



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

JUDICIAL REVIEW NO. 15 OF 2013

**IN THE MATTER OF AN APPLICATION BY EDITH WANJIKU KANANDA FOR LEAVE TO
APPLY FOR ORDERS OF JUDICIAL REVIEW**

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF KIRINYAGA SOUTH LAND DISPUTE TRIBUNAL

AND

**IN THE MATTER OF PROCEEDINGS IN WANG'URU SENIOR RESIDENT MAGISTRATE'S
COURT AT WANG'URU ARBITRATION CASE NO. 24 OF 2010**

REPUBLIC APPLICANT

VERSUS

**THE CHAIRMAN KIRINYAGA SOUTH LAND DISPUTES TRIBUNAL1ST
RESPONDENT**

THE SENIOR RESIDENT MAGISTRATE WANG'URU.....2ND RESPONDENT

PETERSON NDAMBIRI KIRAGU3RD RESPONDENT

STEPHEN KANANDA MWENJE4TH RESPONDENT

AND

EDITH WANJIKU KANANDAEX-PARTE APPLICANT

JUDGMENT

The applicant herein moved this Court by a Notice of Motion dated 7th February 2011 and filed in Court on 8th February 2011 seeking the following orders:-

1. *That an order do issue to remove into the High Court for purposes of quashing the awards of Kirinyaga South Land Disputes Tribunal and the orders of Wanguru Senior Resident*

Magistrate Court Arbitration Case No. 24 of 2010 adopting the said award as judgment of the Court on 9th December 2010.

2. That the costs of this application be provided for.

According to the statement of facts relied upon by the applicant, this application is premised on the following:-

- 1. That the applicant was not afforded an opportunity to be heard and as such, the rules of natural justice were violated.**
- 2. The Kirinyaga South Land Disputes Tribunal deliberated on a matter pending before the High Court.**
- 3. The Kirinyaga South Land Disputes Tribunal deliberated on a matter relating to title to land which it had no jurisdiction.**
- 4. The Kirinyaga South Land Disputes Tribunal issued an injunction against the ex-parte applicant and her husband the 4th respondent.**

The above is the gist of what is contained in the applicant's verifying affidavit in which she has deponed, inter alia, that she is the owner of plot No. 227 A at Kutus which she and her husband STEPHEN KANANDA MWENJE (4th Respondent) have been in exclusive and interrupted occupation since 1976. That in 2003 the 3rd respondent filed a suit at Kerugoya Principal Magistrate's Court alleging the plot was his. The suit was heard and the 3rd respondent's claim was dismissed and he immediately appealed to the High Court vide Appeal No. 26 of 2010. The 3rd respondent also filed a Land Dispute against the 4th respondent and the Land Disputes Tribunal proceeded to make an award in reference to her plot No. 227 A at Kutus without hearing her and thereby made orders that were adverse to her against the rules of natural justice hence this application.

The 3rd respondent PETERSON NDAMBIRI KIRAGU filed a replying affidavit in which he deponed inter alia, that he is the registered proprietor of L.R KABARE/NYANGATI/1862 and in May 2003, the 4th respondent placed building materials on the said parcel of land and so he sued him for trespass in KERUGOYA PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 199 of 2003 and the 4th respondent filed a defence in that case in which he stated that land parcel No. L.R KABARE/NYANGATI/1862 was infact his wife's plot No. 227 A Kutus township. The Court however found that it had no jurisdiction since the dispute was one of trespass to land. The 3rd respondent, aggrieved by that decision, decided to appeal and filed Embu High Court Civil Appeal No. 26 of 2010 which he however abandoned and proceeded to file a reference to the District Land Disputes Tribunal in Mwea seeking the eviction of the 4th respondent and the applicant was not a party to those proceedings but instead gave evidence as a witness for the 4th respondent. The Tribunal award was within the powers conferred upon it by **Section 3(1) of the now repealed Land Disputes Tribunal Act** and should therefore be up-held.

The other parties did not file any responses to the application and written submissions were filed by Magee wa Magee Advocate for the applicant and Kiguru Kahiga Advocate for the 3rd respondent.

I have considered the application, the rival affidavits of the applicant and 3rd respondent and the submissions by counsels.

This is a Judicial Review application and as Mr. Magee has rightly pointed out in his submissions, the purpose of Judicial Review is to look at the legality or otherwise of the Tribunal's decision and not whether it was wrong or right. As Courts have repeatedly stated, Judicial Review is concerned with the decision making process and not with the merits or otherwise of the decision itself. In the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC AND UMOJA CONSULTANTS LTD C.A CIVIL APPEAL NO. 185 of 2001 (NBI)**, the Court of Appeal set out the duty of a Court in a Judicial Review application as follows:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did it take into account irrelevant matters?”

It is therefore clear that in a Judicial Review application, the Court will be looking at illegality, procedural impropriety and irrationality. It will not be concerned about the merits of the decision.

As indicated above, the applicant’s first complaint is that she was not afforded an opportunity to be heard and therefore the rules of natural justice were flouted by the Tribunal. She is therefore alleging procedural impropriety. The right to be heard is embodied in the latin phrase ***“audi alteram partem”*** which means hear the other side. It imposes a duty on a Tribunal determining a dispute to fairly hear both parties before making a decision on the matter. This includes giving the parties to a dispute an opportunity to give their side of the case. The principle of Natural Justice has attained Constitutional embodiment as seen from ***Article 25 of the Constitution*** which prohibits any derogation from the right to a fair trial. ***Article 50(1) of the Constitution*** also provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”

Did the Kirinyaga South Land Disputes Tribunal deny the applicant an opportunity to be heard and therefore flout the rules of natural justice? In answering this question, we need to know who the parties to the dispute were and what the dispute involved and also how the dispute was handled. From the documents herein and particularly the proceedings before the Kirinyaga South Disputes Tribunal dated 19th October 2010 and adopted by the Wanguru Senior Resident Magistrate’s Court on 9th December 2010, the dispute before the said Tribunal was the claim by the 3rd Respondent herein (who was the plaintiff in that dispute) that the 4th respondent (who was the defendant) had ***“poured two lorries of building stones”*** on his property being KABARE/NYANGATI/1862. It is not in doubt that the parcel of land KABARE/NYANGATI/1862 is registered in the names of the 3rd respondent herein i.e. PETERSON NDAMBIRI KIRAGU. The title deed to that property was part of the annexures to the 3rd respondent’s replying affidavit. The applicant is not an owner of the said parcel of land. Therefore, as the applicant was neither a party in the proceedings before the Tribunal nor the owner of the property in dispute, the Tribunal was not obliged to hear her unless of course she

was called as a witness or enjoined in the proceedings. Natural justice is not about giving a hearing to any persons that may want to be heard including busy bodies. A party alleging breach of the rules of Natural Justice must establish that he has a locus standi in the dispute. Locus standi is defined in ***BLACK’S LAW DICTIONARY 9th Edition*** as:

“the right to bring an action or be heard in a given forum”

If the applicant wanted to be heard, she could only be heard as a witness for her husband the 4th respondent herein. I have perused the records before the Tribunal and nowhere is it shown that the 4th respondent was denied an opportunity to call the applicant or any other witness in support of his case. Besides, the applicant herself has not alleged that she was denied an opportunity to testify on behalf of her husband in respect of the property in dispute. Indeed from her own verifying affidavit, her complaint appears to be that the 3rd respondent was claiming that her plot No. 227 A Kutus was in fact her land L.R. No. KABARE/NYANGATI/1862. In paragraph 3 of her verifying affidavit, she depones as follows:-

“That I own plot No. 227 A Kutus which was allocated to me in 1976 (annexed hereto is a bundle of documents from Kerugoya/Kutus Municipal Council marked EWK 1)”

However, the dispute before the Tribunal was not the ownership of L.R No. KABARE/NYANGATI/1862

or plot No. 227 A Kutus. The dispute, as I have indicated above, was that the 4th respondent had “**poured two lorries of building material**” on the 3rd respondent’s parcel of land L.R No. KABARE/NYANGATI/1862. Indeed during the proceedings before the Tribunal, the 3rd respondent cross-examined the 4th respondent as follows:-

“Q: Are we before this tribunal because of plot No. 227 A or L.R KABARE/NYANGATI/1862”

To which the 4th respondent replied as follows:-

“A: Because of L.R KABARE/NYANGATI/1862”

The dispute was essentially a trespass dispute in which the 3rd respondent was claiming that the 4th respondent had put building material on his property. The applicant was neither a party to that dispute nor a witness for her husband. There is no allegation that she was denied an opportunity to testify on behalf of her husband. In short, her claim that she was not afforded an opportunity to be heard and therefore that the rules of Natural Justice were violated with respect to her are not well founded and must be rejected by the Court.

The applicant’s other complaint is that the Tribunal deliberated on a matter that was in the High Court. The 3rd respondent has deponed in his replying affidavit that although he had filed an appeal in Embu High Court being Civil Appeal No. 26 of 2010 against the decision of the subordinate Court which refused to grant him orders to remove the 4th respondents from the land in dispute citing lack of jurisdiction, he later abandoned that appeal. In paragraph 10 of his replying affidavit he states as follows:-

10 “That it’s true that I lodged an appeal against the judgment of the lower Court vide Embu High Court Civil Appeal No. 26 of 2010 but I abandoned that appeal upon reflecting on the issue of jurisdiction”

That averment was not rebutted and in any event, if there was such an appeal still pending in the High Court, it was the responsibility of the parties to bring it to the attention of the Tribunal. A perusal of the Tribunal proceedings does not show that any such issue was brought to the attention of the Tribunal. That ground must also be rejected as unfounded.

The third ground upon which this application is premised, is that the Tribunal deliberated on a matter relating to title to land of which it had no jurisdiction. This dispute was heard by the Kirinyaga South Land Disputes Tribunal in accordance with the provisions of the now repealed **Land Disputes Tribunal Act. Section 3(1)** of the said Act provides 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”**

It has been established by a long line of authorities that a Tribunal exercising powers under the repealed **Land Disputes Act** had no jurisdiction to determine disputes relating to title to land or beneficial interests in land. See for instance **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO. 256 of 2002.**

Did the Tribunal infact adjudicate “**on a matter relating to the title to land**” as alleged by the applicant? As earlier indicated above the issue for determination before the Tribunal was that the 4th respondent

“*had poured two lorries of building stones*” on the 3rd respondent’s land. This was made clear by the 3rd respondent when at the close of his

testimony before the Tribunal he said:-

“My prayer is that the defendant be ordered to remove himself and the building materials from L.R KABARE/NYANGATI/1862 and a permanent injunction to be issued barring the defendant, his servants, agents or anybody claiming through him from interfering with my land parcel No. KABARE/NYANGATI/1862”.

It is clear from the above that what was before the Tribunal was a dispute regarding the 4th respondent’s trespass on the 3rd respondent’s land by pouring building stones on it. It was not a dispute over title to the parcel of land KABARE/NYANGATI/1862. Such a dispute was well within the jurisdiction of the Tribunal as provided under **Section 3(1) of the repealed Land Disputes Tribunal Act**. The fact that the land upon which the trespass was being committed was registered land did not therefore take away the jurisdiction of the Tribunal to determine the dispute so long as what was in issue was within the ambit of the provisions of **Section 3(1) of the repealed Land Disputes Tribunal Act**. In this case, the issue at hand was trespass which was well within the jurisdiction of the Tribunal and I associate myself with the observations made by Khamoni J. in **Republic Vs Chairman Land Disputes Tribunal Kirinyaga District Ex-parte Kariuki 2005 2 K.L.R 10** to the effect that where a dispute falls within **Section 3(1) of the repealed Land Disputes Tribunal**, it did not matter that the land was registered under the **Registered Land Act**. The case of **Republic Vs Resident Magistrate Kaloleni and Kitjao Mengiyaa and Shida Mengiyaa H.C Misc Application No. 117 of 2004** cited by Mr. Magee does not aid the applicant because in that case, the Tribunal made orders touching on title to land which is not the case here.

Therefore, the allegation that the Kirinyaga South Land Disputes Tribunal deliberated on a matter relating to title to land and therefore had no jurisdiction is not well founded. The issue at hand how was trespass to land not title to land. That ground similarly fails.

Lastly, the applicant complains that the Kirinyaga South Land Disputes Tribunal issued an injunction against her and her husband the 4th respondent. After hearing the parties in this dispute, the Kirinyaga South Land Disputes Tribunal made the following award:-

“AWARD

The elders order the defendant Stephen Kananda Mwenje to:-

- 1. Remove himself and building materials placed on L.R KABARE/NYANGATI/1862 in default forceful eviction to apply.***
- 2. Stop himself, his servants and or anybody claiming through him from interfering with the plaintiffs rights on L.R KABARE/NYANGATI/1862”***

A Land Disputes Tribunal exercising its powers under **Section 3(1) of the Land Disputes Tribunal Act** (repealed) would not, strictly speaking, issue an injunction which is a Court order commanding or preventing an action. The Kirinyaga South Land Disputes Tribunal’s order referred to above, though having the effect of an injunction, simply directed the 4th respondent to stop from interfering with the 3rd respondent’s right over L.R No. KABARE/NYANGATI/1862. Having found that the 4th respondent had trespassed onto that land, there was nothing patently wrong with ordering him not to interfere with the land. This was simply asserting the 3rd respondent’s right **“to occupy or work land”** which is one of the matters over which the Tribunal exercises jurisdiction under **Section 3(1) of the Land Disputes Tribunal Act**. Obviously the 3rd respondent could not exercise that right if the 4th respondent continued interfering with his (the 3rd respondent’s) right over L.R No. KABARE/NYANGATI/1862. It is also instructive to note that when the dispute was before the Kirinyaga South Land Disputes Tribunal, the 3rd respondent asked for the following two specific reliefs:-

“My prayer is that the defendant be ordered to remove himself and the building materials from L.R KABARE/NYANGATI/1862, and a permanent injunction be issued barring the defendant, his servants, agents or anybody claiming through him from interfering with my land parcel No. KABARE/NYANGATI/1862”

Perhaps the 3rd respondent was borrowing this from previous pleadings as this dispute had been filed as KERUGOYA PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO. 199 of 2003 where, as the plaintiff, he had sought a similar order against the 4th respondent as one of the reliefs but which order the magistrate declined to grant citing lack of jurisdiction and referring this dispute to the Land Disputes Tribunal. The bottom line however is that the orders that the Kirinyaga Land Disputes Tribunal issued after hearing this dispute were well within its jurisdiction and were not ultra vires.

Ultimately therefore, having considered all the matter herein, I am not persuaded that the applicant is entitled to the orders sought in her Notice of Motion dated 7th February 2011 and filed in this Court on 8th February 2011. The same is therefore dismissed with costs to the 3rd respondent.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015

9/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Abubakar for Applicant – present

No appearance for Respondents

COURT: Judgment delivered this 9th day of October, 2015 in open Court.

Mr. Abubakar for the Applicant present

No appearance by the Respondents.

Right of appeal explained.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015