



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 81 "A" OF 2012**

**SIMON MUTISO MBINDYO.....APPLICANT**

**VERSUS**

**PRINCIPAL MAGISTRATE (MAKUENI).....1<sup>ST</sup> RESPONDENT**

**CHAIRMAN-LAND DISPUTES TRIBUNAL WOTE.....2<sup>ND</sup> RESPONDENT**

**GILBERT MUTIE KITHOME.....3<sup>RD</sup> RESPONDENT**

**EX PARTE APPLICANT: SIMON MUTISO MBINDYO**

**JUDGMENT**

1. In the Amended Notice of Motion dated 27<sup>th</sup> January, 2015 and filed on 24<sup>th</sup> February, 2018, the Ex-parte Applicant is seeking for the following issues:

**a. That the Decree dated 15<sup>th</sup> March, 2012 emanating from Land Disputes Tribunal proceedings in LDTC No. 5 of 1999 be brought up and quashed.**

**b. That this Honourable Court be pleased to issue a prohibition order preventing the Respondents from enforcing the Decree dated 15<sup>th</sup> March, 2012 as it emanates from some unlawful proceedings.**

2. The Notice of Motion is supported by the Affidavit of the Applicant who deponed that he bought the disputed parcel of land from one Kithome Nzingila; that by the time he bought the said land, the area where the land was situate had been declared an adjudication area and that after purchasing the land, he took possession of the same by putting up a house and planting mangoes, oranges and citrus fruits.

3. It is the Applicant's case that by the time the 3<sup>rd</sup> Respondent filed a suit in the Tribunal in respect of the suit land, he had been on the land for over twenty-two (22) years; that the 3<sup>rd</sup> Respondent is the son of Kithome Nzingila, the Vendor and that the Tribunal made findings in favour of the 3<sup>rd</sup> Respondent.

4. It is the deposition of the Applicant that he filed an Appeal in Embu Appeals Committee; that the Appeal was not heard because the file could not be traced and that he filed Machakos HCCC No. 204 of 2011 to protect his interests pending the hearing of the Appeal by the Appeals Committee.

5. The Applicant finally deponed that the Decree sought to be enforced emanates from a court that did not have jurisdiction to deal with the issue of ownership of land and that the said Tribunal was not competently constituted.

6. In response, the 3<sup>rd</sup> Respondent deponed that he is the registered proprietor of land parcel number Nzau/Nziu/783; that in 1977, the Applicant requested his father to allow him carry out seasonal farming on the suit land; that when the Applicant started planting lemon trees on the suit land, he reported him to the Chief who gave him a letter stopping him from developing the suit land further and that the Kshs. 4,667.40 that the Applicant gave to his father was a token for having used the land for farming.

7. It is the deposition of the 3<sup>rd</sup> Respondent that when the Applicant refused to vacate the suit land, he sued him in Makueni Land Disputes Tribunal Case No. 210 of 1998; that the findings of the Tribunal were adopted by the Magistrate's Court; that he took possession of the suit land in the year 2012 and that he has since transferred the suit land to a third party.

8. The Applicant and the 3<sup>rd</sup> Respondent filed written submissions which I have considered.

9. The Applicant is challenging the decision of the Makueni Land Disputes Tribunal proceedings in LDTC No. 5 of 1999. In his Application, the Applicant is seeking for orders of Judicial Review of certiorari and prohibition on the ground that the Tribunal did not have jurisdiction.

10. It is not in dispute that parcel of land known as Nzau/Nziu/783 was registered on 31<sup>st</sup> August, 1974. However, it was not until 21<sup>st</sup> August, 1995 that a Title Deed was issued to the 3<sup>rd</sup> Respondent.

11. The 3<sup>rd</sup> Respondent has admitted that his father allowed the Applicant to use the suit land by cultivating it and planting temporary crops on the land. According to the 3<sup>rd</sup> Respondent, he stopped the Applicant from using the suit land when he started planting lemon trees on the land. When the Applicant refused to abide by those instructions, he reported the issue to the Chief. The 3<sup>rd</sup> Respondent produced in evidence a letter dated 5<sup>th</sup> January, 1993 in which the Chief of Nzau Location advised the Applicant to stop any further development on the suit land.

12. On the other hand, the Applicant's case is that he purchased the suit land from the 3<sup>rd</sup> Respondent's father. The Applicant produced in evidence a paper showing the acknowledgements that the 3<sup>rd</sup> Respondent's father used to sign every time he was paid by the Applicant. The acknowledgments of the payments that were made by the Applicant run from the year 1977 to 1990. Whether the acknowledgement of payments by the Applicant's father were in respect of the purchase price of the suit land or rent for the use of the said land is neither here nor there in the current suit.

13. Indeed, it is now settled that Judicial Review is not concerned with the merits of the decision that is being challenged, but rather, whether the said decision is tainted with illegality or irrationality. The Judicial Review Court is usually concerned with issues such as whether the decision makers had the jurisdiction to deal with the issues; whether the persons affected by the decision were heard before it was made and whether in making the decision, the maker took into account relevant matters or took into account irrelevant matters.

14. As was held in the case of *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd, Civil Appeal No. 185 of 2001*, the court should not act as a Court of Appeal over the decider which 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.

15. The Applicant has not denied that he was heard by the Makueni Land Disputes Tribunal in respect of his claim. Indeed, the proceedings that were exhibited by the Applicant shows that all the parties to the dispute were heard by the Tribunal and were allowed to cross-examine their adversaries.

16. After hearing the dispute which was filed by the Applicant, the Tribunal ordered for the eviction of the Applicant from the suit land. The Tribunal further directed that the Applicant should be refunded the money that he had paid to the 3<sup>rd</sup> Respondent's father.

17. The Applicant has admitted that he is the one who moved the Tribunal to determine the issue of ownership of the suit. Having lost, the Applicant has now turned around and stated that the Tribunal did not have the requisite jurisdiction to determine the issue of ownership of the suit land.

18. The jurisdiction of the Tribunal was derived from Section 3(1) of the Land Disputes Tribunals Act (*repealed*) which provided 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, shall be heard and determined by a Tribunal established under Section 4.”**

19. It is therefore obvious that the Tribunal had jurisdiction to determine the issue of “*trespass to land*”. That is what the Tribunal determined when it ordered that the Applicant should be evicted from the suit land and be refunded the money he had paid to the 3<sup>rd</sup> Respondent's father. Consequently, the Tribunal had jurisdiction to find and hold that the Applicant had not entered into a valid Agreement with the 3<sup>rd</sup> Respondent's father and was therefore a trespasser.

20. Indeed, whether or not the Tribunal was right can only be determined by way of Appeal. Having filed the Appeal at the Embu Appeals Committee, the Applicant should have caused the said Appeal to be transferred to this court for hearing and determination when the Land Disputes Tribunals Act was repealed. He has never done so to date.

21. Having found and held that the Makueni Land Disputes Tribunal had jurisdiction to make the Award it made, I find the amended Notice of Motion dated 27<sup>th</sup> January, 2015 to be unmeritorious.

22. The Amended Notice of Motion dated 27<sup>th</sup> January, 2015 is therefore dismissed with costs to the 3<sup>rd</sup> Respondent.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

JUDGE