REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC MISC. APPLICATION NO. 8 OF 2018

KURMETI OLE PARSITAU.....APPLICANT

VERSUS

PARKEO OLE TAUTA.....RESPONDENT

RULING

What is before me for determination is the Applicant's Notice of Motion application dated the 8th February, 2018 brought pursuant to Order 45 Rules 1 and 2; Order 42 Rule 6; Order 51 Rule 1 of the Civil Procedure Rules, Section 80 & 3A of the Civil Procedure Act and all the other enabling provisions of the law. The Applicant seeks for the following orders:

1. Spent.

2. That this Honourable Court be and is hereby pleased to stay the execution of the Ruling issued by the Land Tribunal (Ngong) in TC No. 09/07/07 and any other consequential orders arising from the Ruling and Decree issued by Honourable S.O. Temu (PM) in the Tribunal Case No. 5 of 2008 on 26th February, 2013 pending the hearing and determination of this application.

3. That this Honourable Court be and is hereby pleased to review and/or declare the Ruling issued by the Land Tribunal (Ngong) in TC No. 09/07/07 and any other consequential Orders arising from the Ruling and Decree issued by Honourable S.O Temu (PM) on 26th February, 2013 as null and void for want of compliance with the law.

4. That the costs of this application be provided for.

The application is premised on the summarized grounds that there is an error apparent on the face of record. Further, that on 4th October, 2007 the Land Tribunal (Ngong) issued blanket orders for the parcel KAJIADO / NTASHART/ 3249 be reverted back to the Respondent herein. The Land Dispute Tribunal acted in excess of its jurisdiction contrary to the provisions of section 3 of the Land Disputes Tribunal Act hence the orders made were null and void. The Land Disputes Tribunal did not have jurisdiction to impeach the title of a registered proprietor of land and orders issued were based on an illegality as well as improper interpretation of the law. The Honourable Magistrate issued Orders and Decree, which were from an invalid Ruling and hence exceeded its jurisdiction in granting orders on 22nd September, 2017 and extending the same. The Applicant was not engaged in the proceedings at the Tribunal and only learnt of the Orders issued when the Respondent filed the application dated the 25th July, 2017.

The application is supported by the affidavit of the Applicant KURMETI OLE PARSITAU where he avers that he was a paid up shareholder of KJD/ NTASHART/ 3249 measuring 10.93 hectares but upon registration of the land, the title was issued in the name of PARKEO OLE TAOTA and the explanation he received from the committee is that they paired him with his sibling. He explains that he subdivided the said land to KJD/ NTASHART/ 5381 and KJD/NTASHART/ 5382 for his sibling and has been on his portion for 30 years continuously. He claims to be the sole proprietor of KJD/NTASHART/ 5381 and he is holding parcel number KJD/ NTASHART/ 13248 in trust for KEPLOY ENE KUMETI including her beneficiaries. He insists the judgment issued is prejudicial to him as well as to KEPLOY ENE KUMETI. He reiterates that the issuance of the judgement without being heard not only goes against the rules of Administrative justice as well as his right to a fair trial.

The application is opposed by the Respondent whose advocate JANEFFER W. NDUTA filed a replying affidavit where she avers that the Applicant was allocated land parcel number KJD/ NTASHART/ 3249 by the KJD/ NTASHART Group Ranch. She claims the Applicant is the blood brother to the Respondent and a member of the Group Ranch. Further, the Applicant was similarly allocated land parcel number KJD/ NTASHART/ 3248 but he fraudulently registered his name in the Respondent's title making him a co owner. She explains that the Respondent after realization lodged a claim with the Land Dispute Tribunal at Ngong being Claim No. TC 09/07/07 which was heard and ruled in the Respondent's favour. She avers that the Award was adopted by the Principal Magistrate Kajiado on 26th February, 2013 and

despite the existence of the said Order, the Applicant proceeded to subdivide the said suit land into two portions namely KJD / Ntashart / 3582 and KJD/ Ntashart / 3583 respectively. Further, he registered KJD / Ntashart / 3582 in his name and KJD/ Ntashart / 3583 in the Respondent's name. She insists the High Court could only nullify the Tribunal's Award before the same was adopted by the Magistrate's Court. She reiterates that the Award having been adopted by the Principal Magistrate Court Kajiado on 26th February, 2013 ceased to stand on its own and cannot be subject to declaration by this Court. Further, even if the Court issues a declaration, it shall have no effect as the Decree from the lower court has not been challenged. She avers that upon the Award becoming a judgement of a court of competent jurisdiction, it can only be varied, vacated, set aside or reviewed by the same court or by an appellate court in appropriate proceedings. She reiterates that the Applicant should have adhered to the procedure defined under the Land Disputes' Tribunal Act to challenge the Award. Further, that the instant application is incurably bad in law.

Both the Applicant and the Respondent filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the materials presented in respect of the instant application, the following are the issues for determination:

· Whether there should be a stay of execution of the Decree issued by Honourable S.O. Temu (PM) in the Tribunal Case No. 5 of 2008 on 26th February, 2013 and Award from the Land Disputes Tribunal (Ngong) in TC No. 09/07/07

· Whether the Ruling issued by the Land Tribunal (Ngong) in TC No. 09/07/07 and any other consequential Orders arising from the Ruling and Decree should be reviewed.

As to whether there should be a stay of execution of the Decree issued by Honourable S.O. Temu (PM) in the Tribunal Case No. 5 of 2008 on 26th February, 2013 and the Award from the Land Disputes Tribunal (Ngong) in TC No. 09/07/07.

The Applicant is challenging the Ruling of the Tribunal as well as the Decree issued by the Court and seeks a stay of execution of the said Ruling and Decree. He insists the Tribunal did not have jurisdiction to challenge a registered title. The Jurisdiction of the Land Disputes Tribunal was enshrined in the now repealed Land Disputes Tribunal Act at Section 3(1) which stipulated as follows; **"Subject to this Act, all case 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".**

The said Act provided the procedure to be adhered to once an Award was made at section 7 while section 8 provided for the Appeals mechanism as follows: **'7. (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the**

Tribunal. (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act. 8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.'

From a reading of these provisions and applying it to the current scenario, the Applicant failed to appeal against the Award of the Tribunal within 30 days from the date of its delivery. The said Award was adopted by the Kajiado PM Temu on 26th February, 2013. As it stands, the Decree issued by the said Court is still valid. The Applicant relied on the decisions of **MARIGAT GROUP RANCH & OTHERS VERSUS WESLEY CHEPKOIMET & 19 OTHERS (2013) eKLR and MASAGU OLE KOITALEL NAUMO v PRINCIPAL MAGISTRATE KAJIADO LAW COURTS & ANOTHER (2014) eKLR** to support his arguments. I note the decision of the Tribunal was made six years ago and the Applicant failed to Appeal to the Provincial Appeals Tribunal nor apply to quash it through a judicial review since he claims they did not have jurisdiction to deal with the dispute. From the legal provisions cited above, it was pertinent for the Applicant to apply to quash the said Award before its adoption by the PM's Court. In the case **MASAGU OLE KOITALEL NAUMO v PRINCIPAL MAGISTRATE KAJIADO LAW COURTS & ANOTHER (2014) eKLR, the Learned Judge was very clear that once the Award was adopted it ceased to exist but as a judgment of the court and hence could not be challenged on its own.** In relying on the judicial decision cited above as well as the equity maxim which states that ***'equity aids the vigilant and not the indolent',*** I opine that the Applicant slept on his rights and cannot cry foul at this juncture. In the circumstances, I decline to grant orders for stay of execution of the Decree issued by Honourable S.O. Temu (PM) in the Tribunal Case No. 5 of 2008 on 26th February, 2013 as well as the Award issued by the Land Disputes Tribunal (Ngong) in TC No. 09/07/07.

As to whether the Ruling issued by the Land Tribunal (Ngong) in TC No. 09/07/07 and any other consequential Orders arising from the Ruling and Decree should be reviewed.

The Applicant seeks to review the Ruling from the Land Disputes Tribunal (Ngong) in TC No. 09/07/07 and any other consequential Orders arising from the Ruling and Decree of the PM's Court claiming the Tribunal did not have jurisdiction to deal with registered land, hence there is an error apparent on the face of record.

Section 80 of the Civil Procedure Act provides:**-"Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

Further, Order 45, rule 1 (1) of the Civil Procedure Rules provides as follows: **' Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from**

which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.'

In the case of MUYODI v INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION AND ANOTHER EALR (2006) EA 243, the Court of Appeal while describing an error apparent on the face of record, held as follows:' ***" In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."***

For a Court to grant an order for review there has to be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by the Applicant at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record. From the materials presented, I am unable to identify any new materials presented by the Applicant to the Court to warrant a review of the Land Disputes Tribunal's Award or the Decree from the PM's Court. Further, the Applicant has taken six years to complain about an Award of the Tribunal and Decree from the PM's Court and this delay is not explained. The Applicant should have sought for the review of the Decree from the Court that issued it and not this court. I opine that the Applicant seems to be seeking a leeway to Appeal through the back door. In the circumstances, I find that the Applicant has not fulfilled the legal requirements to grant the order of review sought and will decline to grant the same.

It is against the foregoing that I find the application dated the 8th February, 2018 unmerited and proceed to dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 29th May, 2019

CHRISTINE OCHIENG

JUDGE