



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO 55 OF 2009**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE LAND DISPUTES APPEAL TRIBUNAL .....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE'S COURT AT NYAHURURU.....2<sup>ND</sup> RESPONDENT**

**HARRISON MWANGI BENSON.....INTERESTED PARTY**

**EX-PARTE**

**CYRUS GATIMU WAWERU**

**RULING**

1. This is a judicial review application seeking orders of certiorari to quash the verdict of the Land Disputes Appeals Tribunal in Nyeri Appeal No. 14 of 2009. The grounds upon which the application is based are :-

1. That the Land Disputes Appeals Tribunal proceeded to hear and determine the alleged dispute in excess of its jurisdiction and further in excess of its powers conferred under Section 3 of the Land Disputes Tribunal Act, Act No. 18 of 1990.
2. That the Tribunal purported to excise part of the applicant's land and annex it to that of the interested party.
3. That the Tribunal dealt with matters ultra vires to the appeal submitted before it.

2. The application is opposed but before I go to the gist of the objection, it is necessary that I lay some background.

3. The ex-parte applicant, Cyrus Gatimu Waweru, is the owner of a land parcel Nyandarua/Kiriita / Shauri Block 1 (Leshau Pondo)/1303 (parcel No. 1303) measuring 3.438 hectares whereas the interested party herein, Harrison Mwangi Benson (Mwangi), is the proprietor of the land parcel Nyandarua/Kirrita/Shauri Block 1 /Leshau Pondo/1280 (parcel No. 1280). There appears to have been a dispute over the boundaries of the two land parcels, and the interested party lodged the dispute before the Ndaragwa Division Land Disputes Tribunal (Ndaragwa LDT) which case was registered as Case No. 4 of

2004 before the said Land Disputes Tribunal. The case was heard over a period of time and an award was made on 19 May 2005. The award is annexed to the supporting affidavit of the ex-parte applicant, and from I have seen, the LDT made the following observations :-

1. That there was a discrepancy of the road layout on the ground and what is shown in the map.
2. The road from the eastern end deviated to Mwangi's plot No. 1280 because of a deep water gully where it straightened on to the western end where another 90% deviation was observed as unnecessary and uneconomical to road users particularly vehicles.
3. The road disadvantaged Mwangi and others from its both ends.
4. The tribunal members studied the Land Registrar's visit findings (sic) and recommendation made in a letter dated 7/4/95 and found out that :-

(i) it was not properly implemented.

(ii) the RIM was not amended as per recommendation.

(iii) both parties are to blame for the omission to follow up.

The LDT then made the following award :-

1. The tribunal has upheld the findings and ruling made by the District Land Registrar on 7/4/95 site visitation (copy letter attached) with amendments to allow some changes.
2. The tribunal recommended cessation of the eastern road curve near Mwangi's house and ask the District Surveyor to re-align the same from that end to continue through Silas' (probably meant Cyrus, the ex-parte applicant), plot No. 103 and meet the other section almost between the two bends that were there before.
3. The whole area so affected north of the road is a beneficial to the plaintiff (sic) while defendant retain the S. Eastern portion as a matter of give and take basis.
4. The District Surveyor has a responsibility to ensure that Registry Index Map (RIM) is amended as per the above changes. Both parties should bear the costs.
5. Both parties are asked to make a follow up to see that the ground work is carried out to have accessible road. They should also make a follow up with the District Lands Surveyor to see to it that the RIM is amended.

4. Aggrieved by the above decision, the ex-parte applicant filed an appeal to the Provincial Lands Appeals Tribunal at Nyeri, vide Appeal No. 14 of 2005. The appeal was heard and determined on 26 January 2009. In a brief ruling, the Appeal's Tribunal made the following decision :-

*The Committee upholds the ruling of the District Lands Tribunal, Ndaragua held on 19th May 2005. Both the Land Registrar and the Surveyor to do the needful. Both parties to bear their own costs. The aggrieved party to appeal to the High Court within 60 days.*

5. In his supporting affidavit, the ex-parte applicant has averred inter alia that he is not satisfied with the decision of the Land Appeal's Tribunal; that the effect of the decision is to excise part of his land and give it to the interested party; that the interested party bought the land from one Elizabeth Nyambura who was his neighbor and who never raised any boundary dispute; that the effect of the decision is to contradict the information contained in the title document; that the appeal judgment is incompetent.

