REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW NO. 22 OF 2012

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN, MWIMBI

LAND DISPUTES TRIBUNAL.....RESPONDENT

EVANS NJIRU MANYARA.....INTERESTED PARTY

SAMUEL KAARIA.....EXPARTE APPLICANT

R U L I N G

This Judicial Review application was brought to Court by way of a Notice of Motion dated 2nd august 2012. In his application, the Ex- Parte Applicant prays for orders that:

a) An order of probation (sic) directed at the respondent (sic) restraining him by themselves, agents, and servants or otherwise howsoever from exercising (sic) any portion from the applicant's L. R. NO. MWIMBI CHOGORIA/177.

b) Costs of this application be provided for.

In the application, the exparte applicant said that he was supporting it with grounds set out in his statement of facts which he had filed at the leave stage.

In the Statutory Statement of facts dated 24th July, 2012 under item c headed "Grounds upon which relief is being sought, the only ground given is:-

"a) The tribunal acted ultra vires as it lacked jurisdiction to order transfer of land registered under Cap 300, Laws Of Kenya."

A conspectus of this dispute is that the Hon. P. Ngare Gesora, SRM, at Chuka, on 11.3.09 read out in open court an award by the Land Disputes Tribunal in LDT No. 36 2008.

The award was in the following format:

"**SUMMARY**

It is a case where the younger brother is accusing his elder brother claiming that he has taken all his father's land and that he wants a share of it.

Elders have listened to both the plaintiff and the defendant and their witnesses and questioned each individually. They went to view the disputed land.

FINDINGS

1. ***The brother is the eldest son and was trusted with all the land by their father to share to others.***
2. ***He has big piece of land which he says be bought.***
3. ***Since their father is not alive the plaintiff says the big land he has was bought by their father and the defendant.***
4. ***Evidence say (sic) that when the mother was sharing land to all other members of the family the plaintiff was given one acre but refused.***

R U L I N G

The land in dispute belongs to Kaaria, but because he has another land at Kinoro and Njiru who is his brother has a lot of development on the disputed land, he should be given 2 acres and Kaaria remains with one acre.30 days for appeal given to any dissatisfied party."

The suit was canvassed by way of written submissions.

Exparte Applicants Submissions

The exparte applicant submitted that the Land Disputes Tribunal lacked jurisdiction to deal with matters to do with land registered under the defunct Registered Land Act, Cap. 300, Laws of Kenya. The case of **Mbiyu Versus Mary Njeri and Another** was cited and Justice Ojwang, J, as he then was is quoted as having said:

"Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the question. Thus a court or tribunal overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity."

It was submitted that only the High Court had power to order for transfer of land. It was also asserted that article 165 (6) and (7) of the Constitution of Kenya conferred upon this Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. The exparte applicant concluded his submissions by saying that since the land disputes tribunal had acted ultravires by ordering fraudulently the transfer of 2 acres out of Land Parcel No. Mwimbi/Chogoria/177 to the Interested Party, the order of prohibition sought by his application ought to be granted.

INTERESTED PARTY'S SUBMISSIONS

The interested party submitted that the application was incurably and fatally defective as it has not been brought to court in the name of the state. It was also submitted that the affidavit of the applicant sworn on 2.8.2012 was wrongly titled. The case of **Farmers Bus Service and Others versus The Transport Licensing Appeal Tribunal [CA 1959 E A LP 779]** was cited. In that case the court held:

"prerogative orders are issued in the name of the Crown and application for such orders must be correctly....." Meaning they must be correctly

headed and in the proper format etc.

The case of **Welamondi Versus the Chairman, Electrol Commission of Kenya (2002 1KLR 486)** was cited as having held that all orders of Certiorari, Mandamus or prohibition issued in the name of the Republic and applications thereof are made in the name of the Republic at the instance of the person affected by the action or omission in the issue. It was submitted that this application was completely muddled in form and hence incompetent and inconceivable in substance.

The respondent submitted that Section 13 and 13(A) of the Government Proceedings Act, mandatorily required that proceedings against he government on behalf

of its officers be brought in the name of the Attorney general. It was opined that this application had failed to do so and this failure rendered the main motion fatally defective, legally incompetent and incurable.

Regarding jurisdiction, it was submitted that the Land Disputes Tribunal had jurisdiction as the Interested Party was seeking division of family land which the interested Party held in trust. **MERU JUDICIAL REVIEW MISC CASE NO. 76 OF 2008: MICHUBU BAARIU VERSUS CHAIRMAN, EASTERN PROVINCE LAND DISPUTES APPEALS COMMIITTEE AND OTHERS** was cited as having held that the tribunal had jurisdiction in matters falling under the ambit of Section 3(1) of the Land Disputes Tribunals Act. The Interested Party contended that as the exparte applicant had actively participated in the proceedings before the Land Disputes Tribunal, instead of filing Judicial Review proceedings belatedly, he should have appealed against the impugned decision within 30 days of the date of the determination as provided for by Section 8(1) of the Land Disputes Tribunals Act. It was submitted that having failed to exhaust the appellate avenues provided by law, he was absolutely disentitled to the relief sought by this application.

It was submitted that by failing to reply to the Interested Party's affidavit sworn on 12.10.2012, the same was automatically deemed to have been admitted by the exparte applicant. The Interested Party asserted that the relief sought cannot be implemented as it is directed to the LDT which had no power to implement the decision. The application was, therefore, directed at the wrong party. It was stated that as the LDT award had been adopted as a judgment of the Court, the only recourse the Exparte Applicant had was to appeal against he judgment.

The Interested Party reiterated that the LDT had jurisdiction as the dispute related to family land and its sub-division. It was stated that the exparte applicant was the brother of the Interested Party who held the suit land in trust for him.

REPLY TO INTRESTED PARTY'S

SUMISSIONS BY THE EXPARTE APPLICANT

The Exparte applicant argued generally that issues such as the supporting affidavit not indicating the Crown as an applicant was a typographical error which could not make the application incurable. He argued that this was merely a matter of form and not substance curable by dint of Order 51 rule 10 (2) of the Civil Procedure rules (CPR). He also supported his argument by relying on Order 2 Rule 14 of CPR which states:"No technical objection may be raised to any pleading on the ground of any want of form." It was further submitted that the case of **Welamondi versus Chairman, Electoral Commission** (supra) had dissimilar facts to those of this suit.

The Exparte applicant reiterated his position that the LDT had no jurisdiction. He concluded by peremptorily dismissing the interested party's submissions as being mere technicalities, misguided and meant to defeat the substance of the exparte applicant's application.

THE RESPONDENT'S WRITTEN SUBMISSIONS

The respondent submits that the order of prohibition sought by the exparte applicant is not tenable. The respondent says that it is settled law that an order of prohibition lies in a situation where a decision is about to be made in violation of the rules of natural justice. As the impugned decision in this case was made and adopted as a judgment of the court in the Principal Magistrates Court at Chuka in **LTD 36 of 2008 on 11.3.2009**, the belated filing of this application in 2012, three years later, had the effect that if the order of prohibition would be issued, it would be in vain and of no legal effect. For this reason, it was submitted that the applicant is not entitled to the order of prohibition as sought.

The Respondent submitted that as the interested party had not quashed the impugned decision, the prohibition sought would only have the effect of prohibiting a valid decision. The respondent argued that this application seeks to redress nothing but was merely aimed at thwarting the operation of a valid decision.

The respondent also postulated that this application was incompetent as it had failed to comply with the mandatory requirements stipulated by Order 53 Rule 4(1) , CPR, which provides:

"copies of the statement accompanying the application for leave shall be served with notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand."

The respondent argues that this application is only accompanied by a supporting affidavit contrary to the above cited provision. It is contended that a Notice of Motion cannot be accompanied by evidential material not allowed during the leave stage and it is further opined that only through the leave of Court that such material would be properly on record. This, the respondent says, would not be in the form of a supporting affidavit **BUT** in the form of an affidavit verifying the statement of fact.

For the above reasons, the respondent, asserts that the motion containing the application is defective for lack of required evidence and should be struck out. He also prays that the affidavit, which was filed without leave of court, should also be struck out.

The Respondent concludes that this court should not exercise its discretionary powers in favour of the exparte applicant as it has been demonstrated that the order sought does not lie and further that the motion is defective and incompetent. The court is urged to dismiss it with costs.

DETERMINATION

The only issue for determination is whether or not the exparte applicant merits the order of prohibition he has sought.

The main thrust of the exparte Application's submissions in support of this application is that the Land Disputes Tribunal which handled this matter lacked jurisdiction. As Justice Nyarangi opined in th case of **"MV SS LILIAN", [1989] KLR1**:-

"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

A perusal of the LDT proceedings makes it pellucid that the exparte applicant, who actively participated in the proceedings, did not challenge the jurisdiction of the tribunal. I wish to dispense with the matter of jurisdiction first.

Section 3(1) of the Land Disputes Tribunals Act states:

*"**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, ncluding 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."

This is a dispute between two brothers. The respondent went to the LDT to seek a share of what he said was family land. The tribunal found that the respondent had made extensive development on the suit land. Hence the respondent was seeking what he deemed to be family land to be subdivided so that he would own the part he had developed. His claim also entailed his right to occupy or work the land in dispute. In these circumstances, I find that the Land Disputes Tribunal had Jurisdiction to entertain the Respondent's dispute.

I will quickly dispose of the submissions by the exparte applicant that the Interested Party's submissions were mainly procedural technicalities which were meant to obviate consideration of the substance. A plethora of cases have conclusively held that Judicial review is a Special Jurisdiction governed by the provisions of the Law Reform Act and by Order 53 of the Civil Procedure Rules. I, therefore, do not agree with the exparte applicant that mandatory provisions of the law should be ignored. However, with respect to the Supporting Affidavit accompanying the Notice of Motion, I find that since the Main Motion was properly titled, the format being challenged by the Interested Party was merely a typographical error. However, I opine that the exparte applicant should have been diligent enough to ensure that he observed the mandatory provisions of Order 53 of the Civil Procedure rules.

I agree with the Respondent that the order of prohibition lies when a decision is about to be made in violation of the rules of Natural Justice. The decision of the LDT was adopted as an order of the Court by the Principal Magistrate's Court at Chuka in LDT 36 of 2008 on 11.3.2009. The application was filed in court in July, 2013, more than three years later. I find that over 5 years later, there is nothing to be prohibited. I also agree that the Exparte Applicant has not quashed the LDT decision. Indeed, the Exparte applicant, who had actively participated in the LDT proceedings should have exhausted the appeal mechanisms as provided by the apposite provisions of the Land Disputes Tribunals Act.

I do opine that it would have been desirable for the exparte applicant to have observed the provisions of Section 13 and 13A of the Government Proceedings Act. Observance of statutory provisions is not a mere procedural matter. It is a legal requirement.

Regarding the argument that Section 159 of the defunct Registered Land Act confers jurisdiction to deal with registered land only on the High Court, I wish to point out that the same section is veritably pellucid that disputes coming within the provisions of Section 3(1) of the Land Disputes Tribunals Act are excluded from this requirement. As I have already pointed out, this dispute falls within the ambit of the provisions of Section 3(1) of the Land Disputes Tribunals Act.

I have considered the averments, the submissions and the various authorities proffered by the parties. The main thrust of the exparte applicant's case was that the land Disputes Tribunal lacked jurisdiction to handle the dispute that has spawned this suit. I have also considered other pertinent issues. I have come to the conclusion that the exparte applicant does not merit to be granted the order sought.

In the circumstances, I dismiss this suit. Stay granted at the leave stage is vacated.

I award costs to the Respondent and to the Interested Party.

It is so ordered.

Delivered in Open Court at Meru this 15th day of October, 2014 in the presence of:

Cc Lilian/Daniel

Kiongo present for Respondent

Kaumbi h/b Mutunga for Interested Party

Muthamia h/b E. Kimathi for the Exparte Applicant

P. M. NJOROGE

JUDGE