



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITUI**

**ENVIRONMENT AND LAND COURT MISC APPLICATION NO. 14 OF 2021**

**(FORMERLY MACHAKOS MISC. 65 OF 2019)**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE CHAIRMAN, LAND DISPUTES**

**TRIBUNAL MUTOMO SUB DISTRICT.....RESPONDENT**

**-AND-**

**MUTUA KAVUNDUU.....INTERESTED PARTY**

**TITUS KIYILI KINYUMU.....EX-PARTE APPLICANT**

**JUDGEMENT**

1. The Ex-parte Applicant herein filed an application by way of Notice of Motion dated 3<sup>rd</sup> November 2004 seeking the following Orders:

***1. An order of Certiorari do issue to remove to the High Court the proceedings and awards of the Land Disputes Tribunal Mutomo sub-district sitting at Kyamatu Location in the tribunal case filed in the Senior Principal Magistrate's Court at Kitui as Land cases numbers 49 and 50 of 2003 Mutua Kavunduu-versus-Titus KitiliKinyumu as well as the orders of the Senior Principal Magistrate made on 16.7.2004 adopting the awards of the tribunal as the judgment of the court for the purposes of having the said proceedings awards and orders quashed.***

***2. Costs of this application be awarded to the Applicant***

2. The Grounds upon which the reliefs are sought are:

***i. The proceedings before the tribunal concerned ownership of land which is not within the land tribunal's jurisdiction.***

***ii. The tribunal that heard the dispute did not follow the laid down procedure as provided for under the Land Disputes Tribunal Act (Repealed) Number 18 of 1990.***

***iii. The Tribunal that heard the dispute was not properly constituted.***

***iv. The proceedings, awards and the subsequent orders by the Senior Principal Magistrate are null and void.***

3. The Notice of Motion is supported by the Statement of Facts dated 30<sup>th</sup> August 2004 and a verifying affidavit sworn by TITUS KITILI KINYUMU sworn on 1<sup>st</sup> September 2004.

4. The Interested Party MUTUA KAVUNDULI filed a replying affidavit sworn on 5<sup>th</sup> September 2006 whereas the respondents did not file any response to the application.

5. A brief summary of Facts is that the Interested Party was the Plaintiff in a Land Dispute Tribunal Case at Kyamasu Location, Mutomo Sublocation against the Ex-parte Applicant herein. There were two different proceedings Civil Suit No. L. 8 /03 and Civil Suit No. L 9/03 Mutua Kavunduu versus Titus KitiliKinyumu regarding adjacent parcels of land that belonged to the Interested Party herein.

6. In the first dispute, Civil Suit No. L 8/03 the Interested Party (Plaintiff) claimed that on 13/08/1987 he had entered into an Agreement to sell the parcel of land to the ex parte applicant for a consideration of Ksh.12,000. He paid a sum of Ksh.10,800 in three installments and promised to settle the balance but he never did in spite of many reminders to pay.

7. In Civil Suit No. L. 9/03, the Interested Party claimed to have found that the Ex parte Applicant had built on his land but the Applicant told him that he would buy the said parcel of land from him but failed to do so. That when the Interested Party wrote a letter demanding that the applicant leaves his land, he deceived the Interested Party's aunt who was living on the land by giving her Kshs 1,000/- to give him the land.

8. In Civil Suit No. L 8/03, the Land Disputes Tribunal found that the Ex parte Applicants claim to the parcel of land was false, imaginary and uncalled for. The Tribunal awarded the entire disputed land to the Interested party and ordered that the Ex parte be restrained from any claim over the land and that he be refunded his Kshs 1,000/- The Tribunal further ordered that the Ex parte Applicant to forfeit the costs, damages and other miscellaneous expenses incurred and he should not lay any claim on the land.

9. In Civil Suit No. L. 9/03, the Land Disputes Tribunal found that the Ex parte Applicant's claim to the parcel of land which he bought in 1987 and then encroached onto the second parcel of land was weak. The Tribunal found that Interested Party should refund the monies the Ex parte Applicant had paid in the sum of Kshs 10,800/- and the Ex parte Applicant was to leave the land and forfeit the costs, damages and other miscellaneous expenses incurred in filing the suit and he should not lay any claim on the land.

### **The Ex parte Applicant's Case**

10. Counsel for the Applicant made oral submissions before the Court on the 29<sup>th</sup> March, 2006 before Hon. Justice D.A. Onyancha to the effect that the Tribunal was improperly constituted.

