



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
CIVIL CASE NO.196 OF 2011

Samson Gitau Muiruri.....PLAINTIFF

VERSUS

Muiruri Mbaci.....DEFENDANT

J U D G M E N T

The genesis of this matter is land dispute cause No.14 of 2008 in respect of land parcel **No.Makuyu/Kimorori/Block 4/555** between Samson Gitau Muiruri hereinafter referred to as the plaintiff and Muiruri Mbaci hereinafter referred to as the defendant, the latter being the father of the former.

The plaintiff's claim is based on facts that he was the registered owner of the land parcel **No.Makuyu/Kimorori/Block.IV/555** measuring 0.20 ha or thereabouts.

On the 29/4/2008 the defendant filed a complaint at the Land Disputes Tribunal at Makuyu Division over the suit land. After hearing both parties the Tribunal found that the parcel of land **No.Makuyu/Kimoroni Block 4/555** initially belonged to the defendant. The said defendant gave about ½ (half) an acre of the said land to the plaintiff which portion the plaintiff wanted to sell . The defendant had been living on this shamba on which he had build a house .The defendant did a search on the property and found that the plaintiff's land read 0.8 acres instead of 0.5 acres as it had been before. The defendant who was the complainant in the Tribunal had claimed for only 0.3 acres where he had built a house. The plaintiff Mr. Samson Gitau Muiruri claimed that his father did not give him equal share with his brothers except ½ an acre that he was claiming .The defendant on the other hand stated that his son was free to sell the ½ acre but not 0.3 acres together with the house he was living in. The defendant stated that if his son (plaintiff) continued to help him all the land will be his but since he had refused to do so he should forget the 0.3 acres.

Having heard and considered the evidence and visited the site of the said parcel **No.Makuyu/Kimorori Block IV/555**, the Land Disputes Tribunal Makuyu ordered the plaintiff to stop any construction on the disputed area of 0.3 acres and further ordered that the Land Registrar and Government Surveyor to issue a title deed for the 0.3 acres to the defendant and the defendant to decide his heir. The plaintiff was awarded 0.5 acres of the suit land which had been given to him by his father. He was to appeal to the Appeals Tribunals within 30 days of the Decision of the Tribunal which he did not.

The award was presented to the Chief Magistrate's Court Thika on the 1st September 2008 and read to the parties on 21st October 2008 before learned Senior Resident Magistrate L.M. Wachira in the

presence of plaintiff and defendant and the decision of the Tribunal was adopted by the court.

The plaintiff filed a Judicial Review Application challenging the Tribunal's order but the same was dismissed on a technicality as he filed the application out of time.

On 14/12/2011, the plaintiff filed this suit by way of plaint seeking for a declaration that the Tribunal award and adoption of the same by the Chief Magistrate's Court Thika in Land Disputes Tribunal D.O's Case No.45 of 2008 was unlawful and the same ought to be set aside with costs.

The defendant neither entered appearance nor filed defence and therefore interlocutory judgment was entered.

On the hearing date of the suit, the plaintiff testified and adopted the written statement filed on 14/12/2011. He produced a search showing that he was a proprietor of the parcel of land. He produced proceedings of the Land Disputes Tribunal D.O's case No.45 of 2008 and prayed that the Tribunal's case be nullified with costs. Moreover that the adopted award vide the decree of the Chief Magistrate's Court be nullified.

Section 3 (1) of the Land Disputes Tribunal Act no 18 of 1990(repealed) limited the jurisdiction of the Land Disputes Tribunal to the **division of, or to determination of boundaries to, land, including land held in common or a claim to occupy or work on land; or trespass to land.** The Tribunal herein was not properly exercising its mandate when it purported to determine the dispute between the plaintiff and the defendant when the land in dispute was already registered in the name of the plaintiff.

This court finds that the Makuyu Land Disputes Tribunal acted ultra vires in determining a dispute on land ownership between the plaintiff and the defendant and therefore its decision is illegal, null and void.

The Tribunal in making the award acted in **substantive ultra vires** as it acted without the scope of power granted to it by law. Moreover the Chief Magistrates Court Thika acted in **procedural ultra vires** as the award adopted was tainted with an illegality and the senior resident Magistrate had a duty to make a legitimate inquiry into the process and jurisdiction of the Tribunal. The leading authority on the principle of procedural ultra vires is the decision of **Lord Reid in Anisminic Ltd v Foreign Compensation Commission(1969)1 ALL ER 208 where he states thus :**

“..... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.” The list, as observed by lord reid, is endless and each case will be determined depending on the facts. This court finds that failure to make a legitimate inquiry into jurisdiction of the tribunal amounts to substantive ultra vires on the part of the lower court.

This court observes that the suit herein is commenced strangely by way of plaint as opposed to appeal or judicial review and appears on the face of it to be time barred, however the courts authority is required to be exercised in accordance with the provisions of Article 159 of the Constitution thus to administer justice without undue regard to procedural technicalities and on limitation of time it is the view of the court that nullities can be nullified if brought to court within reasonable time.

The upshot of the above is that the suit is allowed in terms that a declaration is hereby made that the

award of the Makuyu Land Disputes Tribunal made on 20/5/2008 and the adoption of the same by the Chief Magistrate's Court Thika in LDT No 45of 2008 was nullity in law and the same is hereby set aside with no order as to costs.

Dated, signed and delivered at Nyeri this 11th day of October 2013.

A. OMBWAYO

JUDGE