

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPLICATION NO. 6 OF 2009

REPUBLIC.....APPLICANT

VERSUS

NYERI DISTRICT LAND DISPUTES TRIBUNAL KIENI EAST.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, NYERI.....2ND RESPONDENT

PROVINCIAL LAND DISPUTES APPEALS COMMITTEE, NYERI.....3RD RESPONDENT

LUCY W. GITHINJI.....4TH RESPONDENT

PETER KINYUA.....5TH RESPONDENT

STEPHEN NGURE.....6TH RESPONDENT

AND

EPHRAIM MWAI GITHINJI.....EXPARTE/APPLICANT

JUDGEMENT

Ephraim Mwai Githinji (*hereinafter referred to as the Exparte/Applicant*) has come to court against the Nyeri District Land Disputes Tribunal Kieni East, Chief Magistrate's Court, Nyeri and Provincial Land Disputes Appeals Committee, Nyeri and 3 Others (*hereinafter referred to as the respondents*) seeking to quash the decision of the Provincial Appeals Committee and the Prohibit the Chief Magistrate's Court, Nyeri from entering judgment in terms of the Nyeri District Land Disputes Tribunal out of the Nyeri Provincial Appeals Committee award.

The application is based on grounds that the Provincial Appeals' Committee as it then was lacked jurisdiction to entertain a claim based on title to land and that the Appeals' Committee acted ultra vires the land Disputes Tribunal Act Number 18 of 1990 by upholding the award of the District Land Disputes Tribunal Kieni East which had no jurisdiction to split a title to land. Moreover that the Appeals Committee acted ultra vires the Act in dealing with the issue of adverse possession. The exparte applicant believes that both the award of the Nyeri District Land Disputes Tribunal Kieni East and Central provincial Appeals Committee are a nullity and should be declared as such and that Nyeri Chief Magistrate Court should be prohibited from entering judgment in terms of the either of the two awards as proceeding to do so would be an abuse of the court process.

The affidavit relied on by the exparte applicant in seeking these orders was sworn on 15.1.2009 wherein he states that he is the absolute registered owner of land parcel number **NARUMORU/NARUMORU/KIENI EAST/BK 1/222 purchased** from Kieni East Farmers Company through his shares in the said company. He accommodated his deceased mother to occupy and cultivate part of his land until her death. The 4th, 5th and 6th respondents respectively laid a claim on his land based on adverse possession at Nyeri District Land Disputes Tribunal Kieni East. The said tribunal entertained their claim and ruled that the 4th, 5th and 6th respondents were entitled to a share of his land. He was not satisfied with the tribunals award and he lodged an appeal at Nyeri Provincial Appeals Committee and among other grounds, he raised the issue of jurisdiction. The Appeals Committee upheld the decision of the tribunal award on 23rd July, 2008 and ordered his land to be shared by the 4th, 5th and

6th respondents

The decision of the Appeals Committee Central Province was delivered on 23rd July, 2008 and he seeks for an order of **Certiorari** to have it quashed for want of jurisdiction and an order of Prohibition directed to the Nyeri Chief Magistrate's Court prohibiting the court from entering judgment in terms of the awards as they are a nullity having been made without jurisdiction. Unless prohibited from doing so, the applicant believes that the Chief Magistrate, Nyeri will proceed to enter judgment in terms of the awards which will be an abuse of the court process.

The firm of Ng'ang'a Munene & Company Advocates filed grounds of opposition whose import is that the application is an abuse of court process as the Nyeri District Land Disputes Tribunal and Central Provincial Land Disputes Appeals Committee had jurisdiction to adjudicate on the matter as it involved a claim to occupy or work land.

The Attorney General through **Stella Munyi**, Provincial Litigation Counsel as she then was filed a Notice of Appointment but failed to file a reply. Parties agreed to proceed by way of written submissions.

The Exparte Applicant through **Ndata Mugo** submitted that both the Nyeri District Land Disputes Tribunal lacked jurisdiction to entertain a dispute or claim based on adverse possession and therefore their decision were a nullity.

Mr. Ng'ang'a on the other hand argues that the application is incompetent as the applicant has not complied with Order 53, Rule 4 of the Civil Procedure Rules, 2010. The Notice of Motion is supported by an affidavit for which leave was obtained and therefore the Motion is incurably defective.

Order 53, Rule 4 of the Civil Procedure Rules, 2010 provides that

(1)) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2)) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3)) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.

.....

The Chamber summons seeking leave was filed one day after the lodging of the documents with the

Registrar as it was a requirement then. The chamber summons was supported by the affidavit of Ephraim Mwai Githinji which had not been lodged before the Registrar. The Notice of Motion was filed on 17.2.2009 supported by an affidavit by Ephraim Mwai Githinji sworn on 16.2.2009.

I do find that the filing of the skeleton and bare verifying affidavit on the 14.1.2009 was contrary to the law as it is the verifying affidavit filed with the Notice lodged before the Registrar that is relied upon in the Notice of Motion. The application for Judicial Review orders was filed before the Civil Procedure Rules, 2010 came into force and therefore the applicable law are the Rules that were in force before Civil Procedure Rules, 2010.

From the foregoing, it appears that the application is incompetent as the exparte applicant is seeking to rely on affidavits for which leave was not obtained. The affidavits sworn on 15.1.2009 supporting the chamber summons and the affidavit sworn on 16.2.2009 are irregularly on record as leave was not obtained.

We are left with the affidavit of 14.1.2009 which is bare and refers to the facts in the statements.

In the case of **Commissioner General, Kenya Revenue Authority Vs Silvano Onema Owaki T/a Marenga Filling Station, Civil Appeal No. 45 of 2000 (UR), (unreported).**

The Court of Appeal observed that:

“...The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case.... it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of Rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 VI. 1 at paragraphs 53/1/7

“The application for leave “By a statement” - The facts relied on should be stated in the affidavit (See Republic Vs Wandsworth JJ; ex.p reat (1942) 1KB 581). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to ledge a statement of all the facts, verified by an affidavit...”

The facts relied upon are required to be in the verifying affidavit not in the statement as largely happened in this case. It is the verifying affidavit not the statement to be verified which is of the evidential value in an application for Judicial Review.

The Court of Appeal also referred the Rule 1(2) of Order LIII of the Civil Procedure Rules and Supreme Court Practice 1976 VI at paragraphs 53/17.

In **Republic Vs Wandsworth Justice, viscount Caldecote C.J.** said:

“The court has listed to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason, the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction”

(See Justice Makhandia's decision).

From the foregoing, this court finds that, the Verifying affidavit relied upon cannot assist it to make an informed decision as it is bone. The exparte applicant's submissions are considered and the court finds that there is no basis for granting the orders sought. The upshot of the above is that the application is dismissed with costs.

DATED AND SIGNED AT ELDORET THIS 29TH DAY OF JUNE, 2015.

ANTONY OMBWAYO

JUDGE

DELIVERED AND DATED AT NYERI THIS 7TH DAY OF JULY, 2015.

LUCY WAITHAKA

JUDGE