REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC JR. NO. 20 OF 2020

REPUBLIC.....APPLICANT

VERSUS

LIKUYANI LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT KAKAMEGA.....2ND RESPONDENT

SUBUKIA ARIMI SELF HELP GROUP.....3RD RESPONDENT

JOHN OKWI & 2 OTHERS.....4TH RESPONDENTS

EX PARTE: JAVAN MBOLELA & OTHERS

JUDGEMENT

This is an application for judicial review dated 1st February 2006 filed by the applicants seeking for the following order that this honourable court be pleased to issue an order of certiorari to remove into this honourable court and quash the decision of Likuyani Land Disputes Tribunal and which was adopted as a judgment of the court on 12th August, 2005 vide Kakamega Chief Magistrate's Court Award No. 104 of 2005.

It is based on the following grounds that the District Magistrate who read and adopted the tribunal decision had no jurisdiction. That Subukia Arimi Self Help Group has no legal personality and it cannot own land and the tribunal exceeded its jurisdiction by entertaining the group. That the tribunal had no jurisdiction to handle a land dispute involving 500 acres. That the Land Disputes Tribunal lacked jurisdiction to order specific performance of a land sale contract that was null and void, for non-compliance to the mandatory provisions of the Land Control Act. That the suit land was the subject of a court judgment in Eldoret HCCC No. 303 of 1977 (Washington O. Bren and Others vs. Kiptarus Arap Rotich and John Agui) and where the ex-parte applicants herein were some of the plaintiffs, and the court on the 27th November, 1996 ordered the defendants and who are the 4th respondents herein to execute all such necessary documents as would facilitate the sub-division and transfer of the 258 Acres part of L.R. 5580/2 and 5581/1 awarded by the judgment to the exparte applicants herein and 6 others, and failing which the Deputy Registrar was to sign and execute the necessary documents. That the tribunal award will have the effect of nullifying a subsisting court judgment in Eldoret HCCC No. 303 of 1977. That the enforcement of the tribunal award will dispossess the exparte applicants and who are in occupation pursuant to a valid court order in Eldoret HCCC No. 303 of 1977, and yet they have not been heard. That the tribunal award amounts to a back door attempt to circumvent a subsisting court judgment.it is

supported by the annexed affidavit of Javan Mbolela as well the statement of particulars and its annexures.

John Njuguna Mugetha one of the respondents submitted that the parcels of land complained about by the applicants are not what the group purchased from the fourth respondent and his partners. That the parcel of land where their interests are sought to be excised is found in title No. L.R. 5581/2. That the substantive application are premised on false apprehension on the part of the applicants. That it is also not clear what the applicants have done since they and their predecessors were awarded the decrees they now claim are being violated. That once a subject has been litigated upon and judgment pronounced, the only way to realise the resultant rights is to execute the decree and not file a fresh action. That the 1st and 2nd respondents were discharging their statutory functions and they enjoy certain legal immunities related to their discharge of their duties and can only be sued through the office of the Attorney General and in compliance with the provisions of the Government Proceedings Act. That the jurisdiction of the first and second respondents is donated by statute No. 18 of 1990, which Act is still good law in Kenya as it has not been repealed and its spells their interests in land rather than acreage of the same as its jurisdiction.

This court has carefully considered the application and the submissions therein. In Republic v Kenya Revenue Authority & Another Ex-Parte Tradewise Agencies (2013) eKLR, para. 21 G.V. Odunga, J. in quoting from Pastoli vs.

Kabale District Local Government Council and Others (2008) 2 EA 300 observed that;

> ***"****In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act,the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision*..... "

In Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) eKLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 (2004) 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under

Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See Welamondi vs The Chairman, Electoral Commission of Kenya (2002) 1 KLR,

> *"..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis ....."*

In the case of Republic vs Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & Another (2014) eKLR it was held that;

> *"Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "Judicial Remedies in Public Law" by Clive Olive, it is noted that "there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy."*

In Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo JA stated as follows;

> *"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."*

Be that as it may, this application is based on the grounds that the decision of the Likuyani Land Disputes Tribunal is the subject for adoption, enforcement/execution in Kakamega CMC Award No. 104 of 2005. That the District Magistrate who read and adopted the tribunal decision had no jurisdiction. That Subukia Arimi Self Help Group has no legal personality and it cannot own land and the tribunal exceeded its jurisdiction by entertaining the group. That the tribunal had no jurisdiction to handle a land dispute involving 500 acres. That the land Disputes Tribunal lacked jurisdiction to order specific performance of a land sale contract that was null and void, for non-compliance to the mandatory provisions of the Land Control Act. The general grounds is that the proceedings and decision is a nullity since the tribunal lacked jurisdiction.

The issues to be determined in this application is whether or not the tribunal had jurisdiction to entertain this dispute. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated 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 occupy or work land, or,*
>
> *(c) Trespass to land, shall be heard and determined by a Tribunal established under section 4."*

I have perused the documents before me and the procceedings and verdict of the Lukuyani Land Disputes Tribunal and indeed the dispute seems to be one of ownership to land and hence the tribunal did not have jurisdiction to entertain the same. It is a dispute invoving a sale agreement concerning land. That the Land Disputes Tribunal lacked jurisdiction to order specific performance of a land sale contract. It is clear from

the tribunal ordered the land to be subdivided and title deeds to be issued. The Likuyani Land Disputes Tribunal and decision delivered on 2nd December 2009 stated as follows;

> *"The tribunal therefore rules that the parties in question go and share the land as they agreed above. Should have qualified surveyors to carry out the subdivisions of the land and both parties to take the matter to the Land Control Board after signing the consent and be given the title deeds."*

I find that under Section 3 (1) of the Land Disputes Tribunal the interested party's claim and final decision by the tribunal was outside the jurisdiction of the said tribunal. Thus the tribunal lacked jurisdiction to entertain the claim relating to title to land and acted ultra vires its powers. I concur with the ex parte applicant's submissions. I find the application has merit and I grant the following orders;

1. That an order of certiorari do issue to remove into this court and quash the Likuyani Land Disputes Tribunal proceedings and decision and a prohibition order prohibiting the said tribunal or the court in Kakamega CM Award No. 104 of 2005.

2. Costs of this application to the ex parte applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 22ND JUNE 2021.

N.A. MATHEKA

JUDGE