



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC APPLICATION NO. 4 OF 2016

REPUBLICAPPLICANT

VERSUS

KWANZA DIVISION LAND DISPUTES

TRIBUNAL1ST RESPONDENT

SRM, KITALE, DK GICHUKI.....2ND RESPONDENT

PETER BULUMAINTERESTED PARTY

ABEL KHAKASAINTERESTED PARTY

EX PARTE:

BETHA NGINYE

AND

JACKSON NGINYE.

JUDGMENT

1. Pursuant to leave granted by the court on **29/1/2003**, the ex-parte applicants filed a Notice of Motion dated **6/2/2003**. In that motion they sought orders that the 1st respondent's decision made in **Land Case No. 5 of 2002** and which was filed in **Kitale SPMCC Land Case No. 63 of 2003** be removed into this court and quashed and the 2nd respondent be prohibited from reading or adopting it as a judgment of the court.
2. The applicants have each filed what they term as "statement of particulars pursuant to **Order LIII R 2 CPR**". This court's assumption is that that is the statutory statement. The grounds upon which the application is brought are contained therein. Cumulatively, they are that the panel of elders that dealt the matter acted ultra vires and that there was a breach of the rules of natural justice, that the matter before the tribunal was barred by limitation.
3. The application is supported by the sworn affidavits of the applicants dated 4/2/2003.
4. The interested parties filed a notice of preliminary objection dated 7/12/2004 objecting to the entire notice of motion on the grounds that no notice to the registrar is attached to the motion as required by **Order LIII rule 3**; that no leave of court was obtained and no certified copy is attached to the application; no certified copy of the tribunal decision has been attached; the exhibits attached to the affidavits are not certified and that the application was time barred. All the four limbs of the preliminary objection were determined on **22/6/2005**. While the case was pending hearing the 1st applicant died and was substituted with the 2nd applicant who was already a party.
5. The 1st interested party filed his sworn replying affidavit dated **2nd March 2006** on the same date. The 1st and 2nd respondents filed their grounds of opposition on **12/5/2016**.
6. The applicant filed his written submissions on **21/6/2016** and the respondents filed theirs on **6/11/2018**. I have considered the application, the responses and the filed submissions.

Determination

Issues for determination

7. The following issues arise for determination in this suit.

- (a) *Whether the 1st respondent acted ultra vires in hearing the dispute and issuing an award;*
- (b) *Whether the applicant's right to natural justice was violated.*
- (c) *Whether the dispute before the tribunal was time barred.*

8. First and on a preliminary basis the submission by the respondents as to whether there is a valid decision to be quashed by this court must be addressed. The respondents submit that it would be improper to halt the adoption of the decision of the tribunal through an order of this court. They cite the case of **Republic Vs Chairman Kajiado Central Land Tribunal and 2 Others Ex Parte Timaiyo Kirtari (2012) eKLR**.

9. However with respect to that argument it must be noted that the illegality of an adopted award permeates through the process of adoption such that even when adopted the decree emanating therefrom can not gather more a better standing in law than the award itself.

10. In my view there is an award, a decision of the tribunal, by which the applicant is aggrieved and it matters not that it has or it has not been adopted as a judgement under **Section 7** of the Act.

11. That award was arrived at after the tribunal entertained a complaint by the interested party. The issue of whether the proper procedures were followed in the processing of that dispute before the tribunal will be addressed below.

12. On the first issue the applicant submits that the land is registered land. He submits that for that reason the Land Disputes Tribunal did not have power to deal with a dispute touching on a registered proprietor.

13. He cited in support of that position the cases of **Msambweni Land Disputes Tribunal & Another and Bakari Mwakumanya Ex-Parte Diana Muthoni Muturi 2014 eKLR**, **Hezedkiah Kungu Kinuthia Vs Ernest Kamau Kinuthia 2002 eKLR** and **Mary Wangui Gichogo Vs Charles Muchemi & 5 Others 2007 eKLR**.

14. There are other cases in which it has been held that a tribunal's dealings with registered land are ultra vires. These include **M'Marete vs. Republic & 3 Others, [2004] eKLR (Nyeri Civil Appeal No. 259 of 2000,]** where the Court of Appeal stated as follows:

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Land Act to the appellant. In our view, the tribunal acted in excess of its jurisdiction.”

15. The tribunal decision was made on **1/10/2002** while the title in the name of the applicant was issued on **21/4/1999**. There is no doubt that the tribunal in the instant case acted beyond its jurisdiction by entertaining and determining the dispute. I therefore uphold the first ground

16. The second ground is that the applicant's rights to natural justice were violated. In the supporting affidavit the applicants state that they were not served with any statement of claim as required by law or a valid hearing notice and so they were denied the right to be heard. These are factual claims and can only be responded to by way of a replying affidavit. The only replying affidavit that I find on the record is of the 1st interested party dated 2nd March 2006. It does not address those claims.

17. **Section 4 (4)** of the **Land Disputes Tribunal** states as follows:-

“Every claim shall be served on the other party, or where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summonses shall thereafter apply”.

18. **Order 5** of the **Civil Procedure Rules** governs the issuance and service of summons. **Order 5 Rule 15** of the **Civil Procedure Rules** states as follows:-

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”

19. The respondents only filed grounds of opposition. There is no evidence on oath filed herein to demonstrate that there was an affidavit filed in the impugned proceedings in accordance with that Rule showing that the Ex-parte applicant herein was served with the claim and summons to attend the Tribunal sittings to defend himself.

20. There being no evidence on oath as envisaged by the **Civil Procedure Rules** showing that such service was effected, the proceedings before the tribunal and the award were irregular.

21. Without compliance with the **Order 5 Rule 15** of the Civil Procedure Rules, therefore, there is also nothing showing that the appellant was invited for the reading of the decision by the Tribunal.

22. I therefore find that the rules of natural justice were not observed with regard to the applicant's rights to be heard.

23. The third issue is whether the claim before the tribunal was time barred. On this issue the applicants submitted that the applicant purchased the suit land in **1974** and took possession of the property in **1975** when the vendor vacated the suit property together with his family and that the applicant has stayed on the suit property undisturbed from that time till the time when the interested party brought a claim before the tribunal in **2001** about **26** years later. The applicant's counsel cited the cases of **Henry Kiptalam Barngetuny Vs Stanley 2013 eKLR, Jones M. Musau And Another Vs Nairobi Hospital & Another 2014 eKLR;**

24. **Section 7** of the **Limitations of Actions Act** is relied upon. It states as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

25. **Section 13 (3)** of the **Land Disputes Tribunals Act** (now repealed) states as follows:

“For avoidance of doubt it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court.”

26. I would have expected that the interested parties would provide evidence that would disprove this ground. However, the replying affidavit of the 1st interested party is bare. Though at **paragraph 8** he avers that he used to go to check on the land in **1989** he has not attached any proof of that allegation save the exhibit marked **“PB IV”** attached to his replying affidavit. That exhibit is dated after the year 2000. It does not aid the 1st respondent's case.

27. In **paragraph 7** of his replying affidavit he alleges that he left the land to the applicants in **1976** and that they were meant to look after the same. This is an inexplicable shift from his evidence before the tribunal to the effect that he left the land in **1975**. However, even if his allegation that he tried to claim back the land in the year **1989** was deemed to be true, which this court has declined to do, a quick computation shows that the period from **1976** to **1989** is about **13 years**, which is still beyond the statutory period provided for in the **Limitation of Actions Act**.

28. It is manifest from the provisions of **Section 13(3) of The Land Disputes Act** that if a party is bringing a claim that is time barred in the eyes of the law contained in the **Limitation of Actions Act Cap 22**, that claim should not be entertained by the Tribunal. The interested parties' claim before the tribunal was clearly time barred and should not have been entertained by the tribunal. The ground of time bar urged by the applicants has merit.

29. I therefore find that the application dated **6/2/2003** has merit and the same is granted and the following orders issued:

(a) 1st respondent's decision made in Land Case No. 5 of 2002 and which was filed in Kitale SPMCC Land Case No. 63 of 2003 is hereby removed into this court and quashed.

(b) The 2nd respondent is hereby prohibited from reading or adopting as a judgment of the court the 1st respondent's decision made in Land Case No. 5 of 2002 and which was filed in Kitale SPMCC Land Case No. 63 of 2003.

Dated, signed and delivered at Kitale on this **31st** day of **January, 2019**.

MWANGI NJOROGE

JUDGE

31/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kaosa holding brief for Kirui for Ex-parte Applicant

Mr. Wabwire for Respondents

N/A for Interested Parties

COURT

Judgment read in open court.

MWANGI NJORGE

JUDGE

31/01/2019