REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 54 OF 2012

IN THE MATTER OF: SUPERVISORY POWERS OF THE HIGH COURT

IN THE MATTER OF: ARTICLE 165(6) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE AN APPLICATION FOR AN ORDER OF CERTIORARI AND PROHIBITION IN THE MATTER OF DECISION OF THE LAND DISPUTE TRIBUNAL, KIKUYU, AS READ BY THE PRINCIPAL MAGISTRETE COURT, KIKUYU, INVOLVING LAND REFERENCE L.R. KARAI/KARAI/2527

IN THE MATTER OF: LAND DISPUTES TRIBUNAL ACT (ACT NO.18 OF 1990)

IN THE MATTER OF: ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES (2011) AND SECTION 8 AND 9 OF THE LAW REFORM ACT

BETWEEN

REPUBLIC .....APPLICANT

AND

THE KIKUYU LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE PRINCIPAL MAGISTRATE, KIKUYU

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

MARY WANJIKU MACHUA.....INTERESTED PARTY

EXPARTE: KENNETH NDUNGU MUIGAI

JUDGEMENT

1. By an amended Notice of Motion dated 30th July, 2012, the ex parte applicant herein, **Kenneth Ndungu Muigai**, seeks the following orders:

1. **An order of certiorari bringing into this court and quashing the decision of the Land Dispute Tribunal at Kikuyu Division involving land case Number KW/LND/14/1/24 of 2011 (between Mary Wanjiku (Claimant) and Kenneth Ndungu Muigai (Objector) which was read to the parties and adopted as judgment of court by the Principal Magistrate, Kikuyu on**

the 30th September, 2012 in Kikuyu Principal Magistrate's Court on PMCC No.16 of 2011.

2. **An order of prohibition against the Principal Magistrate's Court, Kikuyu stopping further steps or proceedings in the said suit No. PMCC No.16 of 2011 in enforcing the decision pending the hearing of this application.**

3. **Pending the determination of this application, there be a stay of any further proceedings in the lower court case number PMCC No.16 of 2011 filed in Kikuyu and in Kabete 5/2011 being Nyeri Provincial Land Disputes Appeals tribunal.**

4. **Costs of this application be provided for.**

2. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** the Court of Appeal held:

"We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: 'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.' At page 283 of the report of the case of *R v. Wandsworth* Justices, Viscount Caldecote CJ said: 'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "

3. In this case the three paragraph verifying affidavit which is very thin on the facts, the deponent purports to reiterate the contents of the statement of facts by confirming the truth of the information contained therein. That is not the kind of verifying affidavit contemplated under judicial review proceedings. However the Court has noted that there is another affidavit which was filed and sworn in support of the Notice of Motion to which the documents relied upon are exhibited. The procedure guiding judicial review applications does not, however, have room for supporting affidavits. This position was restated in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** where **Nyamu, J** (as he then was) was of the view which view I associate myself with that:

"There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the

affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant's case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent's case is a hangover, which is not acceptable under the Judicial Review jurisdiction."

4. However, in such matters as this court the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**
5. The Court has therefore to consider the effect of striking out the application herein as against considering the same on its merits the defects not withstanding. In this case, if the Court were to opt for the former, the ex applicant would forever be driven from the seat of justice since under sections 8 and 9 of the ***Law Reform Act*** Cap 26 Laws of Kenya such application must be brought within six months of the action complained of. It is therefore my view that in the circumstances of this case the Court ought to invoke its powers under Article 159(2)(d) of the Constitution and deem the said irregularity as a procedural deficiency and proceed to determine the Motion on its merits.
6. In this case, it is the applicant's case that on or about the 28th day of September, 2010, the applicant and the Respondent entered into a sale agreement for the sale to the Respondent by the applicant of ½ an acre to be excised form a parcel of land known as L.R. Karai/Karai/2527 situated in Kikuyu Division within Kiambu District at an agreed sale price of Kenya Shillings Four Hundred and Eighty Thousand (Kshs.480,000/=. Pursuant thereto the Respondent paid a sum of Kenya Shillings Two Hundred and Ten Thousand (Kshs.210,000/=) upon signing the agreement and the remaining balance of Kenya Shillings two Hundred and Seventy Thousand (Kshs.270,000/=) was to be paid on or before acquisition of the land board consent and that the suit land was to be sub-divided and a transfer made after the relevant consents of the Land Control Board had been obtained. However, the consents of the land control board for both portioning and transfer were not obtained within the prescribed period of six (6) months from date of sale agreement and consequently the said transactions became void by reasons of operation of law. Pursuant to the provisions of section 7 of the ***Land Control Act***, the applicant offered the claimant a refund of Kenya Shillings Two Hundred and Ten Thousand (Kshs.210,000/=) paid to him in pursuance of the said void transactions but the respondent refused to take the same and efforts by the applicant's advocates to refund the same through the respondent's advocates did not also bear fruit. The Respondent instead complained to the District Officer, Kikuyu of the non performance of the said transactions who in turn lodged a restriction against the suit land without even affording the applicant a hearing in the matter. On about the 2nd day of November, 2010, the applicant wrote a letter to the respondent informing her that he had terminated the contract and his reasons of doing so to which the applicant received a letter dated 16th November, 2010 from a firm of advocates known as **Kahuthu & Kahuthu Advocates** purporting to act for the Respondent stating that the applicant's attempt to refund to the respondent the said deposit would be resisted. On the 29th day of July, 2011, the applicant instructed an advocate to act on his behalf and the advocate wrote a letter to the Respondent's advocates in response to theirs dated 16th November, 2010 enclosing a banker's cheque No.054388 made out in the name of the respondent in the sum of Kenya Shillings Two Hundred and Ten Thousand (Kshs.210,000/=) being refund of the deposit paid to appellant. However, respondent's advocates declined to accept the letter on grounds that they had no instructions from the respondent and on the 15th day of July, 2011, the applicant was served with a formal complaint objection from the Lands Dispute Tribunal, Kikuyu,

in Land case No. 16 of 2011 to which applicant field his objection to the complaint as was required of him. Despite that the matter was heard and the Principal Magistrate of Kikuyu Law Courts read a decision to the parties on 30th September 2011 in which the Tribunal ordered the applicant to give vacant possession to the 1st respondent; that the applicant to fence the plot; in the alternative that the applicant refunds the deposit plus 40% interest per annum; and that the applicant pays the respondent Kshs 41,800/- as the costs of fencing and a further Kshs 20,000/-. It is contended by the applicant that the Tribunal had no powers to grant the reliefs it purported to grant hence it acted without jurisdiction.

7. I have considered the submissions filed on behalf of the applicant. The issue for determination by the Court in this application is whether the Tribunal had the jurisdiction to entertain the dispute that was before it. The said Tribunal's jurisdiction was circumscribed in section 3 of the repealed ***Land Disputes Tribunals Act*** under which it was provided that:

   (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.

8. In my view the substantive orders which were made by the Tribunal were with respect to vacant possession of the suit land to the 1st respondent and in the alternative refund of the purchase price. There was also an award for interest.
9. The Court of Appeal in **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002** held that if the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre, it is clear that the proceedings before the tribunal related to both title to land and to 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*** as such disputes can only be tried by the High Court or by the Resident Magistrate's Court in cases where such latter court has jurisdiction.
10. In this case the effect of the order for transfer of the suit land to the interested party was to alter the proprietorship of the said land with the effect that the title to the said land would be affected. Based on the decision cited hereinabove the Tribunal had no power to make a determination with respect to title to land.
11. Apart from the foregoing it was contended without by the applicant and not controverted the interested party that there was no consent of the Land Control Board to the said transaction. The effect of failure to obtain the consent of the said Board within the stipulated 6 months is to render any such transaction void. A void transaction cannot be enforced in a legal proceeding and by ordering the transfer of the suit land the Tribunal was purporting to enforce a transaction which was unlawful.
12. In **Jacob Michuki Minjire vs. Agricultural Finance Corporation Civil Appeal No. 61 of 1982,** the Court of Appeal held that if the consent of the Land Control Board is not obtained where necessary the transaction is void and a party cannot be guilty of fraud if he relies on the same since the duty to obtain consent is on both parties. The Court further held that if the consent of the Land Control Board is not obtained the parties are restored to status quo ante while in between there is merely a *de facto* agreement which has no legal effect but if the consent is obtained the transaction binds the parties which proceeds to completion. In that case, the Court was of the opinion that the only remedy available where the consent is not obtained is to sue for the money paid as a debt and not for general damages.
13. Similarly in **Omuse Onyapu vs. Lawrence Opuko Kaala Civil Appeal No. 21 of 1992.** The same Court held that if the transaction for the sale of land is a controlled transaction involving the sale of an agricultural land within the meaning of section 6 of the ***Land Control Act***- Cap. 302

Laws of Kenya, it is null and void for all purposes for lack of consent of the appropriate land control board in respect of that transaction; It follows therefore that the money or other valuable consideration paid under that void controlled transaction but, not the cost of the improvement on the land whether claimed as general damages or special damages, is recoverable as a civil debt without prejudice to penal consequences imposed by Section 22 of the Act.

14. Accordingly, I find that the Tribunal had no jurisdiction to grant the orders it purported to make.
15. An order of certiorari is hereby issued removing into this Court for the purposes of being quashed the decision of the Land Dispute Tribunal at Kikuyu Division involving land case Number KW/LND/14/1/24 of 2011 (between Mary Wanjiku (Claimant) and Kenneth Ndungu Muigai (Objector) which was read to the parties and adopted as judgment of court by the Principal Magistrate, Kikuyu on the 30th September, 2012 in Kikuyu Principal Magistrate's Court on PMCC No.16 of 2011 which decision is hereby quashed.
16. In light of the procedural irregularities noted herein above there will be no order as to costs.

Dated at Nairobi this 4th November 2013

G V ODUNGA

JUDGE

Delivered in the absence of the parties