



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

JUDICIAL REVIEW APPLICATION NO. 27 OF 2017

(Formerly Machakos Judicial Review Application No. 105 of 2012)

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION PURSUANT TO ORDER 53
OF THE CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF KAJIADO SENIOR RESIDENT MAGISTRATE LAND DISPUTE CASE NO. 53 OF 2009

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE,

KAJIADO.....RESPONDENT

AND

PETER O. KYULE

DANIEL MATHEKA

PAULO KYALO.....INTERESTED PARTIES

EX PARTE DANIEL TURERE KAATA

JUDGEMENT

The application before Court for determination is a Notice of Motion application dated 31st March, 2015 and filed on 1st April, 2015 brought pursuant to Order 53 Rule 3 and 4 of the Civil Procedure Rules, The Land Disputes Tribunals Act (repealed), the Environment and Land Court Act and all the other enabling provisions of the law. It seeks the following prayers:

1. Spent
2. That this Honourable Court do issue the following orders of judicial review;-
 - i. An order of Certiorari directed to the Respondent, the Senior Resident Magistrate Court at Kajiado to quash the ruling and order delivered on 2nd March, 2012 on an application dated 5th October, 2011 in Land Disputes Tribunal Case No. 53 of 2009.
 - ii. An order of prohibition to restrain the Respondent and/or any other subordinate Court whatsoever from hearing or determining any facets of Land Dispute Tribunal Case No. 53 of 2009 in so far as it relates to the award made on 29th October, 2009.
3. That costs of and incidentals to this application be provided for.

4. That such further or other reliefs as the Honourable Court may deem just and expedient to grant.

The application is based on the grounds and Amended Statement which in summary is that the dispute between the Applicant and the Interested parties over KAJIADO/ KAPUTIEI – SOUTH / 2185 hereinafter referred to as the ‘suit property’, was referred to the Kajiado Land Dispute Tribunal for determination. By a ruling delivered on 29th October, 2009, the Tribunal delivered its award in favour of the Applicant. On 15th December, 2009, after the Applicant applied for issuance of a decree in terms of the award, the Respondent issued a decree in Land Disputes Tribunal Case No. 53 of 2009 in his favour against the Interested Parties. Following the issuance of the decree, the Respondent became *functus officio* insofar as the award was concerned. Pursuant to an application by the interested Parties, by the ruling delivered on 2nd March, 2012, the Respondent set aside both the award and the decree. This was after the lapse of a period of over two (2) years from the issuance of the Decree. The Interested Parties did not lodge an Appeal against the Decree and the decision by the Respondent was made without jurisdiction, was a manifest error of law, in breach of natural justice, irregular and/ or unlawful and ought to be quashed. The Respondent’s decision unless quashed, will interfere with the Applicant’s right to property and offends the basic principles of justice. The conduct of the Respondent was in the circumstances unreasonable within the *Wednesbury*’s principle.

The application is supported by the affidavit of DANIEL TURERE KAATA the Applicant herein where he deposes that the Nkama Group Ranch owned property in Kajiado comprised of approximately 100,000 acres and has a membership of around 519 members. He explains that the Interested Parties were not members of the Nkama Group Ranch, which was dissolved in 1989 but thereafter existed for purposes of distributing the property to its members. He contends that following the dissolution of the Nkama Group Ranch, the property was surveyed and subdivided amongst its members wherein he was allocated 76.95 hectares, and on 17th January, 2008 got issued with a title deed. He claims that following the subdivision including allocation, his land bordered land parcel number KAJIADO/ KAPUTIEI – SOUTH/ 2186 that was owned by one KOROMO K Aidongo, and that at the time of subdivision, the Interested Parties occupied a portion of land between his property and Kaidongo’s. Further, upon receipt of the title deed, he asked the Interested Parties to vacate his portion of the land but they failed to do so, culminating in his instituting a claim at the Kajiado Land Disputes Tribunal vide Case No. TC 518/09/09. He avers that on 22nd October, 2010 he submitted evidence including production of his title deed before the Land Disputes Tribunal but the Interested Parties failed to appear at the Tribunal despite being summoned. He states that the Land Disputes Tribunal made an Award in his favour which Award was adopted by the Kajiado Senior Resident Magistrates’ Court and a Decree was issued on 5th March, 2010. Further, that upon receipt of the Decree, he served the Interested Parties and demanded they vacate his property but they failed to do so, culminating in his filing a Chamber Summons application dated the 8th July, 2010 seeking eviction orders, which orders were granted on 2nd June, 2011. He reiterates that he duly served the Interested Parties with the eviction orders, and accompanied by three (3) policemen, they were unsuccessful in evicting them. He reaffirms that the Land Disputes Tribunals Act (repealed) made provisions for the challenge of an Award made by the Tribunal, and the Respondent was clearly not the avenue to address the challenge.

The application is opposed by the Interested Parties who authorized the 1st Interested Party PETER O. KYULE to swear an affidavit where he deposed that he was born in 1968 at Enooretet area of Sultan Hamud sublocation of Kajiado County where he resides. He avers that his family has been in possession and occupation of the suit land KAJIADO/ KAPUTIEI SOUTH/ 2185 since 1948 and the Exparte Applicant is well aware of this fact. He contends that he has developed the aforesaid land parcel number KAJIADO/ KAPUTIEI SOUTH/ 2185 and constructed a permanent house, planted trees and does farming activities thereon. He states that on 14th August, 1981, his late father received a notice letter indicating they should quit NKAMA Group Ranch and report to their respective group ranches. Further that he referred the matter to Kituo Cha Sheria on 13th September, 2009 for assistance and was advised to await for the outcome. He claims he only became aware of the Land Tribunal Case No. 33 of 2009 when the ex parte applicant descended on his house and started demolishing it and denies being served with the summons to attend the case at the Tribunal. He confirms that an Award was issued in favour of the ex parte Applicant herein, which was adopted by the Senior Resident Magistrate, Kajiado. Further, on 2nd June, 2011 he learnt that there were some officers with an eviction order who had started demolishing his property, and rushed to the suit land, negotiated with them where it was agreed that the demolition was to stop as he was not served with any eviction notice. He reiterates that he filed an application to set aside the Award of the Tribunal and all the other consequential orders, which application was allowed through a ruling dated the 2nd March, 2012. Further, that in view of the years he has been in occupation and possession of the suit land KAJIADO/ KAPUTIEI SOUTH/ 2185, he has acquired it by adverse possession. He insists the aforesaid ruling is a good one, not amenable to Judicial Review and the issues raised are material provable by evidence and/ or facts, hence therefore outside the purview of Judicial Review Proceedings. He reaffirms that should the Court find that the Ruling of the Magistrate’s Court should be quashed, it is only fair and just that in accordance with Articles 159 of the Constitution, the issues between the parties be tried and determined before the Environment and Land Court. Further, that the application herein is without merits and ought to be dismissed.

Both the Applicant and the Interested Parties filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of materials presented in respect of the Notice of Motion application dated 31st March, 2015 and filed on 1st April, 2015, the following are the issues for determination:

- Whether the Senior Resident Magistrate sitting at Kajiado had jurisdiction to set aside the decision of the Land Disputes Tribunal?
- Who should bear the costs of the suit.

It is the ex parte applicant’s contention that the Senior Resident Magistrate did not have jurisdiction to set aside the Award, which had been passed by the Kajiado Land Disputes Tribunal. The Interested Party insists the Magistrate had jurisdiction to do so since the Land Disputes Tribunal Act had been repealed and all matters pending before it had to be referred to the Magistrates’ Court. The fulcrum of the instant suit is concerned about the process the Magistrate used to set aside the Award of the Tribunal.

As to whether the Senior Resident Magistrate sitting at Kajiado had jurisdiction to set aside the decision of the Land Disputes Tribunal?

Sections 7(1) and (2) including 8 (1) of the Land Disputes Tribunal Act (repealed) provides that:

‘7. (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered, a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.’

The above provisions clearly stipulated the procedure to be adhered to in case of an Award from the Land Disputes Tribunal. Further, any party who is aggrieved by the Award from the Tribunal was granted the remedy of appealing to the Appeals Committee. Except for adopting the Award as a Decree of the Court, the said Act did not give the Magistrate jurisdiction to interfere with it. The Interested Party has not informed Court as to whether he appealed to the Appeals Committee. The Interested Party has contended that the decision of the Magistrate to set aside the Award was proper and does not fall within the purview of Judicial Review. He relied on the case of **Peterson Nguchi Kaburi V. Joseph Thuku Kaburi (2015) eKLR** where the Court of Appeal stated that: ‘**Musinga J was of course right in expressing that view. It is also quite clear that he was referring to a valid award, made by a Tribunal properly constituted, regularly forwarded to a Magistrates’ Court as a decision of that Tribunal together with any depositions or documents that were taken or proved before such a Tribunal. Musinga J, cannot possibly have been referring to a pseudo Award or anything not an Award, that was purporting to be one. There are many other decisions of the High Court and the Court of Appeal which speak to a Magistrates’ limited role in simply adopting the Award of a Tribunal but they all deal with valid Awards even where the correctness on the Awards themselves may be questionable. But there has to be an Award.**’

The question we need to ponder is whether there was an Award and whether the Magistrate had the jurisdiction and procedural propriety to set it aside. I note at the time the Magistrate was setting aside the said Award, he had initially already adopted it. Which in essence means that before the ruling dated the 2nd March, 2012, there was an Award in existence and hence no matter was pending before the Kajiado Land Disputes Tribunal.

In the case of *Ex parte Masagu Ole Koitelet Naumo, R V Principal Magistrate Kajiado Law Courts & Another (2014) eKLR*, Odunga J held as follows: ‘ **In order to determine this issue it is important to understand the role of the Magistrate’s Court under the repealed Land Disputes Tribunal Act. In *Zedekiah M Mwale Vs Bikeke Farm Directors & Another Kitale HCCA No. 25 of 1998*, the Court held which holding I associate myself with that a Magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with the Land Disputes Tribunal’s award filed in court as section 7 (2) only compels the magistrate to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.** ‘

Further in the case of *R V Kajiado North District Ngong Land Disputes Tribunal & Another Ex parte Caroline Wambui Ngunjiri & 2 Others (2014) eKLR* Justice Odunga held as follows: ‘ **In my view if the learned Magistrate had no jurisdiction to entertain the matter, whatever proceedings flowed from her decision would be null and void since a decision made without jurisdiction must of necessity be null and void. This is in line with the celebrated decision in *Macfoy V United Africa Co. Ltd (1961) 2 ALL ER 1169 at 1172* to the effect that where an act is a nullity, it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse.** ‘

I am persuaded by the judicial authorities cited above including the facts at hand, and concur with the Ex parte Applicant that once the Respondent adopted the Tribunal’s Award and issued a Decree on 5th March, 2010, it became *functus officio* and had no other powers to consider any other issues arising from the adoption of the said Award. I find that the Respondent indeed acted beyond his scope by setting aside the Tribunal’s Award by taking into account irrelevant factors, contrary to his role, which is well stipulated in section 7 (2) of the repealed Land Disputes Tribunal Act.

I note no Appeal was preferred to the Appeals Committee as envisaged by the repealed Land Disputes Tribunal Act Act. Further, the impugned order of 2nd March, 2012 only set aside the Award two years later. I note the Practice Directions on Proceedings relating to the Environment and the Use and Occupation of Land was issued on 9th November, 2012 did not offer any direction relating to Awards already adopted by the Court.

I do concur with the Ex parte Applicant that the impugned decision of the Magistrate was flawed as he did not have jurisdiction to set aside an Award which had already been adopted, by relying on the Practice Directions On Proceedings in the Environment & Land Courts, and on Proceedings relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts; Practice Directions which provided directions for a different scenario as opposed to the current one.

It is against the circumstances that I allow the Notice of Motion dated 31st March, 2015 and filed on 1st April, 2015 and quash the Senior Resident Magistrates’ decision dated the 2nd March 2012.

The costs of the application are awarded to the Ex parte Applicant.

Dated signed and delivered in open court at Kajiado this 12th day of June, 2018.

CHRISTINE OCHIENG

JUDGE