



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC JR. NO. 1 OF 2019**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE CHAIRMAN IKOLOMANI DIVISION LAND TRIBUNAL..... RESPONDENT**

**AND**

**DISMAS KAJILWA KAVOGI.....INTERESTED PARTY**

**AND**

**CHARLES MUDESHI LITORO**

**JOHN MISOLE AMUTALA.....EXPARTE APPLICANTS**

**JUDGEMENT**

The ex parte application is dated 31<sup>st</sup> march 2010 and is brought under order 53 rule 3 of the Civil Procedure Rules seeking the following orders;

a. That an order of certiorari do issue to remove into this court and quash the Ikolomani division Land Disputes Tribunal proceedings and decision delivered on 2/12/2009 in Case No. LDT/VOL.1/12/2009 concerning land parcel L.R. Kakamega/Iguhu/1340 and a prohibition order prohibiting the said tribunal or the court in Kakamega CM Award No. 8 of 2010 or any other from enforcing the decision or adjudicating over the same subject matter.

b. That the exparte applicants costs of this application and for the exparte chamber summons dated 10<sup>th</sup> March 2010 for leave be paid by the interested party.

The application is in respect of the decision of Ikolomani Division Land Dispute Tribunal proceedings and decision delivered on 2/12/2009 in case concerning land parcel L.R. No. Kakamega/Iguhu/1340. The tribunal lacked jurisdiction to entertain the claim and make verdict awarding land to the interested party. It is clear from the interested party statement he was claiming the land. In the verdict by the tribunal they found that the interested party bought a portion of the land and the green card should be amended to reflect this position. Under Section 3 (1) of the Land dispute Tribunal the interested party’s claim and final decision by the tribunal was outside the aforesaid armpits. Thus the tribunal lacked jurisdiction to entertain the claim and acted ultra vires its powers. The claim was time barred. The interested party alleged to have bought the land in 2000 and cleared the balance of Ksh. 45,000/= in the same as seen from the evidence. The claim at the tribunal was filed on 22/10/2009. The interested party was enforcing an agreement/contract/truncation purportedly entered into in 2000, at least 9 years later. Section 13 (3) of the Land dispute Tribunal Act No. 18 of 1990. The interested party was enforcing a contract, which ought to have been filed within 6 years – see section 4 (1) of Cap 22 – the Limitation of Actions Act. Land parcel L.R. Kakamega/Iguhu/1340 was at the time of the proceedings registered in the name of Lizzianda Amutala, who was deceased. This fact was brought to the attention of the tribunal. The said Lizzianda Amutala was not a party. No succession proceedings in accordance with the Succession Act Cap 160 had been undertaken. The interested party contract/transaction had no consent to transfer granted in accordance with Section 6 and 7 of the Land Control Act No. Cap 302. That the interested party transaction became void for all purposes as clearly provided for in the proviso to section 6 (2) of the Land Control Act Cap 302. The 2<sup>nd</sup> Exparte applicant was not served, no evidence is on record. The decision of the tribunal affects him. He was therefore condemned unheard contravening the rule of natural justice. They pray the same be quashed and the court be quashed and the court be prohibited from enforcing the same. The interested party is entitled to costs.

The respondent in his grounds of opposition submitted that the application lacks merit and should be dismissed. The orders made on 16<sup>th</sup>

March, 2010 were ex-party and did not involve him. That the Ikolomani Division Land Dispute Tribunal decision delivered on 2/12/2009 in case No. LDT/VOL1/12/2009 concerning land parcel No. Kakamega/Iguhu/1340 were done legally and its decision should be respected. The applicants were given an opportunity to defend their rights which one did and the other ignored. All the legal procedures were followed, the proceedings in Kakamega CM Misc. Award No. 8 of 2011 is a testimony to this fact. The tribunal clearly observes that he bought a portion of this land for Ksh. 80,000/=. The sale was spearheaded by Philemona Shikokoti and openly before the area Assistant Chief. That a success on cause was filled in the High Court and the 1<sup>st</sup> ex parte applicant and the interested party were co-administrators of parcel of land Idakho/Iguhu/1340. The 1<sup>st</sup> ex parte applicant and the interested party moved to the land registrar and a title deed was issued on 28<sup>th</sup> July, 2000. It is not a secret that he bought this land, the tribunal observation clearly testifies to this. It should be noted that he is a foreigner in this area but still people testified that he bought this parcel of land. That the court on 28<sup>th</sup> July, 2011 in a succession case No. 134/2000, ordered that:- The registration of Charles Mudeshi and John Misole as administrators on 21<sup>st</sup> May, 2008 be cancelled and that land parcel No. Kakamega/Iguhu/1340 be distributed as per the confirmed grant dated 17<sup>th</sup> July, 2000. The 1<sup>st</sup> ex parte applicant in this suit, Charles Mudeshi Litoro died on 4<sup>th</sup> November, 2011. The respondent prays that the application should be dismissed and the ex parte orders made earlier be cancelled.

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 4<sup>th</sup> 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 Kakamega CMC Award No. 8 of 2010. The grounds disclosed in statement of facts dated 10<sup>th</sup> March 2010. The facts disclosed in the verifying affidavit of Charles Mudehi Litoro. The requisite notice to deputy registrar was filed and served. The general grounds 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 Ikolomani 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 interested party submissions that he was claiming the suit land. In the verdict by the tribunal they found that the interested party bought a portion of the land and the green card should be amended to reflect this position. The interested party alleged to have bought the land in 2000 and cleared the balance of Ksh. 45,000/= in the same as seen from the evidence. The interested party was enforcing an agreement/contract/truncation purportedly entered into in 2000. The Ikolomani Division Land Dispute Tribunal and decision delivered on 2<sup>nd</sup> December 2009 stated as follows;

“The tribunal orders;

1. Dismas Kijilwa Kavogi rightly bought the portion of land in dispute from the main parcel of land Idhaho/Iguhu/1340.
2. The green card of this parcel No. Idhaho/Iguhu/1340 should reflect three names i.e.
  - a. Charles Mudehi Litoro
  - b. John Misole Amutala
  - c. Dismas Kijilwa Kavogi
3. Any transaction on parcel in 1 above without involving the three named in 2 above was null and void.
4. The Land Registrar in the company of the Land Surveyor visit the parcel to confirm the boundary and issue new numbers.
5. Costs of this case be met by the objectors.”

I find that under Section 3 (1) of the Land Disputes Tribunal the interested party’s 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 applicant’s 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 Ikolomani Division Land Disputes Tribunal proceedings and decision delivered on 2/12/2009 in Case No. LDT/VOL.1/12/2009 concerning land parcel L.R. Kakamega/Iguhu/1340 and a prohibition order prohibiting the said tribunal or the court in Kakamega CM Award No. 8 of 2010 or any other from enforcing the decision or adjudicating over the same subject matter.
2. Costs of this application to the ex parte applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**