6. The respondent through the State Law Office, filed Grounds of Opposition. Inter alia, it is averred that the Tribunal acted within its jurisdiction; that the act of determination of boundaries was purely within Section 3 (1) of the statute; that the Appeal's Tribunal never acted beyond its mandate since it only considered the award made by the District Lands Tribunal; that if the ex-parte applicant was aggrieved by the jurisdiction of the LDT they would not have preferred an appeal but sought to quash that decision by way of judicial review; that an order of certiorari cannot lie.

7. The interested party filed a replying affidavit. He has averred inter alia that the ex-parte applicant shifted the road of access which led to the dispute. It is further his view that the tribunals acted within jurisdiction.

8. The ex-parte applicant filed a further affidavit in which he annexed the map of the area. He stated that in the year 1995, the Land Registrar had gone to the ground and saw that the map is what has a problem, as it did not reflect the position on the ground. He further averred that the issue is not therefore a boundary dispute but a surveying issue which needs the Land Registrar and Land Surveyor to rectify the RIM. He stated that the tribunal dealt with the issue of change of the RIM and cadastral map which is outside their jurisdiction.

9. The interested party also filed a further affidavit where he repeated that the issue before the tribunals was a boundary issue, therefore, within their jurisdiction.

10. In the course of the proceedings, my predecessors asked for a report by the District Surveyor, Nyandarua. A report dated 6 July 2011 was filed. The same shows the map and the disputed road. It is apparent that where the road currently exists, is not where it is supposed to be on the map. The location of the road has eaten into about 0.8 Ha of the parcel NO. 1280 (owned by the interested party).

11. In her submissions, Ms. Nancy Njoroge for the ex-parte applicant, submitted inter alia that the Provincial Appeals Tribunal lacked jurisdiction in the matter. She submitted that the tribunal exceeded its jurisdiction by creating a road which was non-existent in the RIM, the effect of which is that the ex-parte applicant would lose his land, approximately 3/4 acres. She submitted that the tribunal did not have jurisdiction to order the change of the RIM, nor did it have powers to order the District Surveyor effect the said changes. She submitted that the dispute was not a boundary dispute and that the interested party wanted to create a road where none existed.

12. Mr. Gakuhi Chege for the Interested Party, submitted inter alia that both the LDT and the Appellate Tribunal had jurisdiction pursuant to Section 3 (1) of the Land Disputes Tribunal Act. He submitted that the recommendation for the Land Registrar and Surveyor "to do the needful" was in line with the law. He also pointed out that the Surveyor's report, filed in court, demonstrated that the ex-parte applicant had moved the road into the parcel of the interested party.

13. I have not seen any submissions filed by the State.

14. I have considered the matter. The core issue is whether the tribunals exceeded their jurisdiction. The jurisdiction of the now defunct land disputes tribunals, was donated by Section 3 of the Land Disputes Tribunal Act, Act No. 18 of 1990 (now repealed by the Environment and Land Court Act, Act No. 19 of 2011), 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.*

15. It will be seen from the above, that the LDTs did have jurisdiction to determine disputes as to the determination of boundaries to land. There was provision to appeal a decision of the LDT to the Appeals Tribunal. Section 8 of the Act provided for appeals in the following manner :-

*8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.*

*(2) - (7) (not relevant as they relate to how appeals are to be heard)*

*(8) The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.*

*(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:*

*Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.*

16. It is the argument of the ex-parte applicant that the Tribunal did not have jurisdiction as what was presented was not a boundary dispute. It is also averred that the Tribunal could not direct the Land Registrar or Land Surveyor to alter the RIM.

Following the above arguments, I first need to determine whether the dispute presented to court was actually a boundary dispute or a disguised land dispute over ownership. Secondly, I need to determine whether the directions issued were those which could have been made by the Tribunals.

17. On the first issue, the dispute as presented, appears to me to have been a boundary dispute. I have not seen the claim as lodged, but from the award of the Nyandarua LDT, it seems as if the parties were disputing on where the boundaries over their two parcels of land should be. In my view, that dispute was within the parameters of Section 3 (1) of the Land Disputes Tribunal Act, since the tribunals were allowed to hear disputes relating to boundaries. It will be noted that at the Nyandarua LDT, the LDT observed that there was indeed a discrepancy between the position of the road (which forms the boundary of the two parcels) on the ground and as indicated in the RIM. This observation was clearly within their mandate. They did make recommendations on where the boundary should be and they did recommend some adjustments on the ground and in the RIM.

18. This brings to fore the second issue, that is, whether the recommendations, were outside their jurisdiction. It will be noted that the Land Disputes Tribunal Act, did not list down the orders that the tribunals could make. The complaint that the ex-parte applicant has, if I understood him right, is that the recommendations made were outside jurisdiction. I am not convinced. In determining a boundary dispute, the dispute resolution body, must be regarded as having powers to make all determinations and recommendations which will in their opinion, resolve the boundary dispute in issue. In my view, such body must have power to recommend adjustments on the ground and in the map if such recommendations will resolve the dispute before it. I do not buy into the arguments of the ex-parte applicant, that all that the Tribunal had power to do was simply to ensure that the boundaries on the ground are aligned to what is indicated in the RIM. That would be too narrow a scope. A dispute must be resolved holistically. If there was mandate to resolve a boundary dispute, then so long as the tribunal stuck to the resolution of the boundary dispute, it cannot be said that they went out of jurisdiction. In my view, the tribunal could not be said to have been out of jurisdiction in determining the dispute presented to it by the interested party.

19. I do agree, that where in the process, one party ends up losing land that he is entitled to, mechanisms of compensation must also need to be looked at. In our instance, the ex-parte applicant has contended that the award will make him lose 3/4 acres of his land. Unfortunately, save for that mere statement, it has not

been demonstrated by any other evidence that this will be the case. My own reading of the award, informs me that the tribunal of first instance was alive to the fact that there would be adjustments on the ground, but they did come to a middle ground, where the interests of both parties would be balanced. I have no proof that the recommendations made, left the ex-parte applicant with 3/4 acres less.

20. I have already held that the Nyandarua LDT did have jurisdiction to try the matter before it, and did have jurisdiction to make the recommendations that it made. It follows that the Appeals Committee acted on an appeal made by a body which had jurisdiction. The basis of this application is that the Appeals Committee did not have jurisdiction to hear the matter or make the verdict that it made. But it is not the argument of the ex-parte applicant that the Appeals Committee did not have jurisdiction to hear an appeal from the Nyandarua LDT. The only complaint that can remain, is the argument that the Appeals Committee heard an appeal where the Nyandarua LDT, in the first place, did not have jurisdiction. Having held that the Nyandarua LDT had jurisdiction, it cannot be argued that the Appeals Committee presided over an appeal made by a body without jurisdiction, and therefore, itself, did not have jurisdiction. In the circumstances of this case, if the ex-parte applicant was aggrieved by the decision of the Appeals Committee, he ought to have filed an appeal to the High Court as provided by Section 8 of the Land Disputes Tribunal Act. He cannot however have relief through these proceedings since the decision of both the Nyandarua LDT and the Appeals Committee were within jurisdiction.

21. The upshot of the above is that this motion must fail and it is hereby dismissed with costs. The effect of this dismissal is that the decree of 28 April 2009, in Nyahururu Principal Magistrates Court, Case LDT No. 11 of 2009, may be executed.

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 12th day of May 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**In presence of: -**

Mr Mukira holding brief for Ms Nancy Njoroge for ex-parte applicant.

Ms. Wairimu Kariuki for the respondents

Mr Gakuhi Chege for Interested party

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

