



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC MISC. APPLICATION NO 21 OF 2019

(Formerly HC Misc Civil App No.645 OF 2005(J/R))

REPUBLIC.....APPLICANT

VERSUS

MARGARET WARUGURU NDUNGU.....1ST RESPONDENT

MARGARET NJERI GICHU.....2ND RESPONDENT

LAIKIPIA LAND DISPUTE TRIBUNAL.....3RD RESPONDENT

SENIOR PRINCIPAL MAGISTRATE NAKURU.....4TH RESPONDENT

EX PARTE

WILLIAM KIPTOO CHEPKONGA

J U D G E M E N T

1. The ex parte applicant was granted leave to institute Judicial Review Proceedings on 19th October 2011. The ex parte applicant filed the substantive Notice of Motion dated 9th November 2011 on the same date. By the Motion the ex parte applicant sought the following orders:-

1. That an order of certiorari to issue to remove into this Court and to quash all the proceedings and the award of the Laikipia Land Dispute Tribunal in respect of the plot No.194 Olarabel Scheme wherein the ex-parte applicant was ordered to sub divide the land and transfer three acres to Margaret Waruguru Ndungu and two acres to Margaret Njeri Gichu made on the 19th July 2005 in the Laikipia Land Dispute Tribunal plot No.194 Olarabel scheme Margaret Njeri Gichu & Another – vs- William K Chepkonga.

2. That an order of certiorari to issue to remove in to this Court and to quash all proceedings, order and decree in Nanyuki Senior Principal Magistrate Court at Nanyuki Land Case No.2 of 2005, Margaret Njeri Gichu & Another – vs- William K Chepkonga made on the 17th day of April 2007.

3. Costs of the application be in the cause.

2. The Notice of Motion was premised on the grounds set out on the body of the application. The gist of the grounds was to the effect that the Laikipia Land Disputes Tribunal entertained a dispute that it had no jurisdiction to handle under the Land Disputes Tribunal Act No.18 of 1990 (now repealed). The ex parte applicant contended that the Tribunal acted ultra vires its powers and therefore the decision it rendered was illegal and null and void *abinitio* and hence was amenable to judicial review by way of an order of certiorari and prohibition.

3. The 1st Respondent, Margaret Waruguru Ndungu filed a replying affidavit dated 18th September 2012 on behalf of herself and on behalf of the 2nd Respondent in opposition to the Notice of Motion. She contended that the application was fatally defective as it was filed out of time and without leave. The 1st Respondent averred that all the parties attended before the Tribunal and no party raised any objection to the tribunal's jurisdiction to handle the matter. The Respondents, asserted that the Applicant had truly sold to them 5 acres on which they had lived and openly utilized for over 15 years. The Respondents further contended the applicant had no justifiable reason to refuse to subdivide the land for them to facilitate the processing of their respective titles for the portions they had purchased.

4. To appreciate the basis of the Judicial Review application, it is necessary to set out, albeit briefly, the background to the application as set out in the applicant's statement of facts filed simultaneously with the chamber summons for leave. The Applicant was the registered owner of plot No.194 Olarabel Scheme ("the suit property") which apparently he had charged to the Agricultural Finance Corporation (AFC). He sold to the 1st and 2nd Respondents portions of 3 and 2 acres respectively which were supposed to be subdivided from the suit property. The Applicant did not cause the subdivision and transfer to be effected in favour of the 1st and 2nd Respondents and that precipitated the dispute being referred to the Land Disputes Tribunal at Ng'arua, Laikipia District. The Tribunal heard the dispute and directed that the Applicant subdivide the suit land and transfers 3 acres and 2 acres to the 1st and 2nd Respondents respectively. This is the decision the applicant contends the Tribunal had no jurisdiction to make and seeks orders quashing the same and the consequential order made by the Senior Magistrate's Court, Nanyuki adopting the tribunal's decision as judgment and issuing a decree thereof.

5. The Notice of Motion was argued by way of written submissions. The ex parte applicant filed his submissions dated 6th September 2013 on 12th September 2013 and supplementary submissions dated 12th May 2015, in reply to the 1st and 2nd respondents submissions dated 23rd October 2013. Having reviewed the pleadings and the submissions filed by the parties the issue that stand out for determination are whether the application is fatally defective for want of leave; whether the application was filed out of time; and whether the tribunal had jurisdiction to handle the matter.

6. From the record and having regard to the proceedings before the Tribunal there is no dispute that the applicant was the registered owner of the suit property. There is equally no dispute that indeed the applicant had agreed with the respondents to sell to them portions of the suit property. Indeed during the proceedings before the Tribunal, the applicant never denied he had sold the land to the respondents. His (applicant's) concern was that he had secured a loan using the land as security with the AFC and he could therefore not subdivide the land until the loan had been cleared. The Respondents, it is clear, were before the Tribunal seeking to have the agreement/contract with the applicant honoured and/or enforced. Did the Land Disputes Tribunal have jurisdiction to handle such a dispute? To be able to answer the question, it is necessary to revert to the Land Disputes Tribunals Act No.18 of 1990 to determine the mandate of the Tribunals established under the Act.

7. The mandate of the Land Disputes Tribunals under the Act is set out under section 3(1) of the Act which provides as hereunder:-

3(I) 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.*

8. The jurisdiction of the Tribunal under the above provision has been the subject of numerous judicial pronouncements. The Court have been consistent that the Land Disputes Tribunal did not have jurisdiction to determine disputes affecting title to land and as is clear from section 3(1) of the Land Disputes Tribunal Act the tribunals jurisdiction was limited to determination of boundaries to land; claims relating to occupation of land and or use of land; and claim relating to trespass to land. The jurisdiction of the Tribunals did not include determination of ownership and/or claims arising out of agreements/contracts.

9. Claims relating to land not covered under clause 3(1) of the Land Disputes Tribunals Act, could only be referred to the Court as per the provisions of section 159 of the Registered Land Act, Cap 300 Laws of Kenya (now also repealed) where the land as in the present case was registered under the Act. Section 159 of the Registered Land Act provides :-

159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.

10. The Court of Appeal in the case of ***Asman Maloba Wepukhulu & another -vs- Francis Wakiuabubi Biketi- Kisumu CA No.157 of 2001*** held that as the Tribunal had entertained a dispute that affected land and directed the subdivision of the land which decision was adopted by the Senior Magistrates court, the decision both by the Tribunal and the Magistrate's Court were illegal for want of jurisdiction. The Court of Appeal in its judgment in the matter stated as follows:-

" At the close of the rival submissions by the parties, Mr Omukunda, counsel for the appellants, conceded that the learned judge could not be faulted at all since none of the two bodies was seized of jurisdiction to determine the dispute relating to the suit land, Bokoli/Kituni/169, was unlawfully interfered with by bodies which lacked jurisdiction and all orders made by them were illegal.

The effect of the decision of the learned judge is that all proceedings and orders made by them were illegal."

The effect of the decision of the learned judge is that all proceedings and orders made by the Senior Resident Magistrate's court and the Tribunal are a nullity and were correctly quashed and vacated by the judge. The parties must go back to the competent Court for a proper hearing of the dispute relating to the suit land. We confirm the decision of the learned judge."

11. In the case of ***Samuel Kamau Macharia and Another - vs- Kenya commercial Bank & 2 others (Supreme Court CA no. 2 of 2011)*** the Supreme Court stated that the Court could only exercise jurisdiction that is donated to it by either the constitution and or other written

Law. The Court sated this:-

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is compered upon it by law.”

12. Judicial review is not concerned with the determination of the merits of the respective parties claims but with the decision making process. Where a decision is made without or in excess of jurisdiction and/or in contravention of the rules of natural justice the Court will intervene. See **Kenya National Examination Council -vs- Republic Exparte Geoffrey Gathenji Njoroge & 9 others**. In the present matter the dispute concerned plot No.194 Olarabel Scheme which was registered in the Applicants name. the respondents sought to enforce a contract of sale to have the land subdivided and their respective portions transferred to them. The Tribunal in their decision ordered the subdivision of the Applicant’s land and the transfer of 3 acres and 2 acres respectively to the Respondents. This was not a dispute covered under section 3(1) of the Land Disputes Tribunals Act in regard to which the Tribunal had jurisdiction . The Tribunal acted in excess of its jurisdiction. It lacked the jurisdiction to deal with contracts relating to registered land. The tribunal’s decision had the effect of affecting title to registered land as it ordered the subdivision of the land. The Tribunal’s decision was null and void as it was made without jurisdictions and was of no legal effect.

13. There was no valid decision that the Magistrate’s Court could lawfully adopt as judgment. It matters not that the Magistrate’s Court purported to adopt the decision and a decree issued following such adoption. There was in law nothing to adopt as the Tribunal’s decision was void abinitio for want of jurisdiction. The Tribunal acted in excess of its jurisdiction and its decision was ultra vires.

14. In the case of **Macfoy -vs- United Africa Co. Ltd (1962) MAC 152**, the privy Council as per Lord Denning stated thus :-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceedings which is founded on it is also bad and incurably bad”.

15. Having come to the determination that the Tribunal acted in excess of its jurisdiction, I need not over emphasize that whatever decision it made was illegal and a nullity abinitio and incapable of being given effect. The purported adoption of the decision by the Magistrate’s Court was equally of no consequence. Jurisdiction is everything and without it, the Tribunal acted in vain. Without doubt I am satisfied the Tribunal’s decision is for quashing.

16. The 1st and 2nd Respondents have predicated their opposition to the applicant’s application on the grounds that the application was statute barred as it was not brought within six months as provided under Order 53 Rule 2. Further the 1st and 2nd Respondents have contended that no leave was sought and obtained before the application was made and further no party objected to the jurisdiction of the tribunal to handle the matter . The 1st and 2nd Respondents have additionally implored the Court not to sacrifice substantial justice at the altar of procedural technicalities arguing that the respondents have occupied the portions they purchased for over 15 years and hence the ends of justice would be infavour of the applicant being required to effect the subdivisions and the transfers of the portions that they purchased.

17. On the issue of delay in filing the application for judicial review, the record shows the Tribunal’s decision was rendered on 19th July, 2005 and the application for leave to institute judicial review proceedings was made on 21st September 2005 barely two months from the date the decision was made. The application however was not prosecuted for a considerable period of time for reasons that are not apparent. On 19th October 2011 the application for leave was pending and in the meantime the applicant had on 11th October ,2011 filed a fresh application for leave within the same Miscellaneous Application on the same facts and grounds but now incorporating prayer seeking to quash the proceedings, order and decree of the Nanyuki Senior Principal Magistrates Court - Land case No. 2 of 2007 made on 17th April 2007 arising from the adoption of the Tribunal’s decision. The Applicant elected to withdraw the earlier application for leave and to proceed with the subsequent application. The judge on the 19th October 2011 in exercise of his discretion allowed the withdrawal of the earlier application and granted leave on the basis of the applicant’s application dated 20th September 2011.

18. The 1st and 2nd Respondents never challenged the grant of leave either by way of review and/or appeal and hence the leave granted remained on record. On the basis of the record the judicial review proceedings were commenced within the requisite period under Order 53 Rule 2 of the Civil Procedure Rules and the requisite leave was appropriately given. Thus the 1st and 2nd Respondents assertion that the applicant’s application was statute barred and/or that the application was filed without leave lacks merit and I reject the same.

19. On the submission that all the parties acquiesced to the Tribunal’s jurisdiction to handle the matter, I would only reiterate that parties cannot confer jurisdiction to a Court even by consent. Jurisdiction as held in the Supreme Court case of **Samuel Kamau Macharia another - vs- Kenya Commercial Bank & 2 others (supra)** is donated either by the constitution and/or by statute or both and not otherwise.

20. Lack of jurisdiction cannot be equated to a procedural technicality so that a Court can excuse the breach. Jurisdiction goes to the substratum of any matter before the court or Tribunal. If the Court has no jurisdiction it cannot pronounce itself on the matter before it and if it does, the decision will be nullity. In the matter that went before the Land Dispute Tribunal the issue was whether there had been a valid sale to the Respondents. The Tribunal lacked the capacity to make that determination. If the dispute had been before a competent Court, such Court would have been concerned to see if the agreement had complied with the Law of Contract Act, Cap 23 Laws of Kenya, and the Land Control Act, Cap 302 Laws of Kenya and/or whether it was a fitting case for an order of specific performance of the contract. The Tribunal lacked the jurisdiction/Capacity to make any such inquiries.

21. The net result is that I hold and find the Exparte applicants Notice of Motion dated 9th November 2011 to be well founded and merited

and I accordingly issue an order of certiorari in terms of prayers, 1 and 2 of the Notice of Motion.

22. Having regard to all the attendant circumstances I am persuaded that the appropriate order on costs is that each party bears their own costs of the application.

23. Orders accordingly.

Judgment dated, signed and delivered at Nakuru this 19th day of February 2020.

J M MUTUNGI

JUDGE