



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**MISC. APP. NO. 54 OF 2009**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 8 OF 1990**

**AND**

**IN THE MATTER OF THE LAND TITLES NO. WEST SUNA/WIGA/829**

**AND**

**IN THE MATTER OF AN APPLICATION BY JACK OTIENO OBUTHO**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHIEF MAGISTRATE KISUMU.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, MIGORI.....2<sup>ND</sup> RESPONDENT**

**CYPRIAN OBUTHO OSUNA.....EX-PARTE APPLICANT**

**AND**

**JOSEPH ONYANGO MARERA.....INTERESTED PARTY**

**J U D G M E N T**

1. The Ex parte Applicant by the Notice of Motion Application dated 3<sup>rd</sup> March 2009 seeks for the following orders;

**1) That this Honourable Court may be pleased to issue an order of certiorari to remove into this court the decision of the Chief Magistrate's Court Kisumu given on 25<sup>th</sup> August 2008 in land case No. 33 of 2008 for the purposes of being quashed.**

**2) That this honourable court be pleased to issue an order of prohibition to prohibit the District Land Registrar, Migori from executing or otherwise enforcing the decision of the Nyanza Provincial Lands Appeal committee given on 17<sup>th</sup> July 2008 in Land Appeal No. 188 of 2005 and that of the Chief Magistrate's Court Kisumu given on 25<sup>th</sup> August 2008 or otherwise interfering with the Applicant's registration as owner of land parcel No. West SUNA/WIGA/829.**

2. The Ex-parte Applicant averred that he was the registered proprietor of land Parcel No. **West Suna/Wiga/829** ("suit land"). He further averred that the Land Tribunal in Suba-West Division Land Dispute Tribunal in case No. 16/24/11/04/829 ordered that his land be transferred to the interested party. The interested party was the claimant before the Suba-West Division Land Disputes Tribunal in case No. 16/24/11/04/829 while the Ex-parte Applicant was the objector.

3. The Ex-parte Applicant aggrieved by the decision of the Tribunal appealed to the Nyanza Provincial Lands Appeals Committee, Lands Appeal No. 188 of 2005, and his appeal was dismissed. He stated that on 29<sup>th</sup> December 2008, a group of people hired by M/s Kofulo Investments Agencies Auctioneers demolished his home claiming to be executing an eviction order issued by the Chief Magistrate's Court Kisumu. The Ex parte Applicant upon making inquiry in regard to his appeal before the Appeals Committee he was informed that the appeal had been finalized and its decision adopted by the Chief Magistrate's Court at Kisumu. He averred that he was neither served with the

application for adoption of the award of the Appeals Committee nor the application for eviction despite the presence of affidavits of service being on record. He further averred that the Land Tribunal acted in excess of its jurisdiction in entertaining the matter and that the decree emanating from **Land Case No. 33 of 2008** null and void for want of jurisdiction. He averred that he had been left destitute and homeless despite having lived on the suit land from 1945.

4. The brief background to this case is that sometime in 2004 the ex-parte applicant vide a letter was notified of a claim filed by the interested party before the Migori District Land Disputes Tribunal. The claim was set down for hearing before the Suba-West Division Land Dispute Tribunal in case No. 16/24/11/04/829. The Interested party claimed that the Ex-parte Applicant had transferred the suit land into his name 2 years after the death of the proprietor of the suit land. The registered proprietor of the suit land had died in 1998 and the transfer to the Ex-parte Applicant took place on 30<sup>th</sup> August 2000. The Land Disputes Tribunal awarded the suit land to the Interested party and asked the Principal Magistrate's Court within Migori District to authorize the District Land Registrar and District Land Surveyor to act accordingly.

5. The Ex-parte Applicant appealed to the Nyanza Provincial Lands Appeals Committee whose findings were that the proceedings from the Suba-West Division Land Dispute Tribunal were not signed by any member. They acknowledged that the Interested party was present but had an entirely different set of proceedings. They unanimously agreed that no appeal had therefore been lodged before them and upheld the award/judgment of the Migori Land Disputes Tribunal and ordered that the suit land be registered in the name of the interested party. The Chief Magistrate's court Kisumu subsequently adopted the Land Disputes Tribunal's award on 25<sup>th</sup> August 2008.

6. The applicant has now filed the instant application for judicial review. The application is supported by the statutory statement and verifying affidavit of Nicholas Morume Mautia accompanying the chamber summons application for leave. The interested party opposed the application vide the Replying Affidavit dated 12<sup>th</sup> November 2012.

7. The Notice of Motion was canvassed by way of written submissions. The Ex parte Applicant submitted that the Land Disputes Tribunal lacked the jurisdiction to deal with the matter since it involved title and ownership of land. He submitted that the jurisdiction of the Tribunals had been set by Section 3(1) of the Land Disputes Tribunal Act and did not include claims relating to title in respect of registered land. He contended that the interested party was claiming ownership of the suit land and the Tribunal had no jurisdiction to make a determination on the issue of ownership of registered land. He placed reliance on the following cases; **Republic -vs- Baringo Land Disputes Tribunal & 3 Others Eldoret HCC Misc Appl. No. 754 of 2007 (JR) (unreported)** and **Republic -vs- Sikiago Lands Disputes Tribunal & Anor Embu HCC Misc Appl. No. 86 of 2011 (JR) (unreported)**. He urged the court that the decision made by the Tribunal was a nullity and the court could not give effect to such a decision. He submitted that the Magistrates court could not make eviction orders when the same had not been issued by the Tribunal. The duty of the court was merely to read and adopt the award by the tribunal.

8. The interested party in his submissions contended that the application for leave to commence judicial review proceedings was made outside six months period contrary to Order 53 Rule (2) of the Civil Procedure Rules. The Interested party further submitted that the subordinate court had powers under the Land Disputes Tribunals Act to adopt an award from the tribunal and further that the Magistrate's Court was not required to satisfy itself whether the decision of the tribunal was irregular, bad in law and/or void. It was the Interested party's position that the Magistrate's Court had no other option but to adopt the award of the Tribunal once it had been filed. He further contended that the chamber summons application dated 18<sup>th</sup> February 2009 was bad in law for leave to institute an application for judicial review as it ought to have been brought by the applicant in his name and not "**Republic**".

9. On 7<sup>th</sup> May 2019 when the matter was mentioned before me, Mr. Nyauma appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and intimated that he did not wish to file any response or submissions in the matter and consequently the court reserved the matter for judgment.

#### **Analysis and Determination:**

10. Under the Land Disputes Tribunal Act, No. 18 of 1990 (now repealed), the Lands Disputes Tribunal had jurisdiction to hear specific matters pertaining to disputes in land. Section 3(1) of the Land Disputes Tribunal Act provides as follows:-

**"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."**

11. The powers of the Tribunal were limited to the above disputes and thus where the Tribunal acted in excess of its powers then the Tribunal was deemed to have acted *ultra vires* and its decision was liable to be quashed for being a nullity in appropriate proceedings. In the case of **Joseph Karobia Gicheru -vs- Michael Gachoki Gicheru [2013]JeKLR** the court stated:-

**"Where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void ab initio. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate could confer upon such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end."**

12. In the present matter, it is clear that the decision made by the Land Disputes Tribunal effectively ordered the cancellation of the title of the Ex parte Applicant as the proprietor of **West Suna/Wiga/829** and directed the same to be transferred to the Interested Party. The

Tribunal lacked the jurisdiction to do so and consequently its decision was *ultra vires* and therefore null and *void ab initio*.

13. The role of a Magistrate's Court in regard to awards emanating from Land Disputes Tribunals was provided under Section 7 of the Land Disputes Tribunals Act which provides thus:-

**“(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 decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”**

14. The Magistrate's Court did not have the jurisdiction to review an award made by the Tribunal and the Court's mandate was to enter judgment in accordance with the decision of the Tribunal. In the case of **Paul Muraya Kaguri -vs- Simon Mbaria Muchunu [2015] eKLR** the court held that:

**“It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.**

**...the Trial Magistrate's duty under the law was merely to adopt the award of the Land Disputes Tribunal, she had no mandate to enquire into the legality or otherwise of the judgment...”**

15. Section 7 of the Land Disputes Tribunal Act envisaged that any awards that were to be filed emanating from the Tribunals would be valid awards which were validly made under the provisions of the Act. If an award was made by the Tribunal in excess of its jurisdiction the filing of such an award and its adoption by the Magistrate's Court as judgment could not alter the character of the award if it was a nullity for want of jurisdiction on the part of the Tribunal. This court in the case of **Joseph Oginga Onyoni & 2 Others -vs- The Hon. Attorney General & 2 Others [2016]eKLR** considered the jurisdiction of Land Disputes Tribunals pursuant to Section 3(1) of the Act. The Court at paragraph 12 of the judgment stated:-

**“...The Land Disputes Tribunal could only exercise jurisdiction in regard to matters that it had been conferred jurisdiction under the aforesaid Section 3(1) of the Act to deal with. The Tribunal did not have jurisdiction to deal with title to registered land. That is what the Tribunal in the instant case did and by doing so it clearly acted in excess of its jurisdiction. Courts have repeatedly held that the Land Disputes Tribunals established under Section 4 of the Land Disputes Tribunals Act No. 18 of 1990 lacked jurisdiction to deal with title and that any resultant awards in cases where Tribunals made decisions touching on title to registered land such awards were a nullity.”**

The Court in the same case having found that the award made by the Tribunal was in excess of its jurisdiction, observed as follows in regard to the adoption of the award by the Magistrate's Court:-

**“...The 2<sup>nd</sup> Respondent acted without jurisdiction and hence the Magistrate's Court could not properly endorse and enter judgment in respect of an award that was null and void. There was no valid award that the Magistrate's Court could have given effect to. The award by the Tribunal was a nullity and so was the endorsement of the same as judgment and decree of the Court.”**

16. In the case of **Macfoy -vs- United Africa Co. Ltd** the court held as follows;

**“if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

17. On whether the current application is bad in law for reason that the chamber summons dated 18<sup>th</sup> February 2009 were brought by **“Republic”** and not in the name of the Ex-parte Applicant, I note that a Notice of Preliminary Objection was filed on 21<sup>st</sup> January 2011 by the Interested party seeking that it be struck out for reasons that it was incurably defective. On whether the application should fail for reasons that the application for leave was not made in the name of the Ex-parte Applicant Sitati, J. dismissed the application for reasons that the argument was flawed. I will not therefore comment any further on this issue as it has already been determined vide the Ruling delivered on 24<sup>th</sup> April 2012.

18. The Interested party has further asserted that the ex-parte applicant failed to comply with Order 53 with regard to the six months limitation period for judicial review applications. The Ex-parte Applicant on 19<sup>th</sup> February 2009 made an application seeking leave to file the substantive application. The record shows that he filed the Notice of Motion dated 3<sup>rd</sup> March 2009 on 4<sup>th</sup> March 2009. Section 9(3) of the Law Reform Act Cap 26 Laws of Kenya states as follows:

**“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law .....**

Order 53 Rule 2 of the Civil Procedure Rules, 2010 in the following words:-

**"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."**

19. My understanding of the above provisions governing the institution of judicial review applications is that the application for leave to institute judicial review applications must be filed before the expiry of six months from the date the decision sought to be quashed was made. In the present matter, the decision of the Chief Magistrate's Court adopting the award of the Tribunal as judgment of the Court was made on 25<sup>th</sup> August 2008. The application for grant of leave was filed in Court on 19<sup>th</sup> February 2009. This was within the statutory six months period within which the Ex parte Applicant was entitled to initiate judicial review proceedings.

20. For the reasons that I have discussed herein above, I am persuaded that the Ex parte Applicant's Notice of Motion has merit and I accordingly allow the same in terms of prayers (1) and (2) thereof. I am cognizant that the dispute between the parties remains unresolved but then parties have to ventilate their grievances before appropriate competent institutions with jurisdiction to adjudicate their disputes. That is what the rule of law is all about. I order that each party will bear their own costs of the application.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF JULY 2019.**

**J. M. MUTUNGI**

**JUDGE**