



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC JUDICIAL REVIEW NO. 65 OF 2011**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MERU CENTRAL DISTRICT**

**LAND DISPUTES TRIBUNAL.....RESPONDENT**

**NAAMAN KAILIBI MEME.....INTERESTED PARTY**

**MUTEGI M'RUMURI.....1<sup>ST</sup> EX-PARTE APPLICANT**

**M'RUMURI M'NKUBUKU.....2<sup>ND</sup> EX-PARTE APPLICANT**

**JOHN KIREMA KANYARU.....3<sup>RD</sup> EX-PARTE APPLICANT**

**GERALD MUGWIRIA.....4<sup>TH</sup> EX-PARTE APPLICANT**

**KIRIA MUNURU.....5<sup>TH</sup> EX-PARTE APPLICANT**

**MOSES GICHUNGU.....6<sup>TH</sup> EX-PARTE APPLICANT**

**JUDGMENT**

**The Applicants' Case**

1. By a notice of motion dated 20/12/2012 the six Ex-parte applicants herein sought the following orders:-

**(1) That an order of Certiorari do issue to remove to this High Court and quash the decision of the Respondent made on the 05/7/2011 in Tribunal Case No. 16 of 2011 in respect of LR. No. KIAMURI "A"/1890.**

**(2) That the respondent and the interested party do pay costs of this application.**

2. The application is based on the grounds set out in the six applicants' respective statements of facts and also their respective verifying affidavit filed together with the chamber summons seeking leave to institute judicial review proceedings. The grounds have also been summarized at the foot of the notice of motion as follows:-

**(a) The Tribunal acted in a matter where it had no jurisdiction.**

**(b) The Tribunal proceeded to hear and determine the matter before it without informing the applicants of the filing and the hearing of the dispute.**

**(c) The respondent breached the rules of Natural Justice by condemning the applicants without being heard.**

**(d) The decision of the respondent is bad in law as it is not signed by the chairman as required by the law.**

**(e) The decision of the respondent is manifestly unreasonable.**

3. Though the judicial review were commenced in the High Court the record was transferred to this court for disposal after it was established.

**The Applicants' Case**

4. Each of the Ex-parte applicants described himself as a peasant farmer who has been in actual occupation of **LR. No. Kiamuri 'A'/1890** since 1976 to date; that they were not informed of the filing of the dispute before the respondent or given any notice of hearing of the dispute before the Tribunal and that therefore they were condemned unheard contrary to the rules of Natural Justice when the respondent determined the matter and ordered them to vacate the land or otherwise be evicted therefrom; that the Tribunal exceeded its jurisdiction when it made a determination in respect of land that is registered under **Cap. 300**; that the decision of the Tribunal is a nullity for want of its chairman's signature as required by law and that the decision is manifestly unreasonable and is therefore fit to be quashed.

5. Their evidence is that when they settled on the parcel of land in 1976 the land was not adjudicated. They have developed the land since then. They aver that they do not know when the adjudication process that led to the registration of the land under **Cap. 300** was done but they believe the same was done secretly and fraudulently while they were in occupation of the land.

6. They aver that they have never seen the interested party herein or received any notice from him or from any other person claiming ownership; that they were also not notified of the proceedings filed by the interested party before the respondent and therefore they could not defend themselves.

7. They aver that the only document they have ever received in relation to those proceedings is a hearing notice issued by the Chief Magistrate's Court dated **14/7/2011** informing them of the Tribunal award. That is the document that galvanized them into hiring an advocate to follow up the matter.

8. On **5/8/2011** the Tribunal's award was read in the Chief Magistrate's court declaring the interested party as the owner of the land and ordering the Ex-parte applicants to vacate by **31/8/2011** otherwise they would be evicted therefrom. Further the Ex-parte applicants' evidence is that the respondent ordered their eviction despite the fact that the interested party's evidence at the Tribunal shows that the Ex-parte applicants are not in occupation of **LR. No. Kiamuri 'A'/1890** and that the person in occupation thereof was one Charles Ngaruni. For that reason, the Ex-parte applicants term the decision of the respondent as unreasonable and manifestly wrong. They also accuse the Tribunal of not visiting the land, saying that such a visit would have made the respondent aware that they have been on the land for many years. Finally they dispute the territorial jurisdiction of the respondent, saying that the suit land administratively falls within Tharaka South District and the proceedings should therefore have been entertained by the Tharaka Land Disputes Tribunal and not respondent.

9. There is an affidavit of service sworn by one Nicholas Kisilu a court process server on 27/2/2013 in which he depones that he served the interested party with notice of motion dated 20/12/2012 together with the statements of facts as well as an order dated 20/12/2012. However a perusal of the court record in this reveals that the interested party never filed any response to the notice of motion. While the Ex-parte applicants filed their written submissions on **18/7/2017**, the respondent and the interested party did not file any and these proceedings went undefended.

10. It is trite that even in undefended cases the claimant must prove his claim to the required standard if he is to obtain the remedy that he seeks. The case of **Hon. Daniel Toroitich arap Moi -vs- Mwangi Stephen Muriithi (Civil Appeal No. 240 of 2011 [EKLR])** is illustrative on this point.

