



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC JR. NO. 10 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN KAKAMEGA NORT LAND DISPUTES TRIBUNAL.....RESPONDENT

VERSUS

LOISE INDANGASI

MUCHINA LUMAKANDA.....APPLICANTS

VERSUS

ANTONY MUTALI

SOFIA ACHESA MUTALI.....INTERESTED PARTIES

JUDGEMENT

The application is dated 24th October 2012 and is brought under order 53 of the Civil Procedure Rules seeking the following orders:-

1. The decision of Kakamega North Land Disputes Tribunal in case No. 33 of 2007 and its adoption by Butali Resident Magistrate’s Court in Award No. 29 of 2011 be brought to this court and quashed.
2. The costs of this application be provided for.

The Land Disputes Tribunal lacked the jurisdiction to entertain the dispute and its orders are therefore illegal. That the Butali Resident Magistrate erred in adopting the Award as the act constituting the tribunal had been repealed and there was therefore nothing to adopt.

This court has carefully considered the application and the submissions therein. In Republic v Kenya Revenue Authority & Another Ex-Parte Tradewise Agencies (2013) eKLR, para. 21 G.V. Odunga, J. in quoting from Pastoli vs. Kabale District Local Government Council and Others (2008) 2 EA 300

observed that;

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural

rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision....."

In Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited [2008] e KLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made , but the decision making process itself.

The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See Welamondi vs The Chairman, Electrol Commission of Kenya (2002) 1 KLR,

"..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis"

In the case of Republic v Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & another [2014] eKLR it was held that;

"Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "Judicial Remedies in Public Law" by Clive Olive, it is noted that "there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy."

In Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo JA stated as follows;

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

Be that as it may, this application is based on the grounds that the decision of the tribunal is the subject for adoption, enforcement/execution in Butali Residents Magistrates Court Award No. 29 of 2011. The grounds disclosed in statement of facts dated 30th January 2012. The facts disclosed in the verifying affidavit of Muchina Lumakanda. The general grounds are that the proceedings and decision is a nullity since the tribunal lacked jurisdiction.

The issues to be determined in this application is firstly whether or not the tribunal had jurisdiction to entertain this dispute. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated 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."

I have perused the documents before me and the proceedings and verdict of the Kakamega North Disputes Tribunal and indeed the dispute seems to be one of ownership to land and hence the tribunal did not have jurisdiction to entertain the same. It is clear from the claimants' submissions that they were claiming the suit land. In the verdict by the tribunal they found that the applicant Muchina Lumakanda should be disciplined for interfering with a neighbour's family land and deliberately causing conflict and the title deed Malava/2890 be withdrawn from him and cancelled. The Kakamega North Division Land Dispute Tribunal and decision dated 28th November 2011 stated as follows;

"AWARD

Having scrutinized and considering evidence on the ground land dispute award is as follows;

1. Title deeds Malava/2840 & 2841 be degazetted, new map destroyed.

2. Malava/1746 & 1717 (Mutation) be registered and area marked A(4) acres, which is on ground 2.5 acres be transferred to Anthony Mutli and Sophia Mutali jointly.

Executive officer Kakamega Court to sign on transactions.”

I find that under Section 3 (1) of the Land Disputes Tribunal the claim and final decision by the tribunal was outside the jurisdiction of the said tribunal. Thus the tribunal lacked jurisdiction to entertain the claim relating to title to land and acted ultra vires its powers. I concur with the ex parte applicants' submissions. I find the application has merit and I grant the following orders;

1. That an order of certiorari do issue to remove into this court and quash the Kakamega North Land Disputes Tribunal in case No. 33 of 2007 proceedings and decision dated 28th November 2011 concerning land parcel L.R. Malava/2840 & 2841 and a prohibition order prohibiting the said tribunal or the court in Butali Resident Magistrate's Court in Award No. 29 of 2011 from enforcing the decision or adjudicating over the same subject matter.

2. Costs of this application to the ex parte applicants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE