REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

JR E.L.C. CASE NO. 6 OF 2016

REPUBLIC...APPLICANT

VERSUS

ANISELIMO NJERU MBANDA...1ST RESPONDENT

PRINCIPAL MAGISTRATES' COURT SIAKAGO........2ND RESPONDENT

NATIONAL LAND COMMISSION...........................EX-PARTE APPLICANT

AND

N.K. NYAGA LAND REGISTRAR..................................INTERESTED PARTY

JUDGEMENT

A. Introduction

1. By a chamber summons dated 15th December 2016 the *ex-parte* Applicant (hereafter the Applicant) sought leave of court to apply for judicial review orders of *certiorari, prohibition* and *mandamus* against the Respondents. The order of *certiorari* was intended to quash the award of the Mbeere Land Disputes Tribunal (hereafter *Tribunal*) with respect to *Title No. Nthawa/Siakago/299* (hereafter *suit property*) which was subsequently adopted by the Magistrates' court in *Siakago PMCC LDT Case No. 20 of 2012* (hereafter *Case No. 20 of 2012*) as a decree. The orders of *prohibition* and *mandamus* were intended to deal with all the consequential orders which followed the adoption of the Tribunal's award as a decree of the Magistrates' court.

2. By a ruling dated 20th December 2016, the court granted leave to the Applicant to apply for orders of *prohibition* and *mandamus* only. The court declined to grant leave for an order of *certiorari* to quash the award of the Tribunal on the ground that more than 6 months had lapsed since the date of the award. It was also ordered that the leave so granted do operate as stay of the subordinate court's ruling dated 24 th November 2016 on contempt of court proceedings against the Interested Party.

B. The Applicant's case

3. By a notice of motion dated 15th December 2016 and filed on 30th December 2016 brought under **Section 8 of the Law Reform Act (Cap. 26)** and **Order 53 Rules 1 & 3** of the **Civil Procedure Rules** (hereafter the Rules) the Applicant sought the following orders:

> *a) An order of prohibition do issue to stop the 1st and the 2nd Respondents from enforcing the determination of the Land Disputes Tribunal and the subsequent adoption by the 2nd Respondent herein.*
>
> *b) An order of prohibition do issue to stop the 2nd Respondent herein from enforcing its ruling dated the 24th of November 2016 holding that the Interested Party herein is in contempt of court.*
>
> *c) An order of mandamus do issue to compel the interested party to retain the caution over the property known as Nthawa/Siakago/299.*
>
> *d) Costs of this application be provided for.*

4. The said motion was grounded upon the statutory statement and verifying affidavit filed with the chamber summons for leave to apply for judicial review. The statutory statement indicated that the suit property was at all material times registered in the name of the Siakago Primary School and that the 1st Respondent had lodged a claim for a portion of the suit property before the Tribunal. It was further contended that in excess of its jurisdiction the Tribunal had made an award directing sub-division of the suit property into two portions so that one portion could be registered in favour of the 1st Respondent.

5. It was contended that at the time of adoption of the said award as a decree in *Case No. 20 of 2012* the **Land Disputes Tribunals Act, 1990** had already been repealed hence the 2nd Respondent had no jurisdiction to adopt the Tribunal's award as a decree. The Applicant, therefore, contended that the 2nd Respondent had no jurisdiction to adopt the Tribunal's award since there were no saving provisions in the **Environment and Land Court Act 2011** by which the **Land Disputes Tribunals Act 1990** was repealed.

6. The Applicant's further case was that upon learning of the dispute concerning the suit property it caused a restriction to be registered against it in order to protect public interest pursuant to its mandate under the **Constitution of Kenya 2010** and the **National Land Commission Act, 2012.** However, at the instance of the 1st Respondent, the 2nd Respondent directed the removal of the caution and when the Land Registrar (the Interested Party) failed to remove it promptly he was adjudged to be in contempt of court vide a ruling dated 24th November 2016.

7. In a nutshell, the Applicant's contention was that since the award of the Tribunal and the subsequent decree were passed without jurisdiction, the same could not be a basis for contempt of court proceedings, hence it sought the annulment of the decree and the contempt of court proceedings before the 2nd Respondent.

