REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ENVIRONMENT & LAND COURT

JUDICIAL REVIEW NO.24 OF 2012

MUTHONI VAN SOMEREN.....APPLICANT

VERSUS

KIENI WEST LAND DISPUTES TRIBUNAL

THE CHIEF MAGISTRATE'S COURT NYERI …..... RESPONDENTS

AND

PATRICK NDIRANGU

SAMMY KIHONGE

DAVID KARICHU.....INTERESTED PARTIES

J U D G M E N T

The application dated 10/5/2013 seeks for a judicial review order of ***certiorari*** to remove into this Honorable Court and quash the decision of Kieni West Land Disputes Tribunal (***hereinafter referred to as the tribunal***) that was read and adopted as the judgment of the court on the 2/8/2012 vide CMCC Court Award No.52 of 2007.

The application is grounded on the allegation that the Tribunal lacked the jurisdiction to hear and determine a dispute on title to land then registered under the Registered Land Act, Cap 300 Laws of Kenya, now repealed. That the Tribunal lacked the jurisdiction and acted in excess of its mandate to proceed with the distribution of the land. The decision/award of the tribunal was arrived at in breach and violation of the principles and rules of natural justice as the Exparte applicant was not accorded an opportunity to be heard and therefore the Tribunal's decision is a nullity as it did not give any reasons for its decision.

In the supporting and verifying affidavit sworn on 10/5/2013 and filed on 14/5/2013 the applicant deponed that she is the absolute registered proprietor of all that parcel of land known as Nyeri/Endarasha/297 measuring 21.0 hectares or thereabouts. That she came to learn that sometimes in 2004, the interested parties herein presented a claim to the Tribunal seeking that she be stopped from seeking or leasing the land known as Nyeri/Endarasha/297 without involving them and that the land be sub-divided among them and herself. That she was never served with the claim by the interested parties and in pursuance of the claim the Tribunal proceeded to hear the interested parties in her absence.

On or about 11th February 2005 the Tribunal read its decision to the interested parties and thereafter the award was read and the court entered judgment in accordance with the decision of the Tribunal on the 3rd day of August 2012. She was advised by her advocate on record which advise she verily believed to be true that the Tribunal lacked the jurisdiction to hear and determine a dispute on her land as it was registered under the Registered Land Act, Cap 300 Laws of Kenya.

That she had been further advised by her advocate on record which advise she verily believed to be true that the Tribunal lacked the jurisdiction and acted in excess of its mandate by proceeding with the distribution of her land. She was not accorded an opportunity to be heard hence the decision of the Tribunal was arrived at in breach of ,and or violation of, the principles and rules of natural justice. She had been advised by her advocate on record which advise she verily believed to be true that the Tribunal's decision is a nullity as the Tribunal did not give any reasons for its decision.

The Attorney General through ***T.W. Gathagu, Deputy Chief Litigation Counsel*** filed a notice of appointment but did not file a replying affidavit on behalf of the respondents hence the allegations against them are not controverted.***Sammy Kihonge Someren***, one of the interested parties filed a replying affidavit on the 26/9/2013. The gist of the affidavit is that he verily believes that the applicant's claim and reliefs sought lack merit because they consists of material non-disclosure and the same are founded on explicit lies and afterthoughts. The applicant was duly served with a hearing notice and statement of claim made to the Tribunal before the matter was heard. That despite being duly served with the hearing notice, the applicant failed to appear before the Tribunal nor oppose the application. The applicant's failure to file any reply to the application or attend the hearing before the Tribunal was construed to mean and or meant she did not oppose the same. That the application strictly requested for the division of the property and the issue of ownership of the land was not contested, hence the Tribunal legally and procedurally proceeded to make judgment within its mandate. The Tribunal made an award whose import and effect was to cause the subject land to be divided among the applicant herein and her sons as no issue of ownership had been raised, and thus it clearly worked within the confinement of Section 3(1) of the Land Dispute Tribunal Act. The orders of the Tribunal were in effect aimed at complementing and not circumventing the provisions of the then Registered Land Act, Cap 300 of the Laws of Kenya. The applicant's application is an afterthought as she was well aware she held the land in trust for all her children and the reason she did not take any step to appeal the Tribunal's decision. That it is crystal clear that the applicant herein does not hold absolute ownership or proprietary interest in the subject parcel of land or at all but holds the same subject to overriding interests.

