



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

MISCELLANEOUS APPLICATION NO. 116 OF 2002

IN THE MATTER OF AN APPLICATION BY RICHARD JUMA SUMBULI FOR LEAVE TO APPEAL FOR ORDERS OF CERTIORARI & PROBATION

AND

IN THE MATTER OF LAND DISPUTE TRIBUNAL ACT, THE WESTERN TRIBUNAL LAND DISPUTE APPEAL TRIBUNALS NO 147/1999 AND BUMULA LAND

RICHARD JUMA SAMBULI EX PARTE APPLICANT

VERSUS

THE CHAIRMAN BUMULA LAND DISPUTES

TRIBUNAL AND THE WESTERN PROVINCIAL

APPEALS COMMITTEE.....RESPONDENT

AND

PATRICK MUTOKO SAMBULI

MARICO SIFUNA OKUMU.....INTERESTED PARTIES

J U D G M E N T

By an amended Notice of Motion dated 16th April 2003 and filed on 13th February 2003, the Ex-parte Applicant **RICHARD JUMA SAMBULI** sought the following orders: -

1. This Honourable Court be pleased to issue an order of certiorari and prohibition to remove into this Court and quash the decision of the WESTERN PROVINCIAL APPEALS COMMITTEE and the BUMULA LAND DISPUTES TRIBUNAL presented to the BUNGOMA LAW COURT on 13th June 2002 for adoption.

2. Costs of this application.

This was pursuant to leave granted in **BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION NO 111 OF 2002** on 18th June 2002.

The motion was premised on the following grounds: -

1. The Tribunal and the Appeals Committee acted in excess of it's statutory jurisdiction.

2. The Tribunal and the Appeals Committee acted without jurisdiction.

3. The proceedings in the Tribunal and Appeals Committee were unprocedural for want of pleadings before it and therefore null and void.

4. The Tribunal and Appeals Committee award is fatally defective as it sought to confer title.

5. The Tribunal and Appeals Committee award is fatally defective as it dealt with a matter that was time barred.

The motion was accompanied with the supporting affidavit of the Applicant and a statement of facts.

In brief, the core issues raised in this application are that the Interested Parties herein i.e. **PATRICK MUTOKO SAMBULI** and **MARICO SIFUNA OKUMU** lodged a claim at the **BUMULA LAND DISPUTES TRIBUNAL** (the Tribunal) against the Applicant in respect to the land parcels **NO WEST BUKUSU/KHASOKO/320** and **WEST BUKUSU/MYANGA/1**. That whereas the land parcel **NO WEST BUKUSU/MYANGA/1** is registered in the names of the Applicant since 10th August 1973, the land parcel **NO WEST BUKUSU/KHASOKO/320** is registered in the joint names of the Applicant and the interested parties. That the Tribunal entered an award in favour of the interested parties to the effect that they be awarded 3 acres each from the land parcel **NO EAST BUKUSU/KHASOKO/320** and that the 1st interested party be awarded 2 acres and the 2nd Interested Party 1 acre from land parcel **NO WEST BUKUSU/ MYANGA/1**. An appeal to the **WESTERN PROVINCIAL APPEALS COMMITTEE** (The Appeals Committee) was ruled in favour of the Interested Parties and the award was presented to the **SENIOR PRINCIPAL MAGISTRATE'S COURT BUNGOMA** on 13th June 2002.

The application is contested and in a replying affidavit sworn by **PATRICK MUTOKO SAMBULI** the 1st Interested Party and also on behalf of **MARICO SIFUNA OKUMU** the 2nd Interested party, it is deponed, inter alia that the Applicant and the Interested Parties are siblings and before his death, their late father **SAMBULI WASIKE** owned the land parcels **NO WEST BUKUSU/ SOUTH MYANGA/1** measuring 6 acres and **WEST BUKUSU/KHASOKO/320** measuring 9 acres. That both the Applicant and the interested Parties have lived and utilized the two parcels of land from their childhood and that the Applicant who is the eldest had promised them that they would share the two parcels of land. However, in 1999, the Applicant started up – rooting the boundaries and so the Interested Parties moved to the Tribunal seeking orders that the parcels of land be sub – divided and shared. The Tribunal made an award in their favour. It was then that they discovered that the Applicant who holds the land parcels in trust for the family had fraudulently registered himself as the sole proprietor of the land parcel **NO WEST BUKUSU/SOUTH MYANGA/1** and only registered land parcel **NO WEST BUKUSU/KHASOKO/320** in the names of the Applicant and the Interested parties.

