



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JUDICIAL REVIEW NO. 26 OF 2011

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN MERU CENTRAL

LAND DISPUTES LAND TRIBUNAL.....RESPONDENT

GRACE MUCECE M'IBUURI.....1ST INTERESTED PARTY

JANE KINANU M'IBUURI.....2ND INTERESTED PARTY

EVANGELINE NTHURE.....3RD INTERESTED PARTY

FLORENCE NGUGI.....4TH INTERESTED PARTY

JUDGMENT

The Applicant's Case

1. The applicant filed a notice of motion dated 3/6/2011 and later amended the same on 12/6/2012. In the amended notice of motion the Ex-parte applicant herein sought the following orders:-

(1)That this honourable court be pleased to issue order of certiorari to call for purposes of quashing the decision of the Land Disputes Tribunal Case No. 40 of 2010 which was read in the Chief Magistrate's Court as LDT No. 6 of 2011 on 3/3/2011 and quash the same and other orders made therein without jurisdiction and against the laws of the land.

(2) That the cost of this motion application be provided for.

2. The application is based on the grounds set out in the statement of facts and on the facts set out in the verifying affidavit of the applicant both dated 17/5/2011.

The grounds upon which the relief is sought are that the respondents acted without jurisdiction and contrary to **Section 3 of the Land Disputes Tribunal Act No. 18 of 1990** as it did not have jurisdiction to determine ownership of land; that the decision of the respondent was made in error and is unlawful; that the subject matter of those proceedings was *res judicata* by virtue of **Meru HCC Succession Cause No. 100 of 2008** in which any complaint regarding the sharing of deceased's property should have been raised.

3. In the verifying affidavit the applicant avers that the interested parties are his half-sisters and that before his father Karaja Ibuuri died he was the registered owner of the **Land Parcel Nos. Nkuene/Ngonyi/723 and Land Parcel No. Nkuene/Ngonyi/724**. Upon his death he filed **Meru High Court Succession Cause No. 100 of 2008** which was heard to completion and subsequently, a confirmed grant was issued on 5/7/2008. After this **parcel No. 724** was subdivided into **LR. Nos. Nkuene/ Ngonyi/1177, 1178, 1179, 1180 and 1181** respectively. He and his half-brother one John Mburugu M'Ibuuri became the jointly registered owners of **Land Parcel No. Nkuene/Ngonyi/1178**; he avers that they got so registered by virtue of the court order in **Meru High Court Succession Cause No. 100 of 2008**. The applicant avers that the interested parties were aware of such registration but they did not seek to challenge or file any objection in the succession proceedings. Instead they filed a complaint before the Tribunal being **Tribunal Case No. 40 of 2010** whose the decision is the subject of these proceedings. The applicant depones that the Tribunal's powers are limited to **Section 3 of Cap 303A** and that the respondents' orders were made without jurisdiction and are a nullity. The Land Disputes Tribunal proceedings ruling and award, duly signed by three members are exhibited in the verifying affidavit.

The Respondent's Response

4. The respondents filed grounds of opposition to the amended notice of motion on 22/2/2018. He avers that the proper respondent should have been the Chief Magistrate's Court; that judicial review concerns itself with decision making process rather than the merits and that notice of motion is mischievous an abuse of court process and lacks merit.

The Interested Parties' Responses

5. I have looked through the record and found no response by the interested parties.

Submissions of the Parties

6. The ex-parte applicant filed his submissions on substantive notice of motion on 9/4/2018. I have perused through the record and found no submissions on behalf of the respondents and the interested parties. I have considered the notice of motion, the response and the filed submissions.

Determination

Issues for Determination

7. The following are the issues for determination that arise in this case:

i. Whether the respondent acted within jurisdiction.

ii. Whether the matter is res judicata HCC Succession Cause No 100 of 2008;

8. The issues are discussed as hereunder.

i. Whether the respondent acted within jurisdiction.

9. The basis for this allegation is that the award challenged title or ownership of **LR NO Nkuene Ngonyi 1178** the same being registered land. An examination of the record shows that the land is indeed registered in the name of the **George Mwiti Mbuiri** and **John Mburugu**.

10. The decision in the Land Disputes Tribunal record provided shows that the claimants at the Tribunal brought the complaint against the two registered owners of **LR NO Nkuene/Ngonyi/1178** and that the dispute was heard on **14th December 2010** while the suit land was registered in the name of the respondents named in that dispute on the **10th August 2010**. The ex-parte applicant herein was one of the respondents. It was thus clearly registered land as at the time the dispute was heard.

11. Apparently, the claimants, being sisters to the ex-parte applicant, believing themselves to be entitled to the suit land asked the Tribunal to order that the land be transferred to them. The objectors, the current applicant being one of them, averred that the land was given to them by their father before he died.

12. The Tribunal found that the suit land **Nkuene /Ngonyi 1178** was a subdivision of **Nkuene/ Ngonyi 724** which had been registered in the name of the applicant's father and that the father had subdivided the land into four parcels, none of which had title deeds at the time of the applicant's father's death, and one of which was to remain in the deceased's possession while others were distributed to three other persons, that is the applicant **John Mburugu** and **Penina Mukiri**. It also found that after his death the applicant and his brother **John Mburugu** obtained a grant to his estate, and caused the land parcel which had been left for the deceased to be subdivided into two parcels including the suit land herein. The two brothers are said to have sold some portions of their land and their sisters, the claimants were in fear that in case the disputed parcel is sold they would have no place to go to in case their marriages turned sour. John Mburugu was said to be ready to transfer the parcel to the 4 sisters while the applicant herein disclaimed any responsibility over his sisters. In its determination the Tribunal ruled that the claimants are sisters to the applicant herein and that they too deserve a share of their father's estate. It therefore concurred with John Mburugu and ordered that the suit land be transferred to the claimants.

13. **Section 3** of the **Land Disputes Tribunals Act** Cap 303, (now repealed) sets out the jurisdiction of the Tribunal as follows:

“3.(1) Subject to this Act, all cases of a civil nature involving a disputes 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.”

14. In this case, the Tribunal dealt with registered land and the award reads that the land should be transferred to the claimants in the Tribunal case. This is bound to interfere with the ownership of the land by the applicant and his co-registered owner. In my view the Tribunal gave orders that exceeded its jurisdiction as prescribed in **Section 3** of the Act. That view is supported by the Court of Appeal decision in the case of **M'Marete vs. Republic & 3 Others, [2004] eKLR (Civil Appeal No. 259 of 2000, Court of Appeal sitting at Nyeri)** where the Court of Appeal reiterated as follows:

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

15. On this ground, I find that the award of the Tribunal should be quashed.

ii. Whether the matter is res judicata HCC Succession Cause No 100 of 2008;

16. It has also been argued that the dispute in the Tribunal was *res judicata* the **HCC Succession Cause No 100 of 2008**. The applicant has annexed to his verifying affidavit copy of the Grant issued on **30th June 2008** and dated **8th July 2008** emanating from the Succession Cause in which he and his brother John Mburugu sought and obtained letters of administration to their late father’s estate. On the face of it the grant shows that the he and John Mburugu were not only granted their individual shares but that they were also allocated a parcel of land measuring one half of an acre to hold jointly which this court believes to be **Nkuene/Ngonyi/1178**.

17. I have not seen any response from the interested parties to this submission. I take it to be the truth that upon confirmation by the court, the grant gave the two brothers the suit land to be registered in their name absolutely. In my view, if there was any challenge to their right to own the land, it should have been raised in those succession proceedings and not by way of a complaint to the Tribunal. The matter had already been decided by a court which is granted jurisdiction by **Section 47** of the **Law of Succession Act Cap 160** to determine such matters. Consequently the Land Disputes Tribunal proceedings of 2010 and the award of 2011 came a little late, for the matter had been decided. I would also uphold this ground of *res judicata*.

iii. Whether the failure to enjoin the Chief Magistrate’s Court renders the motion fatally defective;

18. I have considered this ground among those filed by the respondents albeit no submissions were filed to support it. This issue has been addressed by the Court Of Appeal on previous litigation, one being the case of ***John Kasimu Kilatya v Chairman Machakos Land Dispute Tribunal & 2 others [2017] eKLR, C.A at Nairobi Civil Appeal No. 220 of 2015***, in which the Court of Appeal dismissed the objection for failure to enjoin the Magistrate’s Court to a Judicial Review application in which the adoption of a Tribunal award was challenged. It was the court of Appeal’s view that non-joinder was immaterial since the Tribunal lacked jurisdiction *ab initio* to deliberate on the matter. Visram, Karanja & Koome, JJ.A rendered themselves at paragraph 16 to 17 of the judgment as follows;

“[17] It is trite that if a party has a direct and substantial interest in a matter in which he/she may be affected prejudicially by the judgement of a court or tribunal in the proceedings that is a necessary party. The question we have asked ourselves regarding the joinder of the magistrates’ court is how an ultra vires order made without jurisdiction by the tribunal would affect the magistrate’s court that merely adopted the order as an order of the court. Had the learned Judge considered this aspect, that in any case the award that he found was made without jurisdiction was a nullity, we have no doubt he would have arrived at the same conclusion as we have, that the only legal solution was to down his tools and not proceed any further as the award was of no legal effect.”

19. The case of **Republic v Chairman, Kanduyi Land Disputes Tribunal Exparte Erick Barasa Wanyonyi & another [2014] eKLR and [Bungoma H.C Miscellaneous Civil Application No. 390 OF 2005 [J.R]** reiterate the same proposition in the ***John Kasimu Kilatya case*** (supra).

20. I believe that the foregoing analysis has also addressed the respondent’s ground of opposition that states that the judicial review concerns itself with decision making process rather than the merits.

21. The consequence of the above analysis is that I find that the Amended Judicial Review Notice of Motion dated **12th June 2012** has merit and the same is allowed in terms of **prayer 1**.

22. However in view of the familial relationship between the applicant and the interested parties each party shall bear its own costs.

23. It is so ordered.

Dated and signed at Kitale on this 12th day of June, 2018.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 22nd day of June, 2018 in the presence of;

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

In the presence of:

C/A Janet

Mr. Mutunga holding brief for Mr. Kiongo for Attorney General

No appearance for the applicant

No appearance for the interested parties