He further depones that it will be meet and just to disallow the applicant's application since individual interest of the applicant cannot override the greater family interest considering that the applicant held the subject land in trust and her claim of absolute ownership is without any iota of jurisdiction. The applicant had the option of appealing against the Tribunal decision or having the same set aside but choose not to and is guilty of laches. That he was advised by his advocate on record that this honorable court aids the vigilant and not the indolent and the applicant ought not to have the discretion of this Honourable Court exercised in her favour. That the applicant's act of filing this application is meant to complicate this matter further and calculated at frustrating the interested parties herein as the applicant has since then filed one suit in the High Court in Nyeri and two others at the High Court in Kitale relating to the same parcel of land. He was advised by his advocate on record which he believes to be true that the applicant is asking this Honourable Court to act in vain and this Honourable Court does not act in vain.

The interested parties do not deny that the applicant is entitled to her own share of the subject property but state that the quashing of the Tribunal order will only cause bad blood within the family as currently all parties involved are content with what the Tribunal decided. That they were further advised by their advocates on recored which they believed to be the true that the application as filed and served herein is incompetent, fatally defective, craving to be dismissed ex-debitio justitiae.

In the submissions dated 23/10/2013 and filed on 18/11/2013, the exparte applicant submits that the jurisdiction of the Land Dispute Tribunal was set out in Land Disputes Tribunal Act No.18 of 1990 (repealed). Section 3 of the Act provided that the Land Dispute Tribunal was to hear and determine disputes as to the division of, or the determination of boundaries to land, including land held in common;

a claim to occupy or work land; or trespass to land. From the provisions of Section 3 it is quite clear that the Tribunal's jurisdiction was limited to entertaining a dispute as to the division of land and not to make decision as to division or subdivision of land. It then follows that the Tribunal lacked the jurisdiction to proceed with the division or distribution of the applicant's land. By proceeding to order for the division of the land the Tribunal acted in excess of its mandate.

She further submits that the exparte applicant is the absolute proprietor of all that parcel of land title No.Nyeri/Endarasha/297 which she acquired for valuable consideration from the Settlement Fund Trustee. The land was registered under the Registered Land Act Cap 300(now repealed). The Tribunal was only mandated to adjudicate and reach a decision in accordance with recognized customary law. Therefore as the exparte applicant is the registered absolute proprietor of all that parcel of land known as Nyeri/Endarasha/297 the Tribunal lacked the jurisdiction to hear and determine a dispute on title to land then registered under the Registered Land Act, cap 300 Laws of Kenya. The Tribunal did not therefore have jurisdiction to adjudicate on ownership of the land. The Tribunal's decision is therefore ultra vires. The land subject matter was not bought and did not belong to the interested parties' father. In fact there was no evidence adduced at the Tribunal to that effect and none has been adduced before this court. The land, in her view, is therefore not held by the applicant in trust for the interested parties. There is no evidence of existence of any trust whatsoever. The mere fact that the interested parties are children of the applicant did not and does not entitle them to the land. The applicant cannot be directed by any person or authority on how to share out her land. By purporting to direct for subdivision of the land equally among the interested parties and the applicant the Tribunal interfered with the applicant's ownership of the land. The Tribunal's decision that the land be subdivided was made without jurisdiction hence ultra vires. The interested parties claim before the tribunal was a dispute as to title or ownership of the land subject matter. By seeking subdivision of the land amongst them the interested parties claim was basically for a declaration that they were entitled to the parcel of land. Indeed the Tribunal granted the interested parties' title to the land by its decision that it be subdivided amongst them equally. The Tribunal therefore adjudicated upon the claim and made the decision without or in excess of its jurisdiction as the Land Disputes Tribunal Act did not mandate the Tribunal to deal with and determine a dispute as to ownership of land.

The applicant referred to section 3(4) of the Land Disputes Tribunal Act which provides that every claim ought to be served on the other party to the dispute. The applicant was never served with the claim by the interested parties and was not accorded an opportunity of being heard by the Tribunal in violation of Section 3(7) of the Act and the rules of natural justice which require that a party should not be condemned unheard. There is no evidence that the applicant was ever served with the claim or notice of the hearing of the claim and yet the tribunal proceeded to hear the interested parties in the absence of the applicant. The decision/award of the tribunal was therefore arrived at in violation of the principles of natural justice as the exparte applicant was not accorded an opportunity to be heard.

The applicant cited the case of ***Pashito Holdings & another V Ndungu & 2 others KLR (E&L)1 295*** where it was held that ***"The rule of audi alteram partem, which literally means 'hear the other side', is a rule of natural justice. It is an indispensable requirement of justice that the party who has to make a decision shall hear both sides, giving each an opportunity of hearing what is urged against him"***

She also referred to the Case of Nyongesa & 4 others V Egerton University College (1990) KLR 692 where it was held;

> ***"There was a failure of natural justice. It was necessary for each applicant to be served with a notice that he was being proceeded against and each organ which dealt with the applicants was required to act honestly and fairly."***

The applicant further argues that though Section 3(8) of the Act which was couched in mandatory terms required the Tribunal to give reasons for its decision, the Tribunal in arriving at its decision did not state a summary of the issues and the determination thereon. No reasons were given for the decision reached by the Tribunal. In the circumstances there is an error on the face of the record which renders the

decision of the Tribunal fit for quashing and believes that unless the motion is allowed the interested parties stand to be unjustly enriched by the decision of the Tribunal which bearing in mind all the circumstances is irrational or unreasonable as the interested parties did not have and do not have any interest whatsoever in the applicant's parcel of land. Section 30 of the Registered Land Act Cap 300 (repealed) now section 28 of the Land Registration Act, 2012 sets out overriding interests and amongst them there is no children's right over a parent's property. It is just and fair in the circumstances obtaining herein that the applicant's motion be allowed.

The Attorney General did not file his submissions on behalf of the respondent however, the interested party on their part filed submissions whose gist was that the Tribunal dealt with the issue of division of or the determination of the boundaries to land, claim to occupy or work on land or trespass to land. The interested parties who are the applicants' sons had a problem with the division of the land. All the family members who are parties herein were well aware that the applicant held the land in trust for the whole family including her. This was the sole reason she had failed to make any appearance before the tribunal as she was well aware the dispute did not relate to ownership of the suit land but division of the same into equal shares for all members which she was against.

They argued that section 3 of the Land Disputes Tribunal Act does allow the Tribunal to hear and determine a dispute as to division of land. In this case the applicant failed to appear before the tribunal despite having been served with summons and the tribunal having adjourned three times to give her time to reply to the interested parties' application which position was captured in page 2 of the Tribunals decision which the applicant omitted while attaching the Tribunal's decision to her application. The applicants failure to appear before the Tribunal could only be interpreted to mean she was not disputing that she was not the sole beneficiary of the suit property. The applicant has gone further to cry wolf in her submissions that she was not given a right to be heard by the tribunal and she was not served with the claim and submitted that the reason the applicant failed to attach the 1st and 2nd page of the tribunals findings was because she was too well aware that her claim would not stand as the tribunals proceedings would have proved otherwise and hence prejudicial to her case. It is trite principal of equity that he who comes to equity must come with clean hands. The applicant is guilty of trying to omit some materials of the Tribunals findings and as such her hands are tainted and she cannot seek indulgence from the Honourable Court.

The interested parties further argued that the applicant has not made out a case for issue of the order of certiorari. The gravamen of the interested party submission on this point is that the applicant did not attach the impugned decision, contrary to the provision of order 53 rule 7 of the Civil Procedure Rule. She chose to attach a paper purporting to be the award of the Tribunal and missed page 3 and intentionally omitted pages 1 and 2. The attached document does not even show which tribunal was making the decision. The interested party further submitted that the full decision of the Tribunal was to be availed and not just findings.

Secondly, the interested party argues that an order of certiorari would be in vain as no order of prohibition of the execution of the decree by the magistrate's court was made. He submits that the language of Section 7 of the L.D.T Act No.18 of 1990 is mandatory and it follows that the magistrate's court was legally bound to enter judgment. Upon the said decision and thus it did not exceed its jurisdiction. He argues that the decision of the magistrate's court cannot be quashed but an order of prohibition can be issued to halt the process.

