



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
JUDICIAL REVIEW APPLICATION NO. 38 OF 2013
(FORMERLY JUDICIAL REVIEW NO. 7 OF 2012, EMBU)

IN THE MATTER OF LAND DISPUTE ACT (NOW REPEALED)

AND

IN THE MATTER OF LAND PARCEL NO. MBETI/GACHOKA/742

MARGARET NYAWIRA KARIUKI
APPLICANT

VERSUS

SENIOR PRINCIPAL MAGISTRATE SIAKAGO
RESPONDENT

FRANCIS WAITHAKA NGARIUKU INTERESTED
PARTY

JUDGMENT

By her Notice of Motion filed herein on 8th February, 2013, the applicant MARGARET NYAWIRA KARIUKI citing **Order 53 Rule 3 of the Civil Procedure Rules** sought the following orders:-

1. ***That this Court be pleased to issue an order of certiorari to quash the decision of the Gachoka Land Dispute Tribunal dated 11th November, 2011 and a decree of the Senior Principal Magistrate Siakago given on 15th December, 2011 in PMCC Land Dispute Tribunal Case No. 36 of 2011***
2. ***That this Court be pleased to issue an order of prohibition to prohibit the Senior Principal Magistrate Siakago and all Courts below him from enforcing, executing or issuing any orders at all pursuant to the decree issued on 15th December, 2011 in PMCC Land Disputes Tribunal Case No. 36 of 2011.***

The same was supported by the applicant's affidavit in which she deponed, inter alia, that she is the registered proprietor of parcel of land No. MBETI/GACHOKA/742 over which she has been having a running dispute with the interested party FRANCIS WAITHAKA NGARIUKU who claim ownership of the said parcel of land (hereinafter the suit land) through one MASHAKI SAMBURU who fraudulently obtained a title deed to the same suit land while the applicant was still the registered owner.

On discovering this, the applicant complained to the Chief Land Registrar who, vide a Gazette Notice

dated 14th April 1989, cancelled the said title of Mashaki Samburu. Despite that cancellation, the interested party herein continued to remain on the suit land and so the applicant lodged a claim with the Land Disputes Tribunal at Gachoka but before the Tribunal could determine the dispute, the **Land Disputes Tribunal Act** was repealed with the coming into effect of the **Environment and Land Court Act**. Notwithstanding the fact that the Commissioner of Lands had written to all District Commissioners suspending the operations of the Land Disputes Tribunal and Appeals Committees, the Gachoka Land Disputes Tribunal went ahead to hear the dispute and filed a decision dated 11th November, 2011 at the Magistrate's Court at Siakago. That Court proceeded to confirm the said decision which involved cancellation of title and issues of adverse possession which are beyond the Tribunal's powers.

In opposing the application, the interested party FRANCIS NGARIUKU WAITHAKA filed a replying affidavit in which he deponed, inter alia, that the Gachoka Land Disputes Tribunal acted within its powers since the claim was one of trespass and therefore within the jurisdiction of the Tribunal and it did not touch on the issue of cancellation of title or adverse possession. He added that the Tribunal found that he had been on the land for over thirty seven (37) years having developed it with permanent structures. He added further that by the time the Land Disputes Tribunal Act was repealed on 30th August, 2011, the Tribunal had already collected evidence and visited the site and only its decision was filed in Court after the Land Disputes Tribunal Act had been repealed. He added that as at 15th December, 2011, the Environment and Land Court had not been established or constituted.

Counsels for the applicant and interested party have filed their submissions which I have considered together with the application, the replying affidavit and other annexures.

It is true that the applicant herein has actually styled herself as an interested party and not an applicant and has also filed an affidavit not in verification of facts but setting out the basis of her case. Further, the Gachoka Land Disputes Tribunal is not a party. The interested party has therefore asked this Court to find the application defective. I do not consider the defect to be fatal to this application because in the body of the application, the remedy is sought against both the decision of the Gachoka Land Disputes Tribunal and the Senior Principal Magistrate's Court at Siakago and really once the Principal Magistrate's Court at Siakago adopted the award of the Gachoka Land Disputes Tribunal, that decision became the Court's decision. On the issue of the affidavits, I think that would be a proper case in which to adopt the provisions of **Article 159 of the Constitution**. In any case, the respondents and interested party were under no illusion about the case they were facing.

