



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
JUDICIAL REVIEW NO. 8 OF 2011

REPUBLIC APPLICANT

VERSUS

CHAIRMAN KABİYET LAND DISPUTES TRIBUNAL1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

WILSON KIPTARUS TEMUGE INTERESTED PARTY

EZEKIEL K. MABWAI SANG EX-PARTE APPLICANT

JUDGMENT

By Notice of Motion dated 21st March, 2011, Ezekiel K. Mabwai Sang, the Ex-parte Applicant herein sought the following orders:-

- (a) An order of certiorari to quash the proceedings of the 1st Respondent (Chairman Kabiyet Land Disputes Tribunal) and the consequent judgment entered in Kapsabet Principal Magistrate's Court Award No. 2 of 2011.
- (b) An order of prohibition to prohibit the Kapsabet Principal Magistrate's court from executing the order requiring a government surveyor to ascertain existence of the access road and to prohibit the Nandi North District Land Registrar from ordering a government surveyor to survey the existence of the access road in terms of the said award filed in court.
- (c) An order of mandamus to compel the Registrar of Kapsabet Land registry to delete any entries relating to access road over the parcel No. Nandi/Chemuswo/210 which might have been entered in consequence of the award in Kapsabet Principal Magistrate's Court Land Disputes Tribunal No. 2 of 2011.

Earlier, by Notice of Motion application dated 1st March, 2011, the Applicant sought leave to file the substantive motion seeking the above orders and further sought that the leave do operate as a stay pending the hearing of the substantive motion.

Prayers in the Notice of Motion dated 1st March, 2011 were granted on the same date. Accompanying this application were a supporting affidavit sworn by the Applicant on the same date as well as a statement of facts relied on dated 28th February, 2011.

The substantive motion is also supported by the Affidavit of the Applicant sworn on 21st March, 2011 as well as a statement of facts relied on dated 11th April, 2012 and a Verifying Affidavit sworn on the 11th April, 2012.

The Notice of Motion is premised on the following grounds:-

- (i) That the Land Disputes Tribunal lacked jurisdiction to hear and determine the issue as the path crossing over the parcel No. NANDI/CHEMUSWO/210 is a registered access road.**
- (ii) That the Land Disputes Tribunal lacked jurisdiction as the access road was surveyed and registered in 1969.**
- (iii) That the Ex-Parte Applicant was condemned without any hearing which is against the principles of natural justice .**
- (iv) That the Land disputes tribunal award was vague as the Elders concluded that the path crossing over the parcel of land Nandi/Chemuswo/210 was illegal and a government surveyor shall be required to visit the site and ascertain its existence.**
- (v) That the requisite notice to the Registrar has been issued.**
- (vi) That the leave to file this application was granted on 1st March, 2011.**

The Supporting Affidavit emphasizes that the Tribunal adjudicated on issues it did not have jurisdiction over. In particular, the Applicant states that the Tribunal purported to award the Interested Party the path crossing over the parcel of land No. Nandi/Chemuswo/210 which was illegal. To this end, he states that, only a land surveyor can ascertain the existence of the said path.

The Applicant further states that the transaction involved an access path registered under the Public Roads and Roads Access Act, Cap 399, which matters are outside the jurisdiction of the Tribunal. He argues that he was not given an opportunity to be heard as he did not participate in the proceedings before the Tribunal.

In a Replying Affidavit sworn by the Interested Party on 1st September, 2011, he urges the court to dismiss the application for want of merit. He states that the Ex-parte Applicant fully participated in the proceedings before the Kabiyet Land Disputes Tribunal.

He stated that the award adopted by the court was in agreement with what the Tribunal had ruled. That is, it ruled that the path crossing through land No. Nandi/Chemuswo/210 was illegal, as a result of which a government surveyor closed and cancelled it. He has referred the court to annexure 'WK4', being a mutation form against the said parcel of land. He states that despite the closing of the said path, the Applicant has continued to interfere with his quiet possession of his land by grazing his cows on it.

A Notice of Appointment of the Hon. Attorney General on behalf of the Respondents was filed on 10th January, 2012. However, the Attorney General did not file any ground of opposition, Replying Affidavit or submissions.

On 15th May, 2012, the Interested Party filed a Notice of Preliminary Objection which raised the following issues:-

- 1. That the application violates the provisions of Order 53 rule 1 (2) of the Civil Procedure Rules in terms of affidavits on record.**

2. ***Reliefs sought in the statement are not pari material to reliefs sought in the substantive application.***
3. ***That statement is fatally defective for want of the reliefs sought.***
4. ***Leave sought in an improper manner in violation of Order 53 rule 1 (2).***
5. ***Date of the decision sought to be quashed not set out.***
6. ***Copies of the statement accompanying the application for leave and its affidavits are different from those accompanying the notice of motion.***
7. ***The affidavit sworn by the 1st Ex-parte Applicant on 21st March 2012, was filed without leave and the said affidavit together with all the other affidavits sworn prior to the said affidavit are all incompetent.***
8. ***The entire application for judicial review filed by the ex-parte application is bad in law, does not comply with the provisions of Order 53 of the Civil Procedure Rules and is generally incurably defective.***

The issues raised in this Preliminary Objection were canvassed by the Interested Party, in his written submissions dated 24th August, 2012.

The Ex-Parte Applicant's submissions are dated 9th August, 2012. On the issue of jurisdiction, he submitted that the Tribunal cannot adjudicate on matters outside the provisions of Section 3 (1) of the Land Disputes Tribunal Act, No. 18 of 1990. Its jurisdiction is confined to the following:-

- (a) The division, 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.

Hence, the Tribunal could not address itself on an issue respecting a registered access road.

The Applicant submits that the Tribunal gave a contradicting award. On the one hand, it declared the path crossing the land L.R. No. Nandi/Chemuswo/210 as illegal while on the other hand, the government surveyor was required to visit the site and ascertain its existence.

He submitted that the title deed, on the face of it, cannot show the access road. He also states that he was condemned unheard.

On the Preliminary Objection, the Ex-Parte Applicant submitted that, initially, he filed an application seeking to file the judicial proceedings, and accompanying the said application were a notice to the Deputy Registrar, a Statement stating the facts of the claim, a Supporting Affidavit and a Verifying Affidavit. Hence, his application is not irregular. And in any event, any irregularity, as it may be, does not touch on the substance of the matter, neither does it prejudice the Interested Party.

He referred the Court to the case of **KHAYADI -VS- UGANDA (1988) KLR, 2014**, which case I will revisit later on in this Judgment.

Finally, he submitted that he stands to suffer irreparable loss if the orders sought are not granted.

The Interested Party filed his submissions on 7th December, 2012. He submitted that the application is muddled up and goes against the holding in the case of **REPUBLIC -VS- THE MUNICIPAL COUNSEL OF ELDORET (EX-PARTE PATRICK NALIANYA WANYONYI) & OTHERS –**

ELDORET HIGH COURT MISC. APPLICATION NO. 205 OF 2004 in which it was held that the affidavit filed at the leave stage must be the same affidavit that ought to be relied upon in support of the substantive application for judicial review and that there is no room for the introduction of fresh affidavits along the way without leave of court.

In this respect, he submits that the Ex-parte Applicant swore and filed different Supporting Affidavits both at the leave stage and in the substantive application.

He submitted that the statement outlining the facts relied on is defective and contravenes Order 53 Rule 1 (2) of the Civil Procedure Rules. That is, the reliefs sought in the statement ought to be identical with those sought in the Notice of Motion. He referred the court to the case of **REPUBLIC -VS- LURAMBI LAND DISPUTES TRIBUNAL, KAKAMEGA HIGH COURT CIVIL MISCELLANEOUS APPLICATION NO. 31 OF 2011.**

He submitted that, in the instant case, the statement purports to seek leave instead of citing the substantive prayers as couched in the Notice of Motion. He said that even after the Ex-Parte Applicant was granted leave to file the application, he filed the statement dated 11th April, 2012 which contained the same fatal defects.

He further submitted that the Ex-parte Applicant did not indicate the date of the decision sought to be quashed.

He submitted that the Applicant does not lay claim over the subject land save that he wants an access road through it, yet there is no prove by documentation that he is entitled to an access road.

He further submitted that the orders of prohibition and mandamus sought are not available to the Ex-Parte Applicant. This is so because a prohibition cannot issue against an act that has already taken place. This also applies to an order of mandamus. As regards the prayer for a certiorari order, he submitted that the same is also not available to the Applicant as the Tribunal deliberated on an issue of trespass as spelt out under S. 3 (1) of the then Land Disputes Tribunal Act.

I have now considered the entire application, the opposition to it as well as the submissions made by the respective counsel. I formulate the issues for determination to be;

- (1) Was the Ex-Parte Applicant given an opportunity to be heard?
- (2) Did the Tribunal have jurisdiction to hear and determine the matter before it?
- (3) Is the Application defective?

APPLICANT'S RIGHT TO BE HEARD

The proceedings of the Land Disputes Tribunal are marked as annexure E.K MSI to the Supporting Affidavit. At page 2, it is clear that when the Ex-Parte Applicant was given an opportunity to present his case, after the Interested Party had spoken and had been cross-examined by the elders, he chose to walk away in protest, stating that the path in question exists on the survey map and that it will never be a subject of a dispute or be arbitrated upon by the panel of elders.

As such, he cannot be heard to say he was not given an opportunity to be heard or that he was condemned unheard. He personally elected not to participate in the proceedings. When a party having been given an opportunity to participate in any proceedings opts not to so participate, he cannot later turn around and say he was condemned unheard.

The Ex-Parte Applicant's argument in this respect fails.

JURISDICTION OF THE TRIBUNAL

It is trite that the jurisdiction of a Land Disputes Tribunal were conferred to it by then Section 3 (1) of the Land Disputes Tribunal Act, Act No. 18 of 1990 (hereafter referred to as the Act). This act restricts the said jurisdiction to the following matters;

- (a) Division, or the determination of boundaries to land, including land held in common.
- (b) A claim to occupy land.
- (c) Trespass to land.

It is important that I duplicate the award so as to determine whether it was confined within the bracket of the above areas. The same was in the following words:-

“After a careful consideration of the Plaintiff, witnesses and the elders opinion, it was concluded that the path crossing the land parcel No. Nandi/Chemuswo/210 is illegal and therefore a government surveyor shall be required to visit the site and ascertain its existence.”

The above award was subsequently adopted as judgment of the court in Kapsabet Principal Magistrate's Court Land Disputes Tribunal Case No. 2 of 2011 on 25th January, 2011. A decree was then issued on 28th January, 2011 in the following terms.

“1. That the award filed herein be and is hereby read and adopted as judgment of this Hon. Court.

2. That the elders' opinion concluded that the path crossing the land parcel No. Nandi/Chemuswo/210 is illegal.

3. That the government surveyor shall be required to visit the site and ascertain its existence.”

Under Clauses 2 and 3, the Tribunal purported to address itself on an issue touching on proprietorship of a portion of the disputed land. It then directed the land surveyor to visit the land and ascertain its existence. It assumed the powers of determining whether the purported access road ought to exist within the disputed land. Such a decision did not fall within the realm of Section 3 (1) of the Act.

In my understanding, an access road falls under a public utility. And so what the Tribunal did was to adjudicate on whether the said public utility was situated within the said land. As such, the claim giving rise to the decision went far beyond the Land Disputes Tribunal Mandate as set out in Section 3 of the Act. Hence, the Tribunal acted ultra vires its jurisdiction.

Having said so, it is my view that it does not serve any purpose to address in this judgment the relevance of the Public Roads and Roads of Access Act, Cap 399, Laws of Kenya. This is so because the issues the Tribunal was required to address itself to fell squarely under the Land Disputes Tribunal Act and not any other statute.

IS THE APPLICATION DEFECTIVE?

It was the submission of the Interested Party that, under Order 53 1 (2) of the Civil Procedure Rules, the reliefs sought in the statement must be identical to the orders prayed for in the Notice of Motion. He also referred the court to the case of **REPUBLIC -VS- LURAMBI LAND DISPUTES TRIBUNAL – KAKAMEGA HIGH COURT CIVIL MISCELLANEOUS APPLICATION NO. 31 OF 2011.**

Order 53 1 (2) provides as follows:-

“An application for leave as aforesaid shall be made ex-parte to a Judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought

and the grounds on which it is sought and by affidavits verifying the facts relied on.”

I agree with the Interested Party that since the statement ought to outline the reliefs sought, then those reliefs must be as couched in the Notice of Motion.

The first statement the Applicant filed is dated 28th February, 2011 which accompanied the application for leave. Leave was granted on 1st March, 2011. Subsequently, the substantive application was filed – which is this application for determination dated 21st March, 2011. Thereafter on 11th April, 2012 the Applicant filed the statement and a verifying affidavit. Let me pose here and say that both this latter statement and the verifying affidavit ought to have been filed on the same date as the Notice of Motion dated 21st March, 2011. But a look at the court record shows that leave to file them late was granted on 15th May, 2012 and they were deemed as duly filed.

Be that as it may, the reliefs sought in the statement is a total departure from those sought in the Notice of Motion. In the statement, the reliefs sought are for leave to file for an order of certiorari, prohibition, mandamus and stay. These are the same orders that were sought in the statement of 28th February, 2011 before the leave was granted. Ultimately, this was a grave blunder on the part of the Applicant and a contravention of the provisions of Order 53 1 (2) of the Civil Procedure Rules.

And as was held in the case of **REPUBLIC -VS- LURAMBI LAND DISPUTES TRIBUNAL (Supra)**, that ***“In Judicial Review proceedings, the reliefs sought in the statement under Rule 1 (2) of Order 53 must be identical to the orders prayed for in the Notice of Motion. This was not the case in the present application where the relief sought in the statement was 'The Applicants seek orders of certiorari to quash the decision of the Lurambi Land Disputes Tribunal in Case No. 164 of 2003'. Quite apart from failing to cite the date of the decision in the case, the prayer for relief was not couched in the same manner as prayed for in the motion the statement was fatally defective”***.

I am also of a similar view and for the same reasons that the Applicant's statements dated 13th April, 2012 is also fatally defective for want of compliance with Order 53 1 (2).

I also agree with the Interested Party that the Ex-Parte applicant did not indicate in his Notice of Motion and the statement the date of the decision of the Tribunal sought to be quashed. But again, it is in clear terms it is the award of the Tribunal Panel of Elders who sat in the proceedings of 15th September, 2010. Those proceedings are annexed to the Notice of Motion. The decree arising therefrom is also annexed to the Notice of Motion. Hence it is apparent which award and decree the Applicant is referring to.

Although it is crucial to state the date of the decision/award, where in no uncertain terms the substance (in this case the award) being referred to is visibly outstanding, the mere omission of citing the date, cannot of itself, nullify the application. It is an omission arising from a technicality that does not affect the substance of the application.

On the filing of the statement and verifying affidavit separate from the Notice of Motion, I have already noted that that defect was cured on 15th May, 2012 when the court ordered that the two documents be deemed as duly filed.

I further concur with the counsel for the Interested Party that the prayers for orders of prohibition and mandamus cannot obtain in this application. With respect to the order for prohibition, the Applicant prays that the Kapsabet Principal Magistrate's Court be prohibited from executing the order requiring a government surveyor to ascertain the existence of the access road and the Nandi North District Land Registrar from ordering a government surveyor to survey the existence of the access road in terms of the award.

The Applicant in seeking this prayer, failed to appreciate that the Magistrate's duty upon reading the award, ended at that point. Once the award is adopted as a judgment of the court, execution of it proceeds in the same manner as in a civil case. Again, the leave that was granted operated as a stay, meaning that the award could not be further executed until these proceedings are disposed of. Essentially therefore, the

prayer for an order of prohibition was unnecessary.

This also applies to the order of mandamus sought. In no terms did the award stretch its terms to the land registrar to act on any entries in the register of the subject land. If the land registrar were to delete any entries in the register, such directives would have to emanate from a court of law. No order in this respect had been issued. They are also not orders which this court can issue as they do not arise from the subject matter for determination.

It is also important to distinguish the case of **KHAYADI -VS- UGANDA (1988) KLR** with the instant case. Counsel for the Ex-Parte Applicant said that the court in the case held that ***“a suit has to be filed in court for the Magistrate to determine the issues involved and then be referred to the elders who should file their award in court. The elders cannot of their own deal with such disputes merely because parties submit to them”***.

But this holding could only apply in our courts before the enactment of the Land Disputes Tribunal Act and subject to other relevant statutes. Once the Act became operational, all matters as stipulated under S. 3 (1) were determined by the Tribunal. Hence, that argument by the Applicant that the Tribunal was not properly constituted is invalid as the Tribunal was constituted pursuant to the Act.

In the end, I find that the Ex-Parte Applicant failed to properly articulate his relief before the court. Due to the fatal defect in the statement in support of the Notice of Motion, this application must fail. However, as I have noted, the Tribunal acted ultra vires its jurisdiction. And so, the most appropriate order to issue is to strike out the entire Notice of Motion so that this court does not appear to rubber-stamp an illegality.

In the end, the Ex-Parte Applicant's application dated 21st March, 2011 is hereby struck out with costs to the Interested Party.

DATED and DELIVERED at ELDORET this 11th day of June, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Miyianda holding brief for Mr. Birech for the Ex-parte Applicant

No appearance for Attorney General for the 1st & 2nd Respondents

Mr. Marube holding brief for Mr. Limo for the Interested Party