To begin with this court finds that the decision of the Tribunal was made on the 11/2/2005 in Mweiga Land Disputes Civil Case no 20 of 2004 and was adopted on the 3rd of August 2012 in Nyeri Chief Magistrates Award case no 52 of 2007 as a judgment of the court and therefore the decision of the Tribunal became subsumed in the decision of the Magistrates' Court. The Hon. magistrate read and adopted the decision of the Tribunal as a judgment of the court to enable parties to execute the decision. I do agree with Mr. Mahinda that the magistrate's court have no power to reject an award even if based on illegality as the magistrate court has no residual duty to ensure that the decision is made within the law. The court has no discretion to decline to enter judgment in accordance with the award even if the same is entered contrary to procedure. However, I do not agree with his submission that the magistrate's decision

cannot be quashed and that the only way the execution can be halted is by an order of Prohibition which has not been prayed for. It is my view that the application as framed seeks to quash the decision of the tribunal as adopted by the court and therefore both decisions of the tribunal and court are being challenged by the applicant. The court observes that if an order of certiorari is issued, prohibition will not be necessary as there will be no decision to be executed hence granting the prayer would be superfluous.

I do not agree with Mr. Mahinda submissions that the decision to be quashed is not exhibited in the application. The applicant has annexed Mweiga Civil Case No.20 of 2004 as the decision to be quashed which decision has a heading ,findings and the award, and is signed by three members of the tribunal as required by law. The applicant has also annexed the order of the court made on the 3rd August 2012 where the decision of the tribunal was entered as the judgment of the court. These two documents are enough to satisfy the provisions of Order 53 rule 7 of the Civil Procedure Rules 2010 relied upon by the interested parties in their argument that the decision to be quashed has not been annexed.

I do find that the applicant is the absolute proprietor of the suit land known as Nyeri Endarasha /297 which was registered under the Registered Land Act Cap 300(repealed). The tribunal made a decision that the interested parties have a right to their parents properties and ordered that the disputed land be subdivided equally amongst the applicant and the interested parties. ***Section 3 of the Land Disputes Tribunal Act no 18 of 1990 (repealed)*** provided that the Land Dispute Tribunal was to hear and determine disputes as to the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work land; or trespass to land. There was no dispute before the tribunal on division of land as the land was already registered in the applicant's name as an absolute proprietor. The tribunal acted beyond its jurisdiction in making an order for the subdivision of the land equally between the parties. In the case of ***Jotham Amunavi -v- The Chairman Sabatia Land Disputes Tribunal and another Civil Appeal no 256 of 2002 , t***he Court of Appeal observed that if the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels operating a register in respect of each subdivision and thereafter the transfer of half acre, it is clear that the proceedings before the tribunal related to both title to land and the beneficial interest in the suit land and such a dispute is not within the provisions of section 3(1) of the Land Disputes Tribunal Act.

The exparte applicant alleged that she was not served with the claim by the interested parties and that in pursuance of the claim the tribunal proceeded to hear the interested parties in her absence. In response to this allegation the interested parties have stated in the affidavit of Sammy Kihonge Someren that she was served and have annexed the the claim that was before the tribunal. However there is no evidence of service by way of affidavit of service or otherwise. The court finds that the interested parties and the respondents have failed to prove that there was service of the claim and hearing notice. It is trite law that no person can be condemned unheard therefore doing so is in breach of this fundamental principle of natural justice and any decision made in breach of the same is available for review. Indeed in ***Pashito Holdings & another -v- Ndungu & 2 others KLR (E&L) 1 295*** the Court of appeal held that the rule of ***audi alteram partem*** is a rule of natural justice and an indispensable requirement of justice that the party who made the decision shall hear both sides, giving each an opportunity of hearing what is urged against him. The applicant was not given such opportunity by the tribunal contrary to section 3 (4) of the Act and therefore the decision was made in breach of the principles of natural justice.

This court finds that the Tribunal gave reasons for its decision by making its findings at page 3 of the Award and therefore the ground that the tribunal never gave reasons for its decision fails. The tribunal's reasons for the decision was that the interested parties were the applicant's children's hence had a right to the applicant's properties.

The upshot of the above is that the Notice of motion dated 10th of May 2013 is allowed thus, the decision of Kieni West Land Disputes Tribunal which was read and adopted as the judgment of the court on the 3rd Day of August 2012 vide Chief Magistrates Court Award No 52 of 2007 is hereby removed to this court and quashed. Costs to the applicant.

Dated, signed and delivered on 10th day of October 2014.

A. OMBWAYO

JUDGE