11. Secondly, learned counsel for the Applicant submitted that the procedure followed was flawed because there was no claim filed before the Tribunal meaning there was effectively no commencement of proceedings before the Tribunal as envisaged by the Act.

12. Thirdly, he submitted that the award was ultra vires the powers of the Tribunal because the tribunal awarded the portion of the land to the Applicant and thus the issue was ownership of the land. He stated that since the Magistrate's order was based on the Tribunal's Award therefore it was also flawed and that the court has the power to quash that award.

### **The Interested Party's Case**

13. The Interested Party, Mutua Kavunduu, swore a Replying Affidavit on the 5<sup>th</sup> September 2006 and averred that the Tribunal was properly constituted as it was composed of three members who were duly gazetted.

14. He also averred that the issue before the Tribunal concerned non-payment of the agreed purchase price of a parcel of land which the ex parte applicant had bought and not paid the full purchase price. He further claimed that the principal issue before the Tribunal was the position of a boundary between the portion of the land that he had sold to the Ex parte Applicant and the adjoining parcel that remained as his property and the Applicant had crossed over to without paying for the same.

15. The Interested Party averred that the procedure before the Tribunal was the usual one adopted in hearing disputes and no one was prejudiced by the same. He further claimed that it was the duty of the Principal Magistrate's Court at Kituito enter judgment in accordance with the decision of the Tribunal and the Court made no error in adopting the same.

16. The Interested Party also filed written submissions on the 28<sup>th</sup> October 2021. They stated that the issue before the Land Disputes Tribunal was whether the Ex parte Applicant had a right to occupy and work on the land where he had not completed paying the agreed purchase price. The Interested Party sought to have the Ex parte Applicant removed from the land.

17. The Interested Party also stated that the Ex parte Applicant never attended the proceedings despite being informed to attend and the Tribunal proceeded in his absence.

18. On the matter of jurisdiction, Counsel for the Interested Party relied on Section 3(1) of the Land Disputes Tribunal Act CAP 303 A (repealed) and stated that the Ex parte Applicant had trespassed on the Interested Party's land and was occupying the same by building a house and was working on it. The Ex parte Applicant had crossed the boundary of the portion sold to him and extended his occupation to an unsold parcel. That these were the issues before the Tribunal and the said issues were within the jurisdiction of the tribunal.

19. The Interested Party further relied on the holding in **MUHIA-VS-MUTURA EALR(1990) E.A 202** where the Court found that the trespass of land fell within the jurisdiction of the Land Disputes Tribunal under Section 3 of the Act and submitted that the Tribunal was seized of and properly exercised their jurisdiction.

20. Regarding the procedure, the Interested Party submitted that the case before the Tribunal was properly registered as suit No.9 of 2003 at the Land Disputes Tribunals Office at Mutomo and a date was taken for hearing and the Applicant was invited to attend but failed to do so.

21. The Interested Party also submitted that the Tribunal was properly constituted under Section 4(2) of the Land Disputes Tribunal Act that requires 3-5 members and, in this case, they were three and thus properly constituted. They submitted that the proceedings and award was in accordance with the Act and that the reading and adoption of the decision of the Tribunal by the Principal Magistrate's Court at Kitui fell within the ambit of the Section 7(2) of the Land Disputes Tribunal Act.

22. The Interested Party submitted that the procedure followed was in accordance with Section 3(2)-(8) of the Land Disputes Tribunal Act.

23. The Interested Party therefore concluded that the ex-parte Applicant has not demonstrated his case and that the application ought to be dismissed with costs to the Interested Party.

#### **Issues for Determination**

24. The Ex-Parte Applicant has sought an order of certiorari quashing the decision of the Land Disputes Tribunal Kyamatu Location and subsequent adoption of the Decision by the Principal Magistrate's Court at Kitui as judgment and Decree on several grounds, which I will proceed to include in the issues for determination hereunder:

A) Did the Land Disputes Tribunal act outside of its jurisdiction?

B) Was the Tribunal properly constituted?

C) Did the Land Disputes Tribunal not follow the laid down procedure resulting in its decision and subsequent adoption of the decision being null and void?

D) Did the Ex-Parte Applicant have another recourse against the Tribunal's Decision apart from filing the Application before this court?

#### **Analysis and Determination**

##### **A) Did the Land Disputes Tribunal act outside of its jurisdiction?**

25. Section 3(1) of the Land Disputes Tribunal Act CAP 303 A(repealed) provides that: "***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."***

26. It is the Applicant's contention that the Tribunal awarded the Interested Party the land and thus acted outside its jurisdiction given by the above statutory position.

27. However, a look at the proceedings of the Land Disputes Tribunal Office Kyamatu Location clearly shows that the ownership of the land was never in contention as it was always the Interested Party's land. The issue was that the Interested Party sold his one parcel of land to the Exparte Applicant for a sum of Ksh.12,000 but he failed to complete the payment of the purchase price paying only the sum of Kshs. 10,800 but never completed payment of the balance as promised or at all. At the time of hearing the suit it was claimed to have been sixteen years since the balance became due.

28. In addition to this, the Ex-parte Applicant also encroached the Interested Party's adjacent parcel of land and built on it while promising that he would also buy it from the Interested Party which he never did. This led to the Interested Party taking steps to retrieve and recover his land back from the Ex-Parte Applicant.

29. In my view, the matter in issue was the trespass to land and establishing the boundaries of the two adjacent parcels of land belonging to the Interested Party to show that the Ex parte Applicant had encroached onto the second parcel of land. It is thus clear that the Land Disputes Tribunal acted well within its jurisdiction. They also had to establish whether the Ex-Parte applicant has a right to work and occupy the land. The ownership of the parcel of land was never an issue as even the Ex Parte Applicant was well aware that the land belonged to the Interested Party when buying it from him.

##### **B) Was the Tribunal properly constituted?**

30. It is the Courts view that even though this issue is raised in the Exparte Applicants pleadings the same is not supported by any facts. It is not alleged in the supporting affidavit in what way the tribunal was not properly constituted. The applicant having made an allegation must prove the said allegation. The Applicant has unfortunately failed to prove this allegation.

31. Section 4(2) of the Land Disputes Tribunal provides that:

***"Each Tribunal shall consist of— (a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and (b) either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5."***

32. The record of the proceedings before the Tribunal shows that it constituted of three members, one being Thomas W. Muthusa, the

Chairman, with Benjamin K. Mulanda and Benjamin K. Mutisya being members. This means that the requisite requirement for the presence of a chairman and either two or four elders was met as the Act provides. In my view, on the face of the record, the Tribunal was properly constituted.

**C) Did the Land Disputes Tribunal not follow the laid down procedure resulting in its decision and subsequent adoption of the decision being null and void?**

33. The procedure to be followed by a Land Disputes Tribunal is set out at Sections 3(2)-(8) of the Land Disputes Tribunal Act CAP 303A(Repealed) that provides as follows:

*“(2) Every dispute referred to in subsection (1) shall be instituted by presenting a claim to the Tribunal for the area in which the land is situated, and shall contain, and contain only, a summary of the material facts on which the claimant intends to rely.*

*(3) Every claim shall be registered in register of claims to be kept by the Tribunal in the prescribed manner and the claims shall be numbered consecutively in each year according to the order of their institution.*

*(4) Every claim shall be served on the other party, or, where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summonses shall thereafter apply.*

*(5) Each party upon whom a claim is served shall, unless the claim is admitted, within thirty days after service, file with the Tribunal an answer containing a reply to the matters stated in the claim and a summary of the facts upon which he wishes to rely.*

*(6) Within thirty days after the answer has been filed under subsection (5) the claim shall be set down for hearing by the Tribunal.*

*(7) The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an*

*opportunity to question the other party’s witness or witnesses.*

*(8) The Tribunal shall give reasons for its decision, which shall contain a summary of the issues and the determination thereof, and which shall be dated and signed by each member of the Tribunal.*

34. The Act requires that a claim to be filed before the Tribunal for the area in which the land is situated and any party who has been served with the claim has 30 days to answer then proceedings commence 30 days after the answer is given. At the end of the proceedings a decision and judgement are made. In my view, there could not have been proceedings before the Tribunal if the Interested Party had not instituted them. The Ex-Parte Applicant’s allegation that there was no claim filed and therefore no effective commencement of proceedings has no basis because he did not even attend as the record of proceedings before the Tribunal indicates.

35. There is nothing on record that shows that the Tribunal failed to follow the laid down procedure as provided in the Act, therefore I am inclined to say that the Interested Party has failed to prove their allegation. It is a fundamental principle in the law that he who alleges must prove. As the court noted in: **Justus Mathumbi & 9 others v Cabinet Secretary, Ministry of Land, Housing and Urban Development & 4 others [2018] eKLR**

*“It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by all the parties and I find that this Petition has no merits at all. Consequently, I dismiss this petition with no orders as to costs.”*

**D) Did the Ex-Parte Applicant have another recourse against the Tribunal’s Decision apart from filing the Application before this court?**

36. There was a mechanism for appeal established under the Land Disputes Tribunal Act(Repealed)(CAP 303A) that granted a right to an aggrieved party to the Tribunal’s decision to make an appeal within 30 days after delivery of the decision. Section 8(1) states that:

*“Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.”*

37. If a party was further aggrieved upon appeal, Section 8(8-9) allows for a further appeal to the High Court on issues of law but not on issues of fact. Under Section 8(8) of the Land Disputes Tribunals Act(Repealed), the decision of the Appeals Committee was deemed to be final on any issue of fact and no appeal was allowed thereof to any Court. However, a party aggrieved by the decision of the Appeals Committee could under Section 8(9) appeal to the High Court on point of Law within sixty (60) days of the decision of the Appeals Committee. This provision of the Act is in the following terms: -

*“Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixtydays from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the high Court unless a judge of that Court certified that an issue of law (other than customary law) is involved.” A question of customary law shall for all purposes under this Act be deemed to be a question of fact.”*

38. In a similar case where the Applicant had made a Judicial Review Application for an order of Certiorari to quash the decision of the Tribunal and the adoption of the Decision by the Principal Magistrate’s Court at Kitui as a Decree, the court held as follows: **Republic v Land Dispute Tribunal, Bahati& another; Peter KaraniNduku (Interested Party) Ex parte Jacob KipkuruiKonga& another [2020]**

*“It is evident that the Tribunal heard and determined the dispute in 2006 and that the Magistrates Court adopted the award as judgment in 2008 while the Appeals Committee dismissed the applicants Appeal in 2009. Upto the time the appeal was dismissed the Land Disputes Tribunals Act(Repealed), had not been repealed and was in force. Hence the procedure that ought to have been followed in resolving the dispute was the one laid out under the Act.....if he was not satisfied with the decision of the Appeals Committee, he ought to have filed an appeal against the committee’s decision if a point of Law was involved in the High Court. He did not and although the decision in the appeal was given on 17<sup>th</sup> November 2009 the applicant only initiated these proceedings on 27<sup>th</sup> March 2019 when he filed the application for leave. It was not explained why it took the applicant over 9 years from the date the appeal to the Provincial AppealsCommittee was dismissed toseek to bring these proceedings. The delay was inordinate and could only have been an afterthought. I view these proceedings as a fishing expedition on the part of the applicant in the hope that he could somehow make a catch. The Courts do not work in that manner as their solemn duty is to interpret and apply the law the quest of doing justice to the parties who come before them.*

*I have said enough to demonstrate that the instant application was defective for having been brought out of time, was unmeritorious as the applicant failed to exhaust the applicable procedure under the Land Disputes Tribunals Act(Repealed), and that the failure to enjoin the Magistrates Court that adopted the decision of the Tribunal and which the Applicant seeks to have quashed was a fatal omission.”*

39. In my view, the Ex-Parte Applicant had a chance to appeal to the Appeals Committee but failed to do so. Issues such as the constitution of the Tribunal is a matter of fact which could have been appealed on. It is trite law that where there is a clear laid down procedure it must be followed as was held in the case of **Speaker of the National Assembly v James NjengaKarume [1992] eKLR** in which it was stated as follows:

*“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”*

**Final Orders:**

From the foregoing findings it is clear that the Notice of Motion dated 3<sup>rd</sup> November 2004 lacks merit as the grounds relied upon have not been proved and further that the applicant failed to exhaust the applicable procedure under the Land Disputes Tribunals Act(Repealed). The same is therefore dismissed with costs to the Interested Party

**DATED, SIGNED AND DELIVERED AT KITUI THIS 14<sup>TH</sup> DAY OF DECEMBER, 2021.**

**L. G. KIMANI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITUI**

Judgement read in open court in the presence of-

C. Nzioka.....Court Assistant

Muatine..... for the Exparte/Applicant

N/A.....for the Respondent

Kariuki h/b for Kalili .....for the Interested Party