C. <u>The Respondents' case</u>

a) <u>The 1st Respondent's case</u>

8. The 1st Respondent filed a replying affidavit sworn on 13th January 2017 in opposition to the application for judicial review. He contended that the award of the Tribunal and the subsequent decree were valid and lawful and that they had not been challenged in the manner provided for by law. It was further contended that the Interested Party had failed to file any response in the contempt of court proceedings.

9. The 1st Respondent further stated that the application for judicial review was irregular since the Applicant should have sought a remedy through the appellate process. He further contended that the award of the Tribunal was very reasonable and fair and that the Interested Party should have implemented the award which was adopted as a decree by the 2nd Respondent. The 1st Respondent consequently asked the court to dismiss the application for judicial review.

b) <u>The other Respondents' case</u>

The 2nd Respondent and the Interested Party did not file any response to the said application. They did not also participate in the application for judicial review in any way.

D. <u>The Applicant's submissions</u>

10. The said application was prosecuted orally by Ms. Njuguna for the Applicant. She relied upon the grounds set out in the statutory statement dated 9th December 2016. She submitted that the Tribunal had no jurisdiction in law to entertain the dispute and to make the award under the law. It was her submission that the award of the Tribunal was made *ultra vires* and without jurisdiction.

11. It was further submitted that the adoption of the said award by the 2nd Respondent on 31st January 2013 in *Case No. 20 2014* was irregular and without jurisdiction. It was submitted that the **Land Disputes Tribunals Act, 1990** which provided for adoption of such an award as a decree was repealed by the **Environment and Land Court Act, 2011.** It was pointed out that there were no saving or transactional provisions in the **Environment and Land Court Act** with respect to matters which were pending adoption. Ms. Njuguna referred to the case of **Masaga Ole Koitelel Naumo V Principal Magistrates' Court Kajiado Law Courts & Another [2014] eKLR** in support of her submissions.

12. Finally, the Applicant submitted that the impugned award and decree could not form the basis of contempt of court proceedings since they were made without jurisdiction hence null and void in the eyes of the law. The Applicant cited the case of **Saroj K. Shah V Naran Mani Patel & 2 Others [2015] eKLR** in support of that submission. Consequently, the Applicant urged the court to allow its application for judicial review.

E. <u>The 1st Respondent's submissions</u>

13. Mr. Momanyi for the 1st Respondent opposed the said application on the basis of the replying affidavit sworn on 13th January 2017. It was submitted that Ms. Njuguna's submissions should be expunged from the record because she was not on record for the Interested Party. It was submitted that the proceedings for contempt of court principally affected the Interested Party and that he had chosen not to participate in the proceedings.

14. It was further submitted by Mr. Momanyi that the entire application for judicial review was irregular since it was filed before leave of court had been granted under **Order 53** of the **Rules.** It was contended that whereas leave was granted on 20th December 2016 the

substantive notice of motion was filed on 15th December 2016.

15. The 1st Respondent further submitted that the Tribunal had jurisdiction to make the award and that the 2nd Respondent had jurisdiction to adopt the award as a judgement. Mr. Momanyi did not specifically respond to the issue of the Tribunal's jurisdiction under the establishing Act and the repeal of the **Land Disputes Tribunals Act 1999** by the **Environmental and Land Court Act 2011**.

16. Finally, it was submitted on behalf of the 1st Respondent that the 2nd Respondent had jurisdiction to entertain proceedings for contempt of court under **Section 10 of the Magistrates' Court Act.** It was contended that all the concerned parties were represented before the 2nd Respondent and that the instant application was merely an afterthought.

17. Upon conclusion of his submissions Mr. Momanyi sought leave to file authorities in support of his submissions. In spite of opposition by Ms. Njuguna for the Applicant, the court granted Mr. Momanyi seven (7) days within which to file and serve his authorities. The Applicant was also granted leave to file a response to such authorities within 7 days upon service. However, by the time of preparation of the judgement the 1st Respondent had not filed any authorities.

F. <u>The issues for determination</u>

18. The court has considered the Applicant's notice of motion dated 15th December 2016, the statutory statement, verifying affidavit, and the replying affidavit sworn by the 1st Respondent in opposition to the application for judicial review. The court has also considered the oral submissions of the parties in this matter. The court is of the opinion that the following issues arise for determination in this matter:

a) Whether the instant application for judicial review was filed without leave of court.

b) Whether the Tribunal had jurisdiction to entertain the dispute concerning the suit property and to make the consequent award.

c) Whether the 2nd Respondent had jurisdiction to adopt the award of the Tribunal as a judgement of the court in Case No. 20 of 2014.

d) Whether the decree in Case No. 20 of 2014 could form the basis of contempt of court proceedings.

e) Whether the Applicant is entitled to the orders sought in the application for judicial review.

f) Who shall bear costs of the application.

G. <u>Analysis and determination</u>

19. Although the 1st issue was not raised in the 1st Respondent's replying affidavit, the court has decided to determine it as a distinct issue because it was raised in court during the hearing of the application for judicial review. The court made an order on 9th March 2017 directing the Deputy Registrar to ascertain the actual date of filing of the notice of motion dated 15th December 2016 since the court stamp impression thereon was not very clear.

20. By an undated report filed on 19th November 2019 the Deputy Registrar stated that he could not ascertain the date of filing since the receiving stamp impression was not clear. The report, however, confirmed that leave of court was granted on 20th December 2016. The court has checked the court stamp on the notice of motion dated 15th December 2016. It would appear that although the full date is not captured, the date appearing thereon is 30th. The month appears to be missing but the year is 2016.

21. On the basis of the material on record, the court is unable to hold that the application for judicial review was filed without leave of court. There is evidence on record that vide a ruling dated 20th December 2016 the Hon. Justice B.N. Olao granted leave under **Order 53 Rule 1** of the **Rules.** The mere fact that the notice of motion was dated before the leave was granted could not invalidate such leave as long the application was filed after the grant of leave. Accordingly, there is no sufficient material on record to demonstrate that the application for judicial review was filed without leave of court under **Order 53** of the **Rules.**

22. The court has considered the material on record and the submissions of the parties on the 2nd issue. There is no doubt that the defunct Tribunal was a creature of statute. It was established under **Section 4** of the repealed **Land Disputes Tribunals Act, 1990.** It could therefore only have and exercise the jurisdiction as circumscribed by the establishing statute. Its jurisdiction was set out under **Section 3 (1)** of the said **Act** as follows:

"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."

23. The material on record indicates that the suit property was at the material time registered as reserved for Siakago Primary School in the land register. There is no evidence on record to demonstrate that the claim before the Tribunal was a boundary dispute, a claim to occupy or work land or a claim for trespass to land. In fact, the award of the Tribunal demonstrates that it was none of the foregoing because it ordered the Land Registrar to sub-divide the suit property into two portions so that the 1st Respondent could get one portion thereof. It is thus clear that the Tribunal had no jurisdiction to entertain the claim before it and to make the consequent award.

24. As was held in the case of **Joseph Malakwen Lelei & Another V Rift Valley Land Disputes Appeals Committee & 2 Others [2014] eKLR** which was cited by the Plaintiff's advocate, a tribunal's decision made without jurisdiction cannot be allowed to stand. In the said case, it was held by the Court of Appeal, *inter alia,* that:

> **"Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a Trust in favour of a party, which in essence was the basis of the 3rd Respondent's claim. Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity. See Macfoy V. United Africa Co. Ltd 1961 3 All ER 1169; Continental Credit Finance Ltd [2003] 2 EA 399; Owners of Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Limited (1989) KLR 1.'**

25. The 3rd issue is whether the 2nd Respondent had jurisdiction to adopt the award of the Tribunal as a judgement of the court. There is no doubt that the **Land Disputes Tribunals Act, 1990** was repealed by the **Environment and Land Court Act.** The latter **Act** came into force on 30th August 2011. It had no transitional or saving provisions with respect to awards which were pending adoption. It would therefore follow that by the time the 2nd Respondent was adopting the award of the Tribunal as a judgement on 31st January 2013, the enabling legislation had long been repealed.

