



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC JR NO. 39 OF 2014

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

IN THE MATTER OF DISTRICT LAND DISPUTