



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

MISC. APPLICATION NO. 164 OF 2006.

REPUBLIC.....APPLICANT

VERSUS

CHERANGANI LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

AND

SENIOR PRINCIPAL MAGISTRATE KITALE.....2ND RESPONDENT

AND

MARGARET KABON CHESIRE.....INTERESTED PARTY

EX-PARTE ALFRED PASCAL WANYAMA

JUDGMENT

INTRODUCTION

1. The Notice of Motion dated **18th December, 2006** seeks that an order of certiorari do issue to remove to this court the Decision and Award of the Cherangani Land Disputes Tribunal which was read and adopted as the judgment of the court on **13th September, 2005** in ***Kitale SPMC Land Case No 28 of 2005***.

2. The Notice of Motion is founded on the grounds set out in the statement of particulars dated **10th June, 2011** (which this court presumes to be the statement of facts and supported by the sworn affidavits of **Alfred Pascal Wanyama** dated **9th December, 2005** and **3rd April, 2006** which I deem to be the verifying affidavits. The said statement raises the grounds that; the Tribunal was not properly constituted; the 3rd respondent instituted the proceedings without letters of administration of the estate of her husband; the applicant was condemned unheard; the tribunal had no jurisdiction to order payment of damages and mesne profits; the Tribunal determined a question of ownership of land; that the Award is undated, and that the interested party had no privity of contract with the applicant.

3. The respondents did not enter appearance or file any response to the substantive notice of motion. The applicant filed his submissions on the 1st February, 2018.

4. The issues that this court has to determine are as follows:

(a) Was the tribunal properly constituted?

(b) Were the proceedings competent?

(c) Was there a breach of natural justice?

(d) Did the tribunal exceed its jurisdiction by purporting to deal with and determine the issues of mesne profits and damages and ownership of land?

(a) Was the Tribunal properly constituted?

5. The applicant's submission on this point is that there is no evidence on the face of the proceedings to show that the elders who signed the

award were all present during the hearing.

6. However on this point this court would expect the applicant to demonstrate by way of evidence in his verifying affidavit that the elders were not present at the hearing of the case and the issuance of the award rather than leave this court to conjecture. I find no such evidence in the verifying affidavits which, ironically, aver that the Tribunal heard the dispute. The signatures of the elders not having been questioned, and the issue of quorum not having been raised by the applicant this court can only presume that the elders sat and heard the dispute and gave the award as the record shows.

7. Further on the issue of proper constitution of the tribunal, the applicant called on this court to take judicial notice that there was a ministerial directive suspending the operations of the Tribunal. However this court takes a different view.

8. Under the Evidence Act this court is bound to take judicial notice of certain facts but in my view in this case I think it is a matter of discharge of the evidential burden of proof. And that allegation having been made the burden of proof falls squarely upon the shoulders of the applicant to show that the tribunal's operations were suspended by the minister and under what law that was purported to be done.

9. Since ours is an adversarial legal system, if the applicants bring no evidence to court to support that allegation, this court is bound to consider that it has no basis.

10. In the case of *Republic -Vs- Borabu District Land Disputes Tribunal & Another Ex-parte Jemima Kemunto Masare [2010] eKLR* the court stated as follows:

“Finally, the applicant raised the issue of the composition of the 1st respondent. It is her contention that as at the time the 1st respondent was entertaining the claim by the interested party, it was not properly constituted. In terms of section 4 of the Land Disputes Tribunal Act, the 1st respondent is deemed to be properly constituted if it is composed of the chairman appointed by the District Commissioner and either two or four elders. The minister then by a notice published in the Kenya Gazette, appoints them as such. If I understood the applicant's contention properly, it is that much as the 1st respondent's membership were appointed, they were never Gazetted as required. In response to this submission, the interested party stated that “the composition of the 1st respondent was properly and or legally constituted as it fulfilled the conditions required under section 4 of the Land Disputes Tribunal Act No. 18 of 1990...” This is a mere assertion without any proof at all. What was so difficult for the interested party to obtain a copy of the Kenya Gazette that Gazetted the appointment of 1st respondent's members? I cannot think of any. The applicant having asserted that the members of the 1st respondent had not been Gazetted as required, it now fell upon the interested party to prove her otherwise by tendering in evidence the Gazette Notice. However, since no such evidence was forthcoming it must therefore be deemed and assumed that the 1st respondent was not legally constituted”.

11. In my view the situation in this case differs from that in the cited case above, for the applicant herein does not allege that the panel was not gazetted, but that there was a ministerial directive suspending its operations. This ministerial directive is not proved and I find that the claim has no merit.

(b) Were the proceedings competent?

12. The first ground that the applicant raises regarding this issue is that the interested party did not provide any grant of letters and thus had no locus standi to agitate the claim on behalf of her husband. For this proposition the applicant cited the case of *Stephen Ocharo Bikondo -vs- Isabella Kwamboka ELC Appeal No. 72 of 2010 Kisii*.

13. In the instant case the claimant in the Tribunal case raised a complaint of trespass to land in that the applicant herein was said to have forcefully entered the portion he was entitled to and then proceeded to occupy more land than he had bought. A claim in trespass is a complaint that is envisaged by **Section 3** of the Land Disputes Tribunal Act as within the jurisdiction of the Tribunal. In its conclusion the Tribunal specified the amount size of the land parcel that the applicant herein was to remain in occupation of.

14. In my view, there was no need for letters of administration to enable the claimant prosecute her claim as she was in possession.

15. In the case of at *Eldoret E&L No. 471 of 2013 Martha Kigen -vs- Johana Tibino eKLR* the court stated as follows:

“The next point is locus of the plaintiff to file this suit. It is true that the plaintiff does not hold any grant of letters of administration over the estate of Willy Kigen. She would have needed to have a grant in respect of the estate of Willy Kigen if she was claiming the land for and on behalf of the benefit of the estate. But, this suit has not been filed for and on behalf of the Estate of Willy Kigen. The suit is not one to claim land, or to have land revert to the estate of Willy Kigen. This in my view is an action for trespass for which it is not necessary for one to be owner of land to file suit. In the text Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at p923, trespass to land is defined as follows :-

"Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another."

The same text gives various examples of trespass one of which is "to place anything on or in land in the possession of another..."

Page 927 of the same text discusses who may sue for trespass and it states as follows:-

“Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both. A tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion. Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”

It is therefore enough that the person suing is in possession, and it is enough to demonstrate, that the person against whom the claim is sustained has no right over the land. The action by the plaintiff is therefore perfectly sustainable in as much as she holds no letters of administration for the estate of Willy Kigen.”

16. The sum total of the above observations is that there is no merit in the allegation that the proceedings before the tribunal were incompetent for want of grant of letters of administration to the estate of the claimant’s deceased husband.

(c) Was there a breach of natural justice?

17. The applicant claims that he was denied a hearing. However a look at the applicant’s own exhibit demonstrates that he was summoned to the Tribunal hearing on more than one occasion. This court is not able to presume the truth of the applicant’s claim that he was not summoned. I find it improbable to believe that the Tribunal proceedings proceeded without his knowledge. I therefore find no merit in this ground.

(d) Did the tribunal exceed its jurisdiction by purporting to deal with and determine the issues of mesne profits and damages and ownership of land?

18. In the case of *Republic -Vs- Borabu District Land Disputes Tribunal & Another Ex-Parte Jemima Kemunto Masare* [2010] eKLR (supra) where the Tribunal dealt with and determined a dispute concerning ownership the court stated as follows:

“From the foregoing it is quite clear that the 1st respondent is not seized of jurisdiction to entertain and determine a claim touching on ownership and or title to Land registered under the Registered Land Act, nor adjudicate or arbitrate on issues touching on and or concerning succession, neither does it have jurisdiction to direct the rectification of the register in respect of land registered under the Registered Land Act. Yet by the 1st respondent reaching the decision set out in extenso elsewhere in this ruling, it was simply doing what it was not supposed to do as stated above. The 1st respondent being a creature of statute can only do that that the statute tells it to do. It cannot purport to act in excess of what the statutes allows it to do. Nor can it confer on itself jurisdiction that the statute has expressly or impliedly ousted it from. It cannot also not avoid to do what the statute expressly allows it to do. If the 1st respondent was to confer on itself jurisdiction which it does not have then, it will be acting in excess or want of jurisdiction and if it was to avoid such jurisdiction then it will be guilty of abduction of responsibility and or duty. Either way, the 1st respondent would have failed in its mandate and the resultant award would be liable to being quashed by an order of certiorari so long as the application for such remedy was made within the stipulated period of time-six months!”

19. If the Tribunal dealt with mesne profits and damages and ownership of land, the claim of excess of jurisdiction would have some merit on that account.

20. However, from an examination of the facts of this case it is apparent that the claimant in the Tribunal raised allegations of trespass whereby the *ex parte* applicant herein trespassed onto more land than he had been sold and therefore she merely wanted him prevented from occupying or working on land that was not his. The dispute was not about title for indeed the complainant at the Tribunal recognised that the defendant was entitled to some land. Besides, there is no evidence on the face of the record that the Tribunal awarded mesne profits. The Tribunal merely ordered costs to be paid by the *ex parte* applicant. I therefore fail to find any merit in the claim that the Tribunal exceeded its jurisdiction in hearing and determining the complaint.

CONCLUSION.

21. The grounds on which the application is premised have all collapsed. Consequently I find that the Judicial Review Notice of Motion dated 23rd June, 2011 has no merit, and I dismiss it with no orders as to costs.

Dated, signed and delivered at Kitale on this 30th day of May, 2018.

MWANGI NJOROGE

JUDGE

30/5/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Plaintiffs

N/A for the Defendants

COURT

Judgment read in open court in the absence of the parties who had been notified.

MWANGI NJORGE

JUDGE

30/5/2018