11. In this case though there was no response I have noted that the allegation made by the Ex-parte applicants are quite weighty. First it is clear the land subject matter of these proceedings may be registered. However no conclusive evidence of such registration has been exhibited to the affidavits verifying the facts in this case. It is the verifying affidavit that carries the proof of the facts which are alleged or contained in the statement of facts. The Court Of Appeal case of **Commissioner General, Kenya Revenue Authority (Through Republic) vs. Silvano Onema Owaki T/A Marenga Filling Station, C.A at Kisumu Civil Appeal No. 45 of 2000** demonstrates this.

12. The Ex-parte applicants allege that the land is registered under the Repealed **Registered Land Act Cap. 300**. If this were the case nothing would have been easier than to conduct an official search and obtain a certificate of official search from the Land Registrar from the relevant registry to show that that registration has taken place. As things start now it is not possible to determine from the applicants' conclusory statements that the land has been registered or in which land registry the fact of that registration can be established. It was the applicants' duty to bring to court all evidence in support of their claim. In the absence of such evidence this court declines to find that the land was registered as alleged in the affidavit and in the statement of facts.

12. The Ex-parte applicants also contend that they were not made aware of the proceedings before the Tribunal prior to the issuance of the Tribunal award. A perusal through the Tribunal proceedings in **Case No. 16/2011** shows that the plaintiff therein was **Naaman Kailibi Meme** and objectors were **Mutegi Rumuri, Mr. Rumuri, Stephen Muguira, Moses Gichugu, Charles Ngaruni, John Kanyuru and Kiria Munungu**. The records shows that the objectors did not appear on 31/5/2011 and so the case was postponed to 7/6/2011 when only Charles Ngaruni appeared. Nothing is said about service of summons or any hearing notice upon the objectors. Though Charles Ngaruni took part in these proceedings the other did not. The rules governing service of hearing notice or any other document in the Tribunal proceedings are the **Civil Procedure Rules** which must be read in conjunction with the Land Disputes Tribunals Act and the subsidiary rules made thereunder. Had the respondents filed their reply and exhibited their affidavit of service or indeed any other proof of service in compliance with those rules this court would have considered that evidence. Unfortunately the only evidence this court has regarding service is the hearing notice dated **14/7/2011** in **Meru Chief Magistrate's Court LDT No. 36 of 2011** notifying the Ex-parte applicants and interested party that the reading of the award has been fixed for the 5/8/2011 at 8.30 am at the Chief Magistrate's Court at Meru. I find that this notice came too late and after the Tribunal had concluded its hearing and it could not enable the Ex-parte applicant to participate in the Tribunal proceedings which affected the question of their right to the suit property. It is a cardinal rule of natural Justice that a person must be made aware of any case against him filed in any body having jurisdiction to determine that case and that he must be given an opportunity to defend

himself. I therefore find that the proceedings against the Ex-parte applicants having proceeded without service of any notice upon them, prejudiced them and rendered those proceedings to be contrary to the rules of Natural Justice. I therefore find that there is merit in the applicants' claim that they were condemned unheard.

14. In this case there has also been an allegation that the respondent did not even have territorial jurisdiction to determine the dispute before it. This may if proved to be the case be an additional ground for the respondent's decision by this court. However no evidence of this alleged want of territorial jurisdiction has been presented before court and this ground must fail for lack of evidence.

15. Regarding the want of the chairman's signature on the award this court finds that the applicants have not supported their allegation that such want of signature is fatal to their award. I find that their award was signed by three members and in any event the identity of who should, in the opinion in the Ex-parte applicants, have been the chairman was not given in their affidavits' evidence or in the statement of facts. This ground is therefore not sufficiently proved.

16. On the last ground to the effect that the decision of the respondent is manifestly and unreasonable it is the content of such decision that should be examined for unreasonableness. The basis for this allegation regarding this unreasonableness is that the Tribunal ordered the eviction of the applicants despite the fact that it is another person who was in occupation of the land. However on this issue I find the applicants to be breathing both hot and cold like the proverbial satyr and that their affidavit evidence has brought more fog than light in this matter. Whileas at paragraph 14 of each of the applicants' respective verifying affidavits they individually depone that the evidence of the interested party given before the respondent shows that they were not in occupation of the land. Paragraph 2 of each applicants' respective verifying affidavit disproves this by admitting that they are in occupation of the suit land and have been on the suit land since 1976. This court finds that they are undeniably in occupation of the suit land and that the decision of the respondent was not manifestly unreasonably in this regard as alleged.

17. For the reasons stated above I find that the applicants have proved only one ground in their judicial review proceedings and that is want of service of process which rendered the proceedings against them at the Tribunal to be contrary to the rules of Natural Justice. In my view, proof of one ground is sufficient to entitle them to the

18. Consequently the Notice of Motion dated 20/12/2012 succeeds. I grant prayer No. 1 of that Notice of Motion but I order that each party shall bear their own costs.

Dated and signed at Kitale this 12<sup>th</sup> June 2018.

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**

**Delivered at Meru on this 22<sup>nd</sup> day of June, 2018**

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**

In presence of:

C/A Janet

Mr. Mutunga holding brief for Attorney General for 1<sup>st</sup> respondent

No appearance for the applicant

No appearance for the interested parties