



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 7 OF 2016

SIMON MUCHIRI MACHARIA.....1ST APPLICANT

PETER MWANGI MUCHIRI2ND APPLICANT

VERSUS

THE SENIOR PRINCIPAL MAGISTRATE- MOLO....1ST RESPONDENT

JAMES MACHARIA.....2ND RESPONDENT

THE MOLO LAND DISPUTE TRIBUNAL.....3RD RESPONDENT

JUDGMENT

(Judicial Review motion seeking orders of certiorari to quash an order issued by court; original suit having been commenced at the Land Disputes Tribunal; award adopted and decree issued; order sought to be quashed not being the decree but being an order made to execute the decree; argument that the court did not have jurisdiction to issue the said order; suit fails for the court that issues a decree has jurisdiction to make orders in execution of that decree; it cannot be argued that the court that issues a decree has no jurisdiction to execute it; the issue of whether or not the Tribunal had jurisdiction to make the award or whether the decree was proper not being matters before court; suit dismissed)

1. Through an application filed on 23 April 2016, the ex-parte applicants sought and were granted leave to commence judicial review proceedings and they proceeded to file the main motion on 12 April 2016 seeking the following orders :-

- i. That this Honourable Court be pleased to issue an order of certiorari to move to the High Court (this court) and quash the order issued on 14th October 2014 by the 1st respondent authorizing the 2nd respondent to register instruments as (sic) the Nakuru District Land Registry to revert back the land parcel Mau Summit/Molo Block 5/138 to Muchiri Gachigi and the Land Registrar to facilitate the said reversion.
- ii. That this Honourable Court do issue an order of prohibition to prohibit or stop the 1st respondent and the 2nd respondent from executing the order issued on 14th October 2014 by the 1st respondent which arise (sic) from a decision of Molo Land Dispute Tribunal Case No. 6 of 2008 that later gave rise to Molo SPMCC Land Dispute Case No 40 of 2008.
- iii. That the costs of this application be borne by the 2nd respondent.

2. In the application for leave, the ex-parte applicants sought leave for the said prerogative orders on the grounds that :-

- a. That the order issued on 14 October 2014 and other subsequent orders issued in Molo Land Disputes Tribunal No. 40 of 2008 by the 1st respondent are a nullity.
- b. That the decision of the 1st respondent dated 14th October 2014 is a nullity for want of jurisdiction or having been made in excess of jurisdiction.
- c. That the 1st respondent's orders are made in furtherance of a nullity and the applicants stand to suffer irreparable loss unless the orders sought herein are granted.

3. In the verifying affidavit the ex-parte applicants have averred inter alia that they are respectively the proprietors of the land parcels Mau Summit/Molo Block 5/1347 and Mau Summit/Molo Block 5/1348. They have contended that the Tribunal (Land Disputes Tribunal) acted in excess of its jurisdiction by ordering the cancellation of their title deeds. They further contend that all subsequent orders issued pursuant to the adoption of the award of the Tribunal as a judgment are a nullity. They have averred that the District Land Registrar is in the process of implementing the award. They have also stated that they were not served nor were they aware of the Tribunal proceedings save at the time that they were adopted as a judgment in the Molo Senior Resident Magistrate's Court (Molo Court). They have annexed copies of their titles to the two properties, the decree of the Molo Court, and a ruling of the Molo Court dated 27 October 2015.

4. Only the 2nd respondent filed a replying affidavit to oppose the motion. In his replying affidavit, he has denied that the ex-parte applicants are the sole proprietors of the land parcels Mau Summit/Molo Block 5/1347 and 1348 (hereinafter referred to as the suit properties). He contended that their title deeds were obtained by way of fraud and misrepresentation of facts to the Nakuru District Land Registrar. He has stated that the original title deed from which the applicants obtained their titles was Mau Summit/Molo Block/138 which belonged to their deceased father. He has pointed out that the Tribunal was informed of this evidence and in its award, ordered that the ex-parte applicants, who are his brothers, do give him ½ an acre. He has mentioned that the award was adopted on 21 March 2014 in the case Land Dispute No. 40 of 2008. He has complained and considered it to be a mischief that on 25 April 2006, the ex-parte applicants got themselves registered as joint absolute proprietors of the land of their late father, then split the title into the parcels No. 1347 and 1348 without a grant of court. He has averred that no succession proceedings over the estate of their late father has ever been filed and stated that it is a mystery as to how the said title was subdivided. He has urged that the motion herein should not be allowed for the same will amount to aiding and abetting a fraud and an illegality.

