



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC JR NO. 50 OF 2009

M'MUYURI M'ITHIUKI APPLICANT

VERSUS

THE PROVINCIAL LAND DISPUTE TRIBUNAL

APPEAL COMMITTEE 1ST RESPONDENT

THE PRINCIPAL MAGISTRATES COURT MAUA 2ND RESPONDENT

AND

JULIA THIRINDI INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The ex parte applicant first filed a miscellaneous ex parte chamber summons application under order III Rules 1 (2) civil procedure rules section 8 (2) and 9 of the law Reform Act chapter 26, Laws of Kenya seeking the following orders:

(i) The applicant be granted leave to apply for;

(a) An order of certiorari to remove into this honourable court for purposes of being quashed the decision of the principal land disputes tribunal appeal committee decision in case no. 127/2007 made on the 23rd March, 2009.

(b) An order of prohibition, prohibiting the 2nd respondent from entertaining or dealing in any proceedings in respect of appeal case no. 127/2007 or Land Dispute Tribunal No. 72 of 2007.

(ii) The leave so granted do operate as a stay of the decision made on 23/3/2009 by the 1st respondent until the hearing and determination of the substantive application.

(iii) The costs of this application be provided for.

2. When that ex parte application filed under certificate of urgency was placed before the duty Judge, the same was certified urgent and directed to be heard on 29/07/2009.

3. On 29/07/2009, the said application was heard ex parte and the same was allowed in terms of prayers 1, 2 and 3 thereof. The leave so granted was to cease unless the substantive motion was filed within 21 days from the date thereof.

4. On 14/08/2009, the applicant filed the substantive notice of motion pursuant to order L III rule 3 (1) Civil Procedure Rules section 8 and 9 of the law reform act cap 26 laws of Kenya. Before that notice of motion was set down for hearing the applicant and respondent filed a notice of motion under order 24 and order 51 (1) civil procedure rules seeking the following orders;

(i) That this honourable court be pleased to appoint Romano Mathuka as the legal representative of the interested party.

(ii) That application is supported by the affidavit of applicant sworn on 1st September 2014. In that supporting affidavit the applicant deposed that the interested party Julia Thirindi died in April 2014 and that the High Court had issued limited grant of letters of

administration ad litem to one Romano Mathuka to prosecute that application on behalf of the estate of the said Julia Thirindi.

5. Upon hearing that notice of motion, this honourable court allowed the same with costs to be in the cause. When the substantive motion filed came up for directions, the parties agreed to dispose of the same by way of written submissions.

APPLICANTS WRITTEN SUBMISSIONS

6. The applicant stated that the dispute between the applicants commenced as Meru North land case no. 42 of 2004 which was ruled in favour of the interested party. The case was then referred to Maua Chief Magistrate's court as LDT case no. 72 of 2007 where the court adopted the elders' award. It was then that the applicant moved to the provincial appeals committee tribunal at Embu as appeal no. 127 of 2007 which also ruled in favour of the interested party. The applicant contends that he moved to this honourable court to have those orders quashed. It is the applicant's submission that the interested party did not obtain the necessary letters of grant of administration to grant her the locus standi to make her a legal person capable of suing. In conclusion the applicant submitted that the proceedings before the three tribunals were void ab initio. He cited the following cases in support of the application;

- Beth Wanjiru Kamau –vs- Savings and Loan (K) Ltd HCCC no. 629 of 2005 (Nairobi) where Justice Waweru (as he then was) had this to say;

“It is now trite law that a suit instituted by a person who has no capacity or locus to institute it is a non-suit, such a suit is null and void from the very beginning. The plaintiff herein has no capacity or locus to file the suit on 19th September 2005 as she did not possess the requisite grant of representation to her deceased husband estate”.

7. The applicant also submitted that the tribunals had no jurisdiction to hear and determine the issue before them. The applicant argued that section 3 of the land disputes tribunal act (now repealed) provided only three remedies that the tribunal could handle as follows:

Section 3

(i) The division of or the determination of boundaries to land including land held in common.

(ii) Claim to occupy and work on land

(iii) Trespass to land.

8. These three are the only areas which the tribunal could deal with. In the instant case, the tribunal dealt with the ownership of Akachiu/aiki/701 and gave the land to the interested party. That decision by the panel of elders was adopted by the magistrate court in PMCC no. 72/2003. The eastern provincial appeals committee no. 127 of 2007 also confirmed the decision. In short the ownership of the suit land moved from the applicant to the interested party. In conclusion, the applicant relied on the following decided cases;

- Okibel Enkenya vs Simore Ololchurie & another ELC Appeal no. 8 of 2011 (Nakuru)

- Beth Wanjiru Kamau versus Savings and loan (K) LTD HCC No. 629/2005 (Nairobi)

RESPONDENT'S SUBMISSIONS

9. The respondents through M/S J.M Kiongo senior litigation counsel submitted that the orders being sought are untenable as the impugned decision can only be challenged by way of an appeal. The said senior litigation counsel further submitted that Judicial Review orders being discretionary in nature cannot be used to alter a judgment of a court of competent jurisdiction. The learned counsel also stated that the court which adopted the decision which the applicant seeks to quash has not been enjoined in this suit. He relied on the following decisions;

- Republic vs Mwangi Nguya & 3 others (2013) eKLR

- Chairman land dispute tribunal, Kirinyaga district & another ex parte Kariuki (2005) 2 KRR 10

INTERESTED PARTY SUBMISSIONS

10. In his submissions the interested party stated that the instant judicial review is time barred in light of Section 9 (3) of the Law Reform Act cap 26 Laws of Kenya. The learned counsel for the interested party also submitted that the impugned decision by the provincial tribunal in case no. 127 (2007) cannot be quashed since the tribunal decision is adopted by the court making it a judgment of the court thereby ceasing to exist as a decision which can be separately quashed as contemplated in the Judicial Review application. The Interested party did not rely on any decision.

ANALYSIS AND DECISION

11. This Judicial Review application is about the powers conferred to the land disputes tribunal to handle matters concerning land (now repealed) Section 3 of that Act which is now repealed stated as follows:

(i) The division of or the determination of boundaries to land including land held in common

(ii) Claim to occupy and work on land

(iii) Trespass to land

12. In a complaint lodged by Julia Thirindi (who is the interested party herein) before the land disputes tribunal in LDT no. 42 of 2004, the said Julia Thirindi (Interested party) alleged that M'Munjuri M'Ithuki (appellant) annexed a portion of her late husband's parcel of land measuring 4.50 acres and gave it a new number as Akachiu/AUKI/70. When the complaint by the interested party to have the suit property registered in the name of the appellant as Akachiu/Auki/70 transferred to herself the land disputes tribunal should have realized that they had no jurisdiction to hear and determine such a dispute. The dispute was not one of the issue authorized under section 3 of the land disputes tribunal act (now repealed) to handle.

13. By purporting to hear and determine an issue of transfer of land which is registered and purport to transfer the same, the Land Disputes Tribunal Meru North under LDT no. 42 of 2004 acted ultra vires the powers given under section 3 of the land disputes tribunal act (now repealed). Its decision is a nullity as it was arrived at without jurisdiction. Where a tribunal makes a decision without jurisdiction, such decision become null and void to the extent that it lacked the requisite jurisdiction to make such a determination. It therefore follows that the adoption buy the magistrate court in Maua in LDT case No. 72 of 2007 and the confirmation of those orders by the provincial land disputes tribunal appeal committee in a case no. 127/2007 are all a nullity and of no legal effect.

14. For all the reasons I find on that jurisdictional issue alone the judicial review succeeds and the same is hereby allowed in the following terms:

(i) An order of certiorari be and is hereby issued to remove into this honorable court for purposes of being quashed the decision of the provincial land disputes appeals committee in case no. 127/2007 made on 23.03.2009.

(ii) That an order of prohibition be and is hereby issued prohibiting the 2nd respondent from entertaining or dealing in any proceedings in respect of LDT no. 72 of 2007 or appeal case no. 127/2007 relating to land parcel no. Ackachiu/Auki/701.

(iii) Each party to bear his own costs of this Judicial Review.

Read, delivered and signed in the open court at Meru this 14th day of June, 2018

MR. E.CHERONO

ELC JUDGE

In the presence of:

C/A: Galgalo

Mr. Omari holding brief for appellant