26. In the case of **Masagu Ole Koitelel Naumo Vs Principal Magistrate Kajiado Law Courts & Another (supra)** which was cited by Ms. Njuguna for the Applicant, Odunga J whilst dealing with similar circumstances held, *inter alia,* that:

> **"The *Environment and Land Court Act* commenced on 30th August, 2011. The award in question was made on 25th March, 2010 which was obviously before the said Act came into effect. However, the adoption of the award was on 14th August, 2013 by which time the *Land Disputes Tribunal Act*, No.18 of 1990 had been repealed by section 31 of the *Environment and Land Court Act*. Apparently there was no saving provision for proceedings which were either pending hearing before the Tribunal or adoption before the Courts. Accordingly, by repeal of the *Land Disputes Tribunal Act*, No.18 of 1990, no Court could purport to exercise any powers thereunder. In adopting the award on 14th August, 2013, the learned Magistrate was invoking the provisions of sections 7 and 8 of the said repealed Act. In my view the Magistrate could not purport to exercise a jurisdiction which had ceased to exist by operation of law. While the *Land Disputes Tribunal Act*, No.18 of 1990 existed the learned Magistrate had no option but to adopt the award but by the repeal of the said Act that jurisdiction nolonger existed. In other words with the repeal of the *Land Disputes Tribunal Act* went the jurisdiction of the Magistrate's Court to exercise any jurisdiction thereunder and the Respondent ought not to have entertained the application effective from the date of the said repeal since the jurisdiction to adopt the award emanated from the said Act without which no such jurisdiction existed. The Respondent had no blanket power to exercise jurisdiction at large as it were and *in vacuo*."**

27. The court is of the same persuasion as Hon. Justice Odunga that a jurisdiction which has since been taken away by the enabling legislation cannot be exercised in a vacuum. Once jurisdiction is conferred by statute, it can also be taken away in similar manner. The court, therefore, concurs with the Applicant's submission that the 2nd Respondent had no jurisdiction to adopt the award of the Tribunal as a judgement at the material time.

28. The 4th issue is whether the decree in *Case No. 20 of 2014* could form the basis of contempt of court proceedings. The court has considered the submissions of the parties and the authority cited by the Applicant. The court has already found that both the award of the Tribunal and the decree of the 2nd Respondent were made without jurisdiction hence null and void in the eyes of the law. In the case of **Saroj K. Shah V Naran Mani Patel** (supra) which was cited by the Applicant, the Court of Appeal held, *inter alia,* that:

> **"Upon a thorough perusal of the record before us, it seems quite clear as we have already stated that the order by the BPRT on 12th May 2011 was made without jurisdiction. It was not given at the instance of the Appellant. It was at any rate a patent nullity. The learned judge cannot be faulted for finding that it could not be the basis for citing and punishing the Respondents for alleged contempt. An order made without jurisdiction cannot produce rights and is void for all purposes …"**

29. The court is persuaded by the Applicant's submissions on this issue. A court of law should not conternance or aid in the perpetuation of an illegality. It is the policy of the law that a court ought not to close its eyes to an illegality. It does not matter that such illegality was brought to the attention of the court irregularly or by a stranger. The mere fact that it was the Applicant and not the parties who were directly fighting over the suit property who alerted the court of such illegality does not make the impugned actions lawful.

30. The 5th issue is whether the Applicant is entitled to the reliefs sought in the application. The purpose of judicial review was summarized in the case of **Municipal Council of Mombasa V Umoja Consultants Ltd Civil Appeal No. 185 of 2001** as follows:

“**Judicial review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters… The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision…”**

31. The main principles to be considered in an application for judicial review were propounded in the Ugandan case of **Pastoli V Kabale District Local Government Council & Others [2008] E.A. 300 at 303-304** as follows:

“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 or procedural impropriety. See *Council of Civil Service Union v Minister for the Civil Service [1985] A.C.2* and also *Francis Bahikirwe Muntu and Others Vs Kyambogo University, High Court, Kampala, Miscellaneous application number 643 of 2005 (UR).*

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles are instances of illegality.

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. *Re an application* by *Bukoba Gymkhana Club [1963] EA 478* at page 479 paragraph E.

Procedural impropriety is when there is 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 exercise jurisdiction to make a decision *(Al-Mehdawi V Secretary of State for the House Department [1990] AC 876)*.”

32. The court has considered the Applicant’s grievances in light of the above principles. The Applicant’s grounds for judicial review are hinged on the principle of illegality. The court has found that The Tribunal had no jurisdiction to make the impugned award. The court has also found that the 2nd Respondent had no jurisdiction to adopt the award as a judgement and decree of the court. The court has further found that the said award and decree were null and void hence they could not form the basis of contempt of court proceedings. The court is of the opinion that the judicial process is a solemn process. It should not allow a tainted award or decree to find refuge therein.

33. On the basis of the material on record, the court is satisfied that the Applicant has made out a case for the grant of the orders sought. Accordingly, the court is inclined to grant the orders sought in the notice of motion dated 15th December 2016 and filed on 30th December 2016 save the order of mandamus.

34. The court is, however, not inclined to grant an order of *mandamus* sought in order to compel the Interested Party to maintain the restriction for at least two reasons. First, a restriction is designed to be a time-bound encumbrance to prevent dealings pending resolution of an issue or dispute with respect to property which may be the subject of a dispute or suspected fraud. It is not an end in itself nor should it be treated as a final remedy. Accordingly, the Applicant has had sufficient time since 2014 to undertake investigations or other processes pursuant to its constitutional and statutory mandate with respect to the suit property.

35. The second reason is that the Interested Party has a statutuory discretion on the entry and removal of restrictions under the **Land Registration Act 2012.** A court of law should not interfere with such discretion on the part of the Interested Party through an order of *mandamus* except on good and justifiable grounds. In the case of **Republic V Kenya National Examinations Council *Ex-parte* Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** the scope of the order of *mandamus* was considered by the Court of Appeal as follows:

“The next issue we must deal with is this; what is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURYS LAWS OF ENGLAND 4th Edition, volume 1 at page 111 from paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty…

The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty to be carried out in a specific way.” (emphasis added)

36. The court is thus of the opinion that the Interested Party has some statutory discretion in the management of restrictions hence the same should not be fettered by this court without justifiable reason. There is no justifiable reason for the court to compel the Interested Party to perform his duty in a particular way. There is no more danger of the award of the Tribunal being implemented or the subsequent decree being executed. There is also no danger of contempt of court proceedings being continued or maintained on the basis of the impugned decree. Accordingly, the Interested Party shall retain his statutory discretion on the removal of the restriction without having to move this court for permission to do so.

37. The 6th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967] EA 287.** However, due to the peculiar circumstances of this case the court is of the opinion that each party to the proceedings should bear his own costs. This is a case whereby both the Tribunal and the 2nd Respondent acted without jurisdiction hence it would be unfair to condemn the unsuccessful parties to pay costs.

H. Summary of court's findings

38. In summary, the court makes the following holdings on the issues for determination:

a) There is no evidence on record to demonstrate that the instant application for judicial review was filed without leave of court.

b) The Tribunal had no jurisdiction to entertain the 1st Respondent's claim and make the consequent award.

c) The 2nd Respondent had no jurisdiction to adopt the award of the Tribunal as a judgement or decree of the court in Siakago PMC LDT Case No. 20 of 2014.

d) The decree of the court in Siakago PMC LDT Case No. 20 of 2014 could not form the basis of contempt of court proceedings.

e) The Applicant has demonstrated its application for judicial review hence it is entitled to the reliefs sought save the order of mandamus.

f) Each party shall bear his own costs of the application.

I. Conclusion and disposal orders.

39. The upshot of the foregoing is that the court finds merit in the application for judicial review. Accordingly, the Applicant's notice of motion dated 15th December 2016 is hereby allowed in the following terms only:

a) An order of prohibition be and is hereby issued to prohibit the 1st and 2nd Respondents from enforcing or implementing the award of the Mbeere Land Disputes Tribunal and its subsequent adoption by the 2nd Respondent.

b) An order of prohibition be and is hereby issued prohibiting the 2nd Respondent from enforcing its ruling dated 24th November 2016 on contempt of court proceedings.

c) The prayer for an order of mandamus sought in order No. 3 is hereby declined.

d) Each party shall bear his own costs.

40. It is so adjudged.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 12TH DAY of MARCH, 2020.

In the presence of Mr. Kathungu holding brief for Mr. Momanyi for the 1st Respondent and in the absence of the rest of the parties.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

12.03.2020