5. I have gone through the documents tendered. I have seen that through the case registered as No. 6 of 2008, the 2nd respondent lodged a claim before the Molo Land Disputes Tribunal. His complaint was that their father died leaving behind the land Mau Summit/Molo Block 5/138 Moto Farm; some land in Mawingu Farm, Molo South and Kandyenye. He complained that John Gathatwa Muchiri (the 1st objector before the Tribunal) owns land in Mawingu Farm Molo South measuring 5 acres; that the 2nd objector, one Peter Kaguora Muchiri, owned land in Kiambaa in Moto Farm, Molo of 1 ¼ acres; and that the 3rd and 4th objectors (the ex-parte applicants) owned land at Moto Farm the title being the land parcel Mau Summit/Molo Block 5/138 (hereinafter at times simply referred to as parcel No. 138). He complained that he had no share in his father's properties and that the objectors had changed the titles from their father's name into their name in his absence. He thus wanted somewhere to build and settle and further that the money that their father left in the bank be shared equally. The Tribunal noted that the 1st, 2nd and 3rd objectors were present with the 4th objector absent. It was recorded by the Tribunal that the 3rd and 4th objectors (the ex-parte applicants) agreed to give the complainant (2nd respondent) ½ an acre each to make a total of one acre from the land parcel No. 138, and that the 1st objector, would give their two sisters ½ an acre each. The land parcel No. 138 was noted to be 5 acres. In its award, the Tribunal stated that because the objectors had agreed in the presence of the Tribunal to give their brother (2nd respondent) ½ an acre each, they should proceed to do so.

6. The award was filed before the Court in Molo in the case Land Dispute No. 40 of 2008 and from what I can see, judgment was entered in terms of the award on 21 May 2009. I do not know what transpired after that for I have seen another order dated 18 March 2014, which again adopted the award of the Tribunal and further ordered that the District Surveyor do visit the parcel No. 138 and subdivide it into two parcels, one acre for the 2nd respondent and the rest to the other parties. The applicant (2nd respondent) was to meet the costs of the survey and recover 50% from the respondents (the 3rd and 4th objectors before the Tribunal). I have seen another order dated 14 October 2014, where the Molo Court gave orders directing the District Land Registrar, to cancel the titles of the ex-parte applicants to the land parcels Mau Summit/Molo Block 5/1347 and 1348. Thereafter, an application was filed apparently by the 2nd ex-parte applicant (named as the 4th objector in the Tribunal proceedings) seeking to vary, review, or set aside these order arguing that he was not party to the Tribunal proceedings and that the land was given to him vide succession proceedings. That application was dismissed through the order dated 27 October 2015.

7. It does appear that subsequently, the 2nd respondent moved to execute the award and judgment of the court for the ex-parte applicants, did annex a notice by the Nakuru District Land Registrar, dated 26 February 2016, directing that he would proceed to cancel the registration of the ex-parte applicants as proprietors of the suit properties, so that they can revert back to the land parcel No. 138, and thereafter execute the orders of court (directing that the 2nd respondent be given 1 acre from this land) and the ex-parte applicants then moved this court. The ex-parte applicants also annexed copies of title deeds to the land parcel Mau Summit/Molo Block 5/138 which is land measuring 2.12 Ha, and which title shows that they became registered as joint proprietors on 25 April 2006, and their titles to the land parcels Mau Summit/Molo Block 5/1347 and 1348, which show that they became proprietors of these two parcels of land on 31 January 2013. Both these parcels of land measure 1.06 Ha and appear to be subdivisions of the land parcel Mau Summit/Molo Block 5/138.

8. In his written submissions, Mr. Makori, learned counsel for the ex-parte applicants, inter alia submitted that the tribunal had no capacity to deal with land which already had title and owned by the applicants. He submitted that the land was transferred to the ex-parte applicants by their late father after giving and/or allocating all his sons land where the 2nd respondent had his at Tebere-Kawaura, Olenguruone, way back in 1978. He submitted further that the ex-parte applicants did not participate in the tribunal proceedings nor did they consent to giving ½ an acre of their land to the 2nd respondent. He asked for this court to find that the tribunal acted in excess of its jurisdiction by altering cancellation of the title deeds already in their possession that is Mau Summit/Molo Block 5/1347 and 1348; to find that the applicants not being aware of the said tribunal proceedings and the verdict was illegal and irregular as the applicants were condemned unheard against the rules of natural justice; and that the idea that there was consent by the ex-parte applicants to give ½ an acre to the 2nd respondent was not supported by any document to show that such consent was given by them. He submitted that the tribunal acted beyond their jurisdiction and he urged that I quash the same (sic) and that I further prohibit the implementation of the order of 14 October 2014 and declare it null and void.