It is clear from the material placed before me that the parties herein litigated over this suit land at the Gachoka Land Disputes Tribunal which rendered its decision on 11th November, 2011 dismissing the applicant's claim against the interested party. In making its decision, the said Tribunal summarized the issues before it as follows:-

1. ***"BACKGROUND FACTS***

P/NO Mbeti/Gachoka/742

2. ***ISSUES SUMMARIZED***

(a) Trespass

(b) Purchase

(c) Ownership

(d) Development"

In his submission, the interested party's counsel has stated that the Tribunal only confined itself to the issue of trespass which is a matter within its jurisdiction. It is however clear that not only was the suit

land registered but the Tribunal itself considered other issues including purchase, ownership and development. It proceeded further on to make a finding that the interested party who was the objector in those proceedings had lived on the land for over 37 years. The same Tribunal proceeded to make a finding that the title deed of Mashaki Samburu had been **“cancelled without following the procedure or by a Court order”**. All that was clearly beyond the Tribunal’s jurisdiction. And in its final decision, the Tribunal rendered itself in the following words:-

“The objector has been living on disputed land for thirty seven (37) years therefore the claimant’s claim against the objector for trespass on land No. Mbeti/Gachoka/742 is dismissed with no costs”

The applicant’s argument is that the Tribunal went even further to base its findings on the doctrine of adverse possession. Looking at the above decision, it is clear to me that indeed the Tribunal based its findings on the length of time the interested party herein had been on the suit land and was essentially making a finding on the basis of adverse possession. Only the High Court has jurisdiction under **Section 37 and 38 of the Limitations of Actions Act** to declare a person to have become entitled to land through adverse possession. The Tribunal clearly over-stepped its mandate. In the case of **JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA DIVISIONAL LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL NO. 256 of 2002**, the Court of Appeal while considering the jurisdiction of the Land Disputes Tribunal under the now repealed Land Disputes Tribunal Act stated as follows:-

“It is clear that the proceedings before the Tribunal related both to title to land and to beneficial interests in the suit land. Such a dispute is not, in our view, within the provisions of Section 3 (i) of the Land Disputes Tribunal Act. By Section 159 of the Registered Land Act, such a dispute can be tried by the High Court or by the Resident Magistrate’s Court in cases where the latter has jurisdiction”

It is therefore clear that the Gachoka Land Disputes clearly exceeded its jurisdiction in determining issues that the law does not mandate it to.

On the issue that the Gachoka Land Dispute Tribunal and the Siakago Court continued to deal with this dispute notwithstanding the fact that the ***Land Dispute Tribunal Act*** had been repealed by the ***Environment and Land Court Act***, it is true that the Land Disputes Tribunal Act was repealed on 30th August 2011 when the Environment and Land Court Act commenced. However, **Section 30 of the Environment and Land Court Act** which is the transitional provision provided that all proceedings relating to Land and Environment pending before any Courts or Tribunal of competent jurisdiction would continue to be heard and determined by the said Courts or Tribunals until the Environment and Land Courts came into operation. In November, 2012, the Chief Justice issued ***Practice Directions*** allowing Magistrates Courts to continue and determine cases referred to them from the Tribunals. The decisions of the Gachoka Land Disputes Tribunal was delivered in November, 2011 and the decree at Siakago Court in December, 2011. In view of the transitional provision in **Section 30 (i) of the Environment and Land Court Act**, the Tribunal and Court were in order to continue determining the cases before them. That complaint is therefore un-meritious and must be rejected.

Ultimately however, having considered all the evidence in this matter, I am satisfied that both the Gachoka Land Disputes Tribunal and the Siakago Principal Magistrate’s Court exceeded their jurisdiction. The Tribunal having exercised jurisdiction that it did not have, what came out of its deliberations was a nullity and what the Court at Siakago confirmed was equally a nullity because out of a nullity is a nullity due to the maxim *ex nihilo nihil fit* – out of nothing comes nothing.

That being my view of this matter, I enter judgment for the applicant in terms of the prayers sought in her Notice of Motion with no order as to costs.

It is so ordered.

B.N. OLAO

JUDGE

14TH NOVEMBER, 2014

14/11/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Esemé for Applicant – present

Mr. Gachoka for Mr. Okwaro for Interested party – present

COURT: Judgment delivered in open Court this 14th day of November, 2014.

Mr. Esemé for Applicant present

Mr. Gachoka for Mr. Okwaro for Interested party present

Right of appeal explained.

B.N. OLAO

JUDGE

14TH NOVEMBER, 2014