



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2011

IN THE MATTER OF AN APPLICATION BY STEPHEN NGUGI MUNGA FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT CHAPTER 303A

REPUBLIC.....APPLICANT

VERSUS

THE RIFT VALLEY PROVINCIAL

LAND DISPUTES APPEALS BOARD.....RESPONDENT

EXPARTE

STEPHENNGUGI MUNGA..... SUBJECT

AND

WINNIE WANJA OWITI.....-INTERESTED PARTY

**JUDGMENT.**

1. Leave to bring these Judicial Review Proceedings was granted to the subject, Stephen Ngugi Munga (hereinafter called the applicant) on the 6/11/2011 ( M.Odero J).

Pursuant to the said leave, the applicant filed a Notice of Motion dated 7/4/2011, which was Amended and filed on the 8/6/2018 with leave. The Exparte applicant sought:

***i. An Order of Certiorari to remove into the High Court for purpose of it being quashed, the decision of the Rift Valley Provincial Land Disputes Appeals Board awarding vacant possession of Kijabe Plot NO. 215 to the Interested Party, Winnie Wanja Owiti.***

***ii. That Costs of the proceedings be provided for.***

Together with the Motion and grounds in support, an Amended Statement and Amended Affidavit in verification of the Statement together with several documents were filed.

2. In opposing the application, the Respondent- Rift Valley Provincial Land Disputes Appeals Board sought to rely on its submissions dated the 27/10/2015 before the Amendment to the Notice of Motion.

Though served with the Amended Notice of Motion by Order of the Court the Interested Party represented by counsel, M/S Wairegi Kiarie & Associates Advocates (Notice of appointment filed on the 29/8/2019) has not filed its submissions.

The Exparte Applicant is represented by M/S Odhiambo and Odhiambo Advocates while the Respondent is represented by the Hon. The Attorney General.

Both have filed their written submissions. I have considered them.

### **3. Brief background to the Judicial Review application.**

The property in issue here is **Plot no. 215 Kijabe**.

Both the applicant and the Interested Party lay claim of occupation and ownership over the plot.

4. The applicant's averments are that in 1989 the County Council of Nakuru (as it was then) allocated to him the said plot, upon paying the requisite rent, survey fees and upon compliance with all other requirements, and was issued with a Title Deed.

He then took possession and has since lived thereon with his family, and has continued to occupy and farm undisturbed for 20 years, upto the year 2008 when the Interested Party filed a claim of ownership before the Naivasha Land Dispute Tribunal NO. 88 of 2008 citing the applicant as the intruder.

5. The Interested Party's Claim is that the plot belonged to her father-in-law one Stephen Ochieng Owiti, and that she lived thereon with her husband and family upto 1987 when she left due to family disputes to her motherland. She claims that after the death of her husband, the applicant unlawfully took possession of the plot and proceeded to demolish her house, prompting her to file the dispute before the Naivasha Land Dispute Tribunal seeking repossession of the suit plot.

### **6. Mandate of the Naivasha Land Dispute Tribunal NO. 88 of 2008 was to determine whether the subject plot ought to be given back to the interested party, widow of the Late Richard Ondieki Owiti.**

7. Both the applicant and the Interested Party presented themselves before the tribunal which was presided over by a panel of four elders. The proceedings and the verdict are on record.

8. Verdict of the Tribunal was that the suit plot be shared equally between the Applicant and the Interested Party on grounds, among others, that

*a) Mr. Owiti – the interested party's late husband was the first owner of the plot in dispute*

*b) Mr. Munga, (the applicant) came in and paid the arrears of the county councils rates, and was allocated the plot.*

9. The applicant herein Stephen Ngugi Munga was not satisfied. He appealed to the Rift Valley Provincial Land Disputes Appeals Board in Appeal No. 30 of 2009.

In its ruling dated 7/3/2011, the verdict was overturned and vacant possession of the suit plot was given to the Interested Party, with each party bearing own expenses. Right of Appeal to the High Court was explained to the parties.

10. The Applicant being aggrieved approached the High Court by these Judicial Review proceedings, on the grounds stated at the face of the application.

### **11. ISSUES FOR DETERMINATION**

*a. Whether The Land Disputes Tribunals Act, Chapter 303 A Laws of Kenya grants the Tribunals established thereunder Jurisdiction to determine questions of ownership and Land occupation.*

*b. Whether the Interested Party's claim of ownership of the suit plot was time barred under the Limitations of Actions Act (Cap 22) and Sections 13(3) of the Land Disputes Tribunals Act, Cap 303 A, Laws of Kenya.*

*c. Whether long and uninterrupted occupation and use of land gives the occupier legal possession to the occupier.*

#### **Applicable Legal underpinnings:**

*a) The Land Disputes Tribunals Act Commenced in 1993.*

*Section 3(1) states its Jurisdiction thus*

*3(1) subject to this Act, all cases of a civil nature involving a dispute as to*

*i. The division of, or the determination of boundaries to land, including land held in common,*

*ii. a claim to occupy or work land, or*

*iii. trespass to land*

Shall be heard and determined by a Tribunal established under **Section 4**.

## Section 4(2)

Each tribunal shall consist of

*(a) A chairman who shall be appointed by the District Commissioner from the panel of elders appointed under Sections 5, and*

**Section 6(1)** subject to this Act, each Tribunal shall have jurisdiction to resolve disputes instituted under **Section 3(2)**

**6(2)** whenever a dispute is being dealt with by the Tribunal,

*(a) The Chairman shall preside at the hearing, and*

*(b) The decision of the Tribunal shall be that of the majority of the members hearing the dispute.*

**Section 8** – deals with Appeals to the Appeal Committee and the High Court

**8(5)** The appeal shall then be determined by the Appeals Committee, which shall consist of three members appointed under Section 9

**Section 9(1)** The Minister shall establish each province a Land Disputes Appeals Committee which shall consist of -

*i. A chairman appointed from time to time by the Provincial Commissioner from the panel of Elders appointed by the Minister by Notice published in the Gazette for purposes of appeals under this Act, and*

*ii. Such persons shall, not being less than five, appointed by the Minister;*

**9(2)**----- the committee shall sit in a panel of three members in such places as may be determined by the Provincial commissioner.

**Section 8(9)** Each party to the appeal may appeal from the decision of the Appeal Committee to the High Court on a point of law within sixty days from the date of the decision complained of;

## Section 13(3)

For avoidance of doubt, it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings, in respect of which the time for bringing such proceedings is barred under any law relating to the Limitation of actions or to any proceedings which had been heard and determined by any court.

## 12. LIMITATIONS OF ACTIONS ACT, CHAPTER 22, LAWS OF KENYA

**Section 7:** Actions to recover land. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person.

**Section 9:** Accrual of right of Action in case of present interest in land.

**Section 9(1);** Where the person bringing an action to recover through whom he claims has been in possession of the land, and has while entitled to the land dispossessed or discontinued his possession, the right of action accrues on the date of dispossession or discontinuance.

**(2)** Where a person brings an action to recover land of a deceased person, whether under a will or in intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.

I have taken the liberty to quote the above provisions as they are relevant in the determination of the dispute herein.

13. The **Land Dispute Tribunals Act Chapter 303 A** has since been repealed upon enactment of the Environment and Land Court Act, and the Court thereunder. However the said Act was the applicable legislation during the period under review, before 2012. At the time, no appeal was pending at the High Court as the Rift Valley Provincial Land Disputes Appeals Board decision was rendered on the 7/3/2011.

## 14. Analysis and Determination.

Jurisdiction to a court or tribunal is donated either by the Constitution, legislation or both **Republic Vs. Karisa Chengo & 2 Others (2017), Articles 163, 164 and 165 of the Constitution.**

15. The **repealed Land Disputes Tribunals Act, Section 3(1)** states the jurisdiction of the Tribunal.

**3(1) (a)** confers jurisdiction as to (a) division of, or determination of boundaries to land and (c) to a claim to occupy or work on land or

(c) Trespass to land.

The powers of the Tribunals is well stated. Under Section 3(1) the Tribunal is mandated to hear and determine civil cases involving disputes over division, boundaries and occupation or work on the land, including trespass. Issues of ownership and in effect contracts and or agreements for sale of land are excluded.

16. In the case **Wamwea VS. Catholic Diocese of Murang'a Registered Trustees (2003) KLR 389**, the Court held that

***“---disputes over title to land are not within the jurisdiction of tribunals and Land Disputes Appeals Committees. It can be said that disputes over contracts are not under that jurisdiction---”***

The Court of Appeal in **M'Marete VS. Republic & 3 Others, (2004) e KLR**, it was held that a

Claim to ownership of land was different from a claim over boundaries, occupation or work the land, and proceeded to hold that

***“...We are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under the Registered Land Act to the Appellant. In our view the Tribunal acted in excess of its jurisdiction”.***

17. The same position was held in **ELC Case Appeal NO. 7 of 2016 Moses Makokha Osanya Vs. Elekia Mabosio Marenga; and JR NO. 370 of 2013 (2014)Eklr**, and in **Masagu Ole Naumo Vs. Principal Magistrate Kajiado Law Courts & another**.

18. Both parties to these proceedings speak of having been allocated the suit plot by the County Council of Nakuru at different times. By so doing, the parties entered into contracts and or agreements over the suit plot with the county council. Indeed, they both produced documents before the Tribunals to demonstrate the manner of the plot allocations to assert their ownership claims to the subject plot. The Provincial Land Disputes Appeals Tribunal upon hearing the dispute gave vacant possession of the plot to the Interested party

19. Without a doubt, the Appeals tribunal dealt with the matter of ownership, possession and occupation of the suit plot.

I do not agree with the respondent in its submissions that determination on vacant possession does not translate to determination on ownership.

Both parties in the dispute testified to how they acquired the suit plot. It was not about divisions or trespass on the land, or occupancy or work on the land, but who between the two parties was the bonafide owner of the plot.

20. As stated by the **Court of Appeal in M'Marete Case (Supra)**, that

***“...taking into account the provisions of Section 3 of the Act, and what was before the Tribunal, we are of the view that the Tribunal went beyond its Jurisdiction----- and acted in excess of its jurisdiction”.***

I too come to the same conclusion that the tribunals lacked jurisdiction to interrogate matters of ownership of the suit plot and thus by doing so acted ultra vires their jurisdiction.

21. To that extent, any decision rendered by the tribunals without the necessary jurisdiction is declared null and void.

Similar sentiments were expressed in the **case Jesse Kamau Kinuthia Vs. Teresia Wanjiku Kamande (2008) e KLR**, and **Moses Makokha Osanya Vs. Elekia Mabosio Marenga (2018) e KLR** that disputes over title and ownership of land are not within the jurisdiction of tribunals but may only be ventilated through the High Court (prior to 2012) and now through the Environment and Land Court.

22. The upshot is therefore that the Land Disputes Tribunals lacked jurisdiction to entertain and determine questions of ownership of land, whether registered or not.

Having determined the matter of jurisdiction by the Land Disputes tribunals and being aware that once a court finds that a tribunal acted without jurisdiction, and being guided by the holding in the **Owners of Motor Vessel “LilianS” Vs. Caltex Oil (Kenya) Ltd (1989) KLR 1**, that when a Tribunal makes a factual finding, it is not for this court in Judicial Review proceedings to interfere with such finding, as such a decision would go to the merits of the decision, and by interfering with such a finding the court would be acting as an appellate court, rather than a Judicial Review Court.

23. It is trite that Judicial Review proceedings do not deal with the merits of a decision, but the process of the decision making – **Municipal Council of Mombasa Vs. Republic & Umoja Consultants Ltd, Civi Appeal No. 185/2001; and Republic Vs. Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) e KLR**.

24. Matters of Jurisdiction ought to be determined in the first.

Once the court makes a decision that it has no jurisdiction, it must down its tools at once, as any other step taken thereafter becomes a nullity.

To that end, it may just be an academic exercise to move to determine the other issues framed as their outcome will not affect the court's decision that the Tribunals had no jurisdiction to hear the dispute between the two parties.

25. The final orders of the Rift Valley Provincial Land Disputes Appeals Board gave vacant possession of the suit plot to the **Interested party Winnie Wanja**. The Naivasha Land Disputes Tribunal NO. 88/2008 determined that the suit plot should be shared equally to both the exparte applicant and the complainant.

As demonstrated above, both tribunals acted in excess of their jurisdiction.

26. This court has been urged to issue an order of Certiorari to remove into this court, the decision of Rift Valley Provincial Land Disputes Appeals Board awarding vacant possession of **Kijabe Plot NO. 215 to the Interested Party**.

Doing so, which I hereby do, and leaving the Naivasha Land Disputes Tribunal's decision standing would be acting in vain.

27. In the premises, the two Tribunal's decisions must be quashed, to give effect to the Jurisdictional mandates of the Land Disputes Tribunals as clearly stated under **Section 3 (1) of the Act Cap 303 A (Repealed)**.

**Accordingly, for the foregoing reasons, I proceed to make the following orders in respect of the Notice of Motion dated 7/6/2018;**

*a. An order of Certiorari to remove into the High Court for purposes of being quashed, the decision of the Rift Valley Provincial Land Disputes Appeals Board awarding vacant possession of Kijabe Plot NO. 215 to the Interested Party, Winnie Wanja Owiti, is hereby allowed.*

*b. That the decision of the Naivasha Land Disputes Tribunal filed in the Senior Principal Magistrate's Court at Naivasha on the 17/4/2009 is also removed to The High Court and likewise quashed.*

*c. In view of the circumstances pertaining to the dispute herein, I order and direct that each party bears own costs of this Application.*

Orders accordingly.

**Dated, Signed and Delivered at Nairobi electronically this 20<sup>th</sup> day of May, 2020.**

**J.N. MULWA**

**HIGH COURT JUDGE.**