



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW APPLICATION NO 79 OF 2011

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI

AND

IN THE MATTER OF THE LAND DISPUTE ACT NO 18 OF 1990 LAWS OF KENYA (REPEALED), THE REGISTERED LAND ACT CAP 300, THE LAND CONTROL BOARD ACT CAP 302 AND THE LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA

AND

IN THE MATTER OF NYANDARUA OLJOROOROK DIVISION LAND DISPUTE TRIBUNAL CASE NO 10 OF 2010 AND THE NYAHURURU PRINCIPAL MAGISTRATE'S COURT LAND DISPUTE CASE NO 32 OF 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NYANDARUA OWOROOROK DIVISION

LAND DISPUTETRIBUNAL.....1ST RESPONDENT

NYAHURURU PRINCIPAL MAGISTRATE'S COURT.....2ND RESPONDENT

AND

KAMAU GATHARA.....INTERESTED PARTY

EX PARTE

FRANCIS WATHINJA NJAGI.....SUBJECT

JUDGMENT

1. The ex-parte applicant **Francis Wathinja Njagi** pursuant to leave granted on **15th July, 2011** filed a Notice of Motion dated **26th July, 2011** seeking an Order of Certiorari to remove to this court for the purpose of quashing the proceedings and award of the **Nyandarua Oljoroorok Division Land Dispute Tribunal** in Land dispute No. 10 of 2010, adopted by the Nyahururu Principal Magistrates Court in

Land Dispute Case No. **32** of **2010**.

2. The motion is grounded upon the grounds set out on the face thereof, statement of facts and supported by the affidavit verifying the facts that the tribunal did not have jurisdiction to entertain a dispute relating to a contract for the sale of land or order for specific performance; that the claim instituted before the tribunal was statute barred and the interested party had no capacity to institute proceedings before the tribunal as he did not have a grant of letters of administration.

3. The Interested Party opposed the application vide a replying affidavit sworn **on 8th September, 2011** wherein he deponed that he had not been served with the application within the strict timelines as ordered by the court and that the tribunal acted within its mandate, giving an award that stated he was to occupy and work on the land.

4. The respondents did not enter appearance or file any documents in response to the application. However, on **23rd July, 2013** Mr Njuguna being present in court, intimated that the respondents would not be opposing the application.

5. Both the ex parte applicant and the interested party filed written submissions as agreed on **23rd July, 2013** which I have taken into consideration together with the authorities filed in support of the parties respective positions.

6. Judicial review will lie where an inferior court, tribunal, or other public body or person exercising a public or statutory function, has acted without or in excess of jurisdiction. This is very common in situations where such an inferior court, tribunal or public body commits a fundamental error of Law which itself might constitute a fundamental misdirection on the effect of which is to make the resulting decision destitute of legality. It is the duty of the judicial review court to correct such jurisdictional or error of law by the order of certiorari which quashes the decision of the inferior tribunal or court, or public body.

7. The determination of the motion herein rests on the question whether or not the tribunal had jurisdiction to determine a dispute relating to a contract for the sale of land or order for specific performance and further entertain a dispute relating to succession where letters of administration had not been taken out.

8. Before I go into the merits of the application, I think it is important to first address the issue raised by counsel for the interested party on service. Whereas it might be true that the interested party was not served within the 14 days ordered by the court, the interested party was served non the less, he entered appearance and filed his replying affidavit and submissions. Failure to serve him with the application on time cannot be sufficient ground to strike out the application as any loss occasioned to the interested party can be compensated by way of damages.

9. What is more critical to my mind is whether the motion was filed on time as was the case in **Waweru Richu v Kingori Nderue**, Nyeri Misc. Civil Appl. No 12 of 2008 cited by counsel for the interested party. In that case, **Kasango J.** struck out the motion because the same had been filed out of time. This is not the case in the current suit as the application herein was filed on time but it is the service of that application that was effected late. For the reasons stated above, I decline to strike out the application on that ground.

10. The jurisdiction of the Land Disputes Tribunal is set out in **Section 3(1)** of the Land Disputes Tribunals Act 1990 (repealed). The said section provided-

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 (1)"

11. In the instant case, whereas the tribunal had jurisdiction to entertain the interested party's claim to occupy and or work the land, the tribunal certainly had no jurisdiction to make an award ordering the ex parte applicant to honor the sale agreement, subdivide the land and transfer a 1/2 acre to the beneficiary. Such an order was in effect determining the issues of contract entered into between the two brothers and further was a determination of a matter under the law of succession.

12. Land Disputes tribunals have no jurisdiction to make such orders and in the instant case, the tribunal vastly overestimated its powers and exceeded its jurisdiction. It usurped the powers of this court in purporting to order specific performance, an equitable remedy that can only be exercised with appropriate discretion by a court of competent jurisdiction. Precedents have made that position very clear. See for instance two of the cases relied on by Counsel for the ex parte applicant - **Republic v ol Kalou Land Disputes Tribunal ex parte Hannah Wanjiku Mwangi** Nyeri Misc. Appl. No 11 of 2008 and **Republic v Nyahururu Principal Magistrates' Court & ol Joro Orok Land Disputes Tribunal ex parte Phillip Ndegwa** - Nakuru Misc. Appl. No 29 of 2010.

13. Further, even as a son and preferred personal representative of his mother, the interested party had no locus standi to take any legal action before the tribunal or other body, without first being invested with a grant of letters of administration as is required under the law of succession Act (Cap 160 Laws of Kenya).

14. For those reasons, the ex parte applicant has established grounds for the grant of an order of certiorari. The tribunal had no jurisdiction to determine a dispute concerning a contract for the sale of land and a claim under the law of succession or order for specific performance.

15. There shall therefore issue an order of certiorari calling up to this court and be quashed the award of Nyandarua Oljoroorok Division Land Dispute Tribunal made on **25th May, 2010** and the order of the court adopting the award made on **18th January, 2011**.

16. These being desperate land disputes, I direct that each party bear its own costs.

Orders accordingly.

Dated, Signed and Delivered at Nakuru on this 14th day of November 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Githui holding brief for Martin Waichungo for the interested party.

N/A for the plaintiff

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE