



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

JUDICIAL REVIEW NO. 14 OF 2013

IN THE MATTER OF THE LAND DISPUTE TRIBUNAL ACT NO. 18 OF 1990

IN THE MATTER OF THE LAND PARCEL NO. NGIRIAMA/THIRIKWA/758

AND LAND PARCEL NO. BARAGWE/KARIRU/1600

REPUBLIC.....APPLICANT

VERSUS

GICHUGU LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

SENIOR RESIDENT MAGISTRATE'S

COURT GICHUGU.....2ND RESPONDENT

AND

JANE WANGECI KIURA.....INTERESTED PARTY

SAMUEL GAKONO NGARI.....EX-PARTE APPLICANT

AND

JACKSON NJERU MURIUKI.....INTERESTED PARTY

JUDGMENT

BACKGROUND

The applicant's Notice of Motion dated 26th October 2016 is seeking for an order of certiorari to remove into this Honourable Court for purposes of quashing the decision made by Gichugu Land Disputes Tribunal dated 5th November 2009 and adopted by the Magistrate's Court as the judgment of the Court on 6th July 2011. The impugned award which was adopted by the Magistrate's Court was as follows:

(a) The interested party 1¾ acre out of Ngariama/Thirikwa/758.

(b) David Ngari Muriuki and Jackson Njeru Muriuki 1¼ acre and ½ acre respectively out of Ngariama/Thirikwa/758.

(c) Jackson Njeru Muriuki 1 acre out of Baragwi/Kariru/1600.

APPLICANT'S CASE

The applicant's claim is based on grounds that he is the registered owner of both land parcel numbers Ngariama/Thirikwa/758 and Baragwi/Kariru/1600. In the year 2009, he lodged a complaint before Gichugu Land Disputes Tribunal seeking protection against Jackson Njeru Muriuki (interested party) who had trespassed and illegally occupied 1 ¾ acres. Instead of protecting his proprietary rights in the said

land, the Land Disputes Tribunal awarded him the portion he was illegally occupying measuring 1¾ acres. As if that was not enough, the Land Disputes Tribunal also awarded one David Ngari Muriuki and Jackson Njeru Muriuki 1¼ acre and ½ acre respectively out of land parcel No. Ngariama/Thirikwa/758 and Jackson Njeru Muriuki 1 acre out of Baragwi/Kariru/1600. The applicant stated that the said David Ngari Muriuki and Jackson Njeru Muriuki were not parties to the proceedings before Gichugu Land Disputes Tribunal. The applicant further contends that the award by the Gichugu Land Disputes Tribunal which was adopted by the Magistrate's Court in Gichugu was ultra vires in that it interfered with his proprietorship rights to land and that the same was made contrary to the rules of natural justice.

INTERESTED PARTY'S CASE

The interested party filed a Notice of Preliminary Objection on the following grounds:

- (1) The application offends Order 53 Rule 4 (1) C.P.R since it is not accompanied by statement or supported by verifying affidavit.***
- (2) The applicant has not served the documents.***
- (3) The application is brought under wrong provisions of the law.***

I have considered the Notice of Motion giving rise to this Judicial Review proceedings, the statements of fact, the affidavit verifying the facts and the replying affidavit by the interested party sworn on 4th February 2014. I have also considered the Preliminary Objection, the submissions by the parties and the applicable law.

To begin this analysis, I have to start with the Notice of Preliminary Objection. First, **Article 159 (1) (d) of the Constitution of Kenya 2010** provides a remedy and allows the Courts and Tribunals to resolve disputes between parties without undue regard to procedural technicalities. What the interested party is raising in his Notice of Preliminary Objection are technicalities which in my view cannot affect the substance of the suit. In this case, I am guided by the case of **Nancy Nyamira & another Vs Archer Diamond Morgan Ltd (2012) e K.L.R** where the Court held thus:

“..... Next, the defendant argues that the plaintiff's application must fail because it cited the wrong provisions of law..... As many cases have now held, and notwithstanding Sir Udoma's remarks Selume Namukasa Vs Yoseful Butya (1966) E.A 433, invoking the wrong provisions of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in Gitari Vs Muriuki (1986) e K.L.R 211 which I now follow to hold that in as long as a party's invocation of the wrong provisions of law is not in bad faith meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong provisions of the law on which the application is grounded”.

Having said that, I find and hold that the Notice of Preliminary Objection has no merit and the same is not upheld. In regard to this case, it has been said again and again that Judicial Review is not about the merits of the decision taken but rather, the process. The remedy of Judicial Review is to ensure fair treatment by the bodies mandated to make decisions, therefore, the applicant must show that either the decision complained of was illegal, irrational or procedurally improper.

In the case of **Municipal Council of Mombasa Vs Republic & another (2002) e K.L.R**, the Court of Appeal held as follows:

“The Court would only be concerned with the process leading to the making the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters?

These are the kind of questions a Court hearing a matter by way of Judicial Review is concerned with, and such Court is not entitled to act as a Court of Appeal over the decider; acting as an appeal Court over the decider would involve going into the merits of the decision itself – such as whether there was or there was no sufficient evidence to support the decision – and that, as we have said, is not the province of Judicial Review”.

Certiorari in my view is an order setting aside a decision, technically speaking, the record of the decision maker by removing the same to the Superior Court for purposes of quashing the same and expunging it from the record. An order for certiorari would be sought where a decision has been made by the body authorized by statute unlawfully, irrationally or un-procedurally and such a decision is out for setting aside.

Again, in the case of **Kenya National examination Council Vs Republic Ex-parte Geoffrey Gathinji Njoroge & 9 others (1977) e K.L.R**, the Court of Appeal at Nairobi held:

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.....”.

Having said that, it is imperative to look at the applicable law. Whether the Land Disputes Tribunal acted within the law in arriving at the impugned decision. **Section 3 (1) of the said Act** provides as follows:

“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.

From my analysis of the affidavit evidence and the submissions by the parties, it is clear in my mind that the Land Disputes Tribunal exceeded its jurisdiction by determination issues relating to title to and ownership of a registered land contrary to law. The provisions of **Section 3 (1) of the Land Disputes Tribunal (repealed)** does not donate jurisdiction to deal with issues of determination of and title to land or ownership of registered land or the determination of a trust in favour of a party. The Tribunal therefore dealt with dispute relating to ownership of land parcel No. Ngariama/Thirikwa/758 and Baragwi/Kariru/1600 by awarding the interested parties. That obviously did not fall within the provisions of **Section 3 (1) of the Land Disputes Tribunal Act (repealed)** and therefore they acted ultra vires.

It therefore follows that if the Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decisions would be null and void since a decision made without jurisdiction must of necessity be null and void.

My final order is that this Judicial Review is allowed as follows:

(1) An order of certiorari be and is hereby issued removing to this Honourable Court for purposes of quashing the decision made by the Gichugu Land Disputes Tribunal dated 5th November 2009 and adopted as the judgment of the Senior Resident Magistrate's Court at Gichugu in LDT Case No. 7 of 2010 on 6th July 2010 and all consequential orders.

(2) Each party to bear her own costs.

READ and SIGNED in open Court at Kerugoya this 25th day of January, 2019.

E.C. CHERONO

ELC JUDGE

25TH JANUARY, 2019

In the presence of:

1. Mr. Asimwe holding brief for Magee
2. Mr. Ngigi holding brief for Mr. Nganga
3. Mbogo – Court clerk present.