That the Tribunal had the requisite jurisdiction since the dispute involved sub – division of land held in trust and was not time barred and this application lacks merit and is a waste of this Court's time and ought to be dismissed with costs.

The 1st Interested Party passed on during the pendency of this application and following an application dated 26th September 2018, he was substituted with his son **HORACE WEKESA MUTOKO**.

The application was canvassed by way of written submissions which have been filed both by **MR WAMALWA** instructed by the firm of **EMMANUEL WANYONYI & COMPANY ADVOCATES** for the Applicant and **MS CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the Interested Parties.

I have considered the application, the statement of facts, the replying affidavit and the submissions by counsel.

The Applicant's case is that both the Tribunal and the Appeals Committee exceeded their jurisdiction and also dealt with a dispute that was time barred. In determining the dispute filed by the Interested Parties against the Applicant, the Tribunal was exercising its jurisdiction under the then **Land Disputes Tribunal Act** (now repealed). The jurisdiction of the Tribunal was therefore circumscribed by **Section 3(1) of the said Land Disputes Tribunal Act** which provided as follows:-

3(1) "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."

I have looked at the proceedings of the Tribunal and the award that it arrived at. Having heard the parties and their witnesses, the Tribunal made the following award: -

"AWARD

The decision reached by these panel members is that: -

For parcel NO WEST BUKUSU/KHASOKO/320 which is 9 acres, the objector RICHARD JUMA SAMBULI ID/NO 6564630, the 1st Complainant PATRICK MUTOKO SAMBULI ID/NO 4388629 and the 2nd Complainant MARICO SIFUNA OKUMU ID/NO 13718633 each gets 3 acres and for parcel NO WEST BUKUSU/SOUTH MYANGA/1 Objector RICHARD JUMA SAMBULI ID/NO 6564630 gets 3 acres and 1st Complainant PATRICK MUTOKO SAMBULI ID/NO 4388629 gets 2 acres and 2nd Complainant MARICO SIFUNA OKUMU ID/NO 13718633 gets one acre respectively and each of them to get Title Deed in his own names.

That is 6 acres, 5 acres and 4 respectively.

If any of the parties is dissatisfied by the decision of the panel members of this Land Dispute Tribunal can appeal against this decision in 30 days' time from the time Court reads this ruling."

It is clear from the above award that the Tribunal determined a dispute regarding ownership of registered land and even went ahead to direct that each of the parties be issued with Title Deeds for their respective portions. That award was beyond the jurisdiction of the Tribunal and the Appeals Committee also acted in excess of its jurisdiction in up – holding it. This has been settled in the case of **JONATHAN AMUNAVI .V. THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO 256 OF 2002** where the Court held that the Land Disputes Tribunal had no jurisdiction to deal with claims relating to ownership of registered land. See also **JOSEPH MALAKWEN LELEI & ANOTHER .V. RIFT VALLEY LAND DISPUTES APPEALS COMMITTEE & OTHERS C.A CIVIL APPEAL NO 82 OF 2006 (ELDORET) 2014 eKLR** and also **DOMINIC KIHU .V. JOHANA WAKARITU 2012 eKLR**. The 1st Respondent has suggested in paragraph 24 of his replying affidavit that the Respondents were entitled to the land in dispute because it was held by the Applicant in trust on their behalf. This is how he put it:-

24: “That the fact that the Applicant held this land in trust for us was apparent at the Tribunal herein as the Applicant was at pains to explain how he acquired the aforesaid land.”

The Tribunal in it’s award did not explicitly refer to the issue of trust and so it is not clear whether it was influenced by that averment in arriving at the award that it did. Nonetheless, in the case of **JOSEPH MALAKWEN LELEI** (supra), the Court of Appeal after citing **Section 3(1)** of the repealed **Land Disputes Tribunal Act** went on to state as follows: -

“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, it’s proceedings and decisions are null and void. It then follows that every other proceedings, decision or award that results from such a process must be construed as a nullity.”

In urging this Court to up-hold the Tribunal’s award, Counsel for Interested Parties has submitted as follows in paragraphs 22 and 23 of her submissions: -

22: “Your Lordship, the Land Disputes Tribunal had all the statutory jurisdiction and duty to entertain the issue before it being a case for subdivision and partitioning of land.”

23: “Your Lordship, the fact that the Applicant held land in trust for the Interested Parties was apparent and crystallized at the Tribunal hearing herein as the Applicant was at pains and could not explain how he acquired the aforesaid land.”

If the Tribunal had confined itself to determining the division or boundaries or the claim to occupy or work or trespass to land, it would have been within it’s mandate as provided by **Section 3(1)** of the repealed **Land Disputes Act**. In that respect, I would agree with the decision of **KHAMONI J in R .V. CHAIRMAN LAND DISPUTES TRIBUNAL KIRINYAGA DISTRICT & ANOTHER EX – PARTE KARIUKI 2005 2 KLR 10** when he stated that so long as the dispute fell within the provisions of **Section 3(1)** of the repealed **Land Disputes Tribunal Act**, the Tribunal would have properly exercised it’s jurisdiction notwithstanding that the land in dispute was registered. However, in this case, the Tribunal went on to direct each of the parties **“to get Title Deed in his own name.”** It was beyond the Tribunal’s jurisdiction to create titles. And as I have already shown from the binding decision in **JOSEPH MALAKWEN LELEI** (supra), counsel for the Interested Parties cannot be right when she submits that the issue of trust **“crystallized at the Tribunal hearing.”** If it did, then the Tribunal had no jurisdiction in basing it’s award on a claim of trust.

Apart from determining a dispute involving ownership of registered land, the Tribunal also exceeded it’s jurisdiction in determining a suit that was statute barred. The Green Card to the land parcel **NO WEST BUKUSU/SOUTH MYANGA/1** indicates that it has since 10th August 1973 been registered in the names of the Applicant. The Interested Parties lodged their claim with the Tribunal on 18th May 1999. **Section 7 of the Limitation of Actions Act** provides that: -

“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 13(3) of the repealed **Land Disputes Tribunal Act** is clear that the Tribunal was also governed by the Law of Limitation. It stated thus: -

“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 time for bringing such proceedings is barred under any law relating to Limitation of Actions or to any proceedings which had been heard and determined by any Court.”

Having said so, the Applicant seeks orders of both Certiorari and Prohibition. An order of prohibition directs an inferior body or Tribunal from continuing with proceedings which are in excess of jurisdiction or in contravention of the law. In this case, the proceedings in both the Tribunal, the Appeals Committee and the Court have been heard and determined and so there is nothing to prohibit. Such an order will therefore be in vain.

With regard to the order of Certiorari, I am satisfied that it is well founded. Counsel for the Interested Parties has made a passionate submission pointing out that the parties are siblings and the land in dispute belonged to their late father and so should be shared. That may be so. However, judicial review is concerned not with the merits of the decision arrived at but, among other things, whether the Tribunal had the jurisdiction to determine the matter before it which is the position in this case and as is now abundantly clear, the Tribunal acted in excess of its jurisdiction.

Counsel for the interested parties has also urged me to make a finding that the Applicant holds the land in dispute in trust for the Interested party. In paragraph 32 of her submissions Counsel states as follows: -

“Your Lordship, in the alternative we pray that this Honourable Court in its supervision jurisdiction be pleased to declare that the Applicant held the suit land in trust for the Interested Parties herein and that the same was properly sub – divided by the Tribunal.”

Counsel cited the case of **PHILLICERY NDUKU MUMO .V. NZUKI MAKAU C.A CIVIL APPEAL NO 56 OF 2001 [2002 eKLR]** for that proposition. Whereas that submission may be attractive, it is worth noting that the case before me is a Judicial review matter and not a civil case where disputes of ownership of property are determined which was the situation in the case of **PHILLICERY .V. NZUKI** (supra) which can therefore be distinguished from this case. As there is no time limit in cases of trust as counsel for the parties has rightly submitted, all I can say is that they may consider filing a suit predicated on a claim based on trust against the Applicant if they so wish.

The up – shot of the above is that the Notice of Motion as amended is meritorious and I allow it and make the following orders: -

1. The prayer for Prohibition is declined.

2. An order is issued calling into this Court and quashing the decisions of the BUMULA LAND DISPUTES TRIBUNAL and the WESTERN PROVINCIAL APPEALS COMMITTEE as presented to the BUNGOMA LAW COURT on 13th June 2002 and adopted. The Interested Parties may file a claim in trust in another forum.

3. As the parties are siblings, there shall be an order that each party meet their own costs.

Boaz N. Olao.

J U D G E

11th December 2019.

Judgment dated, delivered and signed in Open Court this 11th day of December 2019 at Bungoma.

Mr Murunga for Ms Were for Attorney General

Ms Chungu for Interested Party – absent

Mr R Wamalwa for the Applicant present

2nd Interested Party present

1st Interested Party absent

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

11th December 2019.