9. The 2nd respondent who was acting in person submitted that if there was any issue, the Tribunal and the court would have said so and he relied on the court's proceedings.

10. I have considered the matter. Lest we lose focus of what is before this court, I find that it is important that I reiterate the orders that the

ex-parte applicants want in these proceedings. There are two prayers, the first being to quash the order issued on 14 October 2014 by the 1st respondent (the Molo Court) and secondly an order of prohibition to stop the execution of the order issued on 14 October 2014. I have already given the background to that order in my above analysis. Specifically, the order sought to be quashed provides as follows :-

- i. That the District Land Registrar to enter into parcel Mau Summit/Molo Block 5/1347 and 1348 and cancel the said title and revert back the above parcel to original number Mau-Summit/Molo Blok 5/138 as per the recommendation of the District Surveyor Letter dated 28th July 2014.
- ii. That the District Land Registrar to cancel the green card and title deed of parcel No. Mau Summit/Molo Block 5/1347 and re-open the green card for Mau-Summit/Molo Block 5/138 which was closed on partition.
- iii. That the surveyor be accompanied by the OCS Molo Police Station in order to provide security.

11. The contention of the ex-parte applicants is that the said orders are a nullity as the court did not have jurisdiction to make them or that the said orders were made in excess of jurisdiction.

12. I do note that in his submissions, Mr. Makori, learned counsel for the ex-parte applicants, did submit inter alia, that the Land Disputes Tribunal did not have jurisdiction in the dispute. I think it is necessary for me to make clear that the proceedings before me do not ask me to quash the award of the Land Disputes Tribunal nor is it seeking orders to quash the adoption of the award of the Molo Court nor to quash the decree of the Molo Court. What the ex-parte applicants want quashed is an order of 14 October 2014, which to me, appears to be an order that was made so as to facilitate the execution of the decree of the court. It is not the decree itself.

13. The argument of the ex-parte applicants is that the court had no jurisdiction to make the order of 14 October 2014. I do not agree. As I have mentioned, the orders were made so as to execute a decree of the court. I do not see how one can argue that a court has no jurisdiction to make orders that are aimed at executing a decree issued by the same court. If the issue is that the Tribunal had no jurisdiction to make the award, or that the Molo court had no jurisdiction to adopt the award or pass the decree that it did, then what the ex-parte applicants ought to have applied for is for the quashing of the award, or the decree. As it is, there are no pleadings before this court to enable this court determine whether or not the Tribunal had the requisite jurisdiction to determine the dispute that was placed before it by the 2nd respondent. Neither do I have any pleadings before me to enable me determine whether the Magistrate's Court at Molo had the requisite jurisdiction to adopt the award and pass the decree. It is trite law that parties are bound by their pleadings and it will be unfair to the respondents herein if this court went beyond the pleadings before it to determine questions that the respondents were not given prior notice of. I cannot thus proceed beyond the scope of the pleadings placed before me.

14. Without there being a pleading that the award of the Tribunal be quashed, and without there being a pleading that the decree of the Molo Court be quashed, I do not see how this court can proceed to only quash an order made to execute the decree. As I have explained, a court has jurisdiction to make orders aimed at executing the decree that it has made. This is in fact specifically provided for in Section 34 (1) of the Civil Procedure Act, which provides as follows :-

34 (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

15. It follows from the above that the Molo Court sued as the 1st respondent, had jurisdiction to make orders relating to the execution of its own decree. Whether or not the Tribunal had jurisdiction to make the award, or the Court jurisdiction to adopt the award and pass a decree, as I have explained, are not matters that are before me, and I will therefore not delve into them. What is before me is the question whether the court had jurisdiction to make the order of 14 October 2014, and my holding is that it had, for the reason that Section 34 (1) above gives the court that passed the decree power to determine all questions inter alia relating to the execution of the decree; the court thus had jurisdiction to make those orders. The court would cease having the power to make the said orders only if its proceedings and/or decree were nullified. As it stands, they have not been nullified and there is no prayer to nullify them, and given that position, it cannot be argued that the court had no jurisdiction to make orders to execute its own decree.

16. It is for the above reasons that I am not persuaded to grant the prayer to quash the said orders by an order of certiorari, or to prohibit the execution of the orders of 14 October 2014 made by the 1st respondent.

17. This suit therefore fails and is dismissed with costs to the 2nd respondent.

18. The interim orders issued when this court granted leave to commence these judicial review proceedings are also set aside.

19. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 13th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Otiga holding brief for Mr. Makori for the ex-parte applicants.

2nd respondent present acting in person.

Court Assistants: Janepher Nelima /Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU