2020] eKLR;**

iii) **Lempaa Suyianka & 5 others v Nelson Andayi Havi & 14 others; Caucus of LSK Branch Chairpersons (Interested Party) [2021] eKLR;**

iv) **Republic v Eldama Ravine Land Dispute Tribunal Ex-parte Committee Members Stolmo Primary School [2012] eKLR;**
and

v) **Republic v Chairman Land Disputes Tribunal at Embu & another; Mathuva Mukemba (Interested Party) Ex-parte Mbaika Kaviti Kyunguti alias Mbaika Kaviti Nyange [2020] eKLR**

9. The 1st Respondent filed his submissions on 15th April, 2021. It was submitted that the Land Disputes Tribunal Nzau Location properly applied the jurisdiction granted to it under Section 3(1) of the Land Disputes Tribunal Act, 1990. That the ex-parte Applicant ought to have appealed against the Tribunal's decision to the Provincial Appeal Committee. That the Tribunal's decision has already been executed after being adopted as judgment of the subordinate court and therefore nothing remains for this Court to quash. That the transfer of the suit property to the 1st Respondent was done in accordance with the law under Section 7(2) of the Land Disputes Tribunal Act, 1990 and accordingly, it is prayed that the application be dismissed with costs. Only one authority was annexed in support of the submissions namely **Timotheo Makenge v Manunga Ngochi [1979] eKLR.**

10. It is common ground that the Land Disputes Tribunal Nzau Location was only mandated to hear and determine disputes of the nature outlined under Section 3(1) of the Land Disputes Tribunal Act, 1990. These are as follows: -

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land.

11. After perusing the Exhibit marked "RMM4" it is manifestly clear that the Tribunal awarded the 1st Respondent herein ownership of land parcel No. Mbitini/Ngetha/117 measuring 4.0 Ha and directed that it be accordingly transferred by the Court. The only question for determination is whether the Nzau Land Disputes Tribunal had jurisdiction to award the 1st Respondent ownership of the suit property. The obvious answer is in the negative because the Tribunal's statutory limits in the exercise of its jurisdiction did not extend to questions of ownership. It does not matter that the ex-parte Applicant did not appeal the decision to the Appeals Committee or that his Appeal to the High Court was unprocedural. Therefore, I am in agreement with the submission of the ex-parte Applicant that the decision of the Land Disputes Tribunal was a nullity to begin with when it exceeded its jurisdiction.

12. To bolster my finding, I agree with the decision of the Court of Appeal in **Stephen Kibowen v Chief Magistrate's Court Nakuru & 2 others [2017] eKLR**, where the learned judges aptly held as follows: -

"It is clear from the brief ruling that the learned Judge took a strict approach to the 6-month limitation period and concluded that the application before him was incompetent. Ordinarily, such a conclusion would be unimpeachable but, in the matter before the learned Judge, what was being challenged was not a decision properly made within jurisdiction against which time could run. Rather it was a nullity which amounted to nothingness. It was therefore incapable of commencing a reckoning of time and was definitely incapable of triggering a statutory bar, being in every respect barren and of no effect."

13. The Court of Appeal went on to hold as follows: -

"Since it is indisputable that the Land Disputes Tribunal had no jurisdiction to purport to determine ownership and to cancel the appellant's title to the land in question, we have no hesitation in finding that the tribunal's decision was ultra vires, made without jurisdiction and therefore null and void ab initio. It amounted to nothing and could not form a sound basis upon which a decree could issue from the Magistrate's Court. Any transfer of the title in execution of the said invalid decree was equally null and void."

14. The upshot of the foregoing is that the ex-parte Applicant's Notice of Motion dated 30th September, 2019 is allowed in terms of prayers 1, 2 and 3.

SIGNED, DATED AND DELIVERED VIA EMAIL THIS 9th DAY OF March, 2022.

MBOGO C.G.

JUDGE

9/3/2022

Court Assistant: Mr. T.Chuma