



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. MISC. APPLICATION. 335 OF 2011

MOHAMED ABDALLA GOSI.....PLAINTIFF

VERSUS

MOHAMED ABDALLA MASAZA

MWANAMWINYI ABDALA

MWANASHA ALI.....DEFENDANTS

RULING

1. By a Notice of Motion dated 3rd May, 2011 made pursuant to Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, the Applicant seeks orders:

- 1. That the application herein be certified urgent and the same be heard ex-parte and on priority.**
- 2. That the court be pleased to confirm the award of the provincial Lands Appeal Tribunal Coast Province in Land Appeal No. LND/TA/223 of 2002 dated 24th July 2007 as judgment of the court.**
- 3. That the Honourable Court do issue orders of eviction against Mohamed Abdalla Masaza, Mwanamwinyi Abdala and Mwanasha Ali to be moved out of Land known as KWALE/NGOMBENI/2390 in accordance with the ruling of the Provincial Land Appeals committee Coast Province of 24th July 2007.**
- 4. That the O.C.S. Diani Police Station (Kwale) be ordered to provide security and observe the execution of the orders herein and the Eviction process.**
- 5. That costs of the application and eviction be borne by the Respondents.**

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Mohamed Abdalla Gosi sworn on 3rd May 2011 and supplementary affidavit sworn on 25th January 2019. Briefly, the applicant avers that he is the registered trustee of his family in land known as **KWALE/NGOMBENI/2390**. That the respondents without any colour of right moved into, trespassed and occupied a portion of the said land without the consent of the applicant or any of his family members. The applicant avers that he filed a claim with the land disputes tribunal, Matuga, Kwale district whose award was in favour of the respondents. Being dissatisfied with the findings and award of the tribunal, the applicant appealed to the Land Disputes Appeals Committee, Coast Province, who in its decision delivered on 24th July 2007 set aside the decision/award of the Matuga Land Disputes Tribunal, Kwale District and ordered the Respondents to move out of the suit plot.

3. The Respondents sought leave to file judicial review proceedings in Nairobi Misc. Application No. 1025 of 2007(JR) seeking an order of certiorari to remove into the High Court and quash the said decision of the Land Disputes Appeals Committee. Though leave was granted, the respondents failed to file the application within the time granted by the court in Nairobi Misc. Application No.1025 of 2007 (JR). It is the Applicant's contention that in the circumstances, there exists no order barring the applicant from executing the orders as per the award of the Land Disputes Appeals Committee, hence this application.

4. The application is opposed by the Respondents through a replying affidavit sworn by Mohamed Abdalla Masaza, the 1st Respondent on 14th January, 2019. It is the Respondents contention that though they filed Nairobi Misc. Application No. 1025 of 2007, the court Ibrahim, J (as he was then) on 9th May, 2011 transferred the matter to Mombasa, but the transfer has never been effected to date. The respondents aver

that the court should not issue the orders sought herein until the orders in Nairobi Misc. Civil Application No. 1025 of 2007 are complied with. The respondents further state that the letters of Administration issued in HC Misc. Succession Cause No.165 of 1998 relied on by the applicant is a limited grant *ad colligenda* bona for the purposes of preservation of the deceased's estate only. It is the Respondents argument that the title deed registered in the name of the applicant was acquired through fraudulent and dubious means and is therefore illegal and revocable, and that they have filed Mombasa ELC No.74 of 2017 against the applicant, seeking revocation of the Title Deed in the applicant's name. The respondents want this matter consolidated with Mombasa ELC No.74 of 2017.

5. The application was prosecuted by way of written submissions which I have read and I need not reproduce their contents herein.

6. I have considered the application. The issue for determination is whether this court has the jurisdiction to confirm the award of the Land Disputes Appeals Committee and grant the orders sought herein. The Land Disputes Appeals Committee was established under Section 9 (1) of the Land Disputes Tribunal Act No.18 of 1990 (repealed). Section 8 of the repealed Act provided as follows:

“ 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.

(2)

(3)

(4)

(5)

(6)

(7)

(8) The decision of the Appeals committee shall be final on any issue of fact and no appeal shall lie therefrom to any court.

(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: provided no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law (other than customary law) is involved. ”

7. It is clear from the above provisions of the repealed Act that this court has appellate jurisdiction to hear and determine appeals from the appeals committee. Indeed Section 13 (4) of the Environment and Land Court Act which came into operation on 30th August, 2011 provides that this court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court. Section 31 of the Environment and Land Court Act repealed the Land Disputes Tribunal Act.

8. Section 7 of the repealed Act stipulated how decisions of the Tribunal could be executed and provided 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 judgment in accordance with the decisions of the Tribunal and upon such judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the civil procedure Act. ”

9. In this case, the applicant wants this court to confirm the judgment of the Appeals Committee as judgment of the court and to issue orders of eviction against the Respondents in accordance with the ruling of the Appeals Committee, Coast Province made on 24th July, 2007. Whereas the submissions filed suggest otherwise, it is clear in the mind of the court at this juncture, the issue before court is not the merits and demerits of the decision of the Appeals committee. The application herein is not an appeal against the decision of the Appeals Committee. The issue that arises for determination is whether this court has jurisdiction to grant the orders sought in the application herein. In my considered view, to grant the orders, I am afraid, the court will be descending into the arena of a matter that is strictly for the magistrate's jurisdiction. In my view, this court must be careful not to descend into the arena of matter whose decision may eventually come before the court by way of appeal. The execution of judgment arising under the repealed Act, in my view, are matters reserved for the magistrate's court under Section 7 of the repealed Act.

10. As already stated, the jurisdiction of this court, in my view, is limited to appeals from the appeals committee under Section 8 of the repealed Act. Further, the court may handle judicial review applications from such tribunals. It is therefore my finding that this court lacks jurisdiction to issue the orders sought herein.

11. The upshot is that the notice of motion dated 3rd May 2011 is improperly before this court and the same is hereby struck out with costs to the respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of May 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mkomba holding brief for Mutugi for defendant/respondent

Magolo Paul holding brief Ms. Chesaro for Applicant

Yumna Court Assistant

C.K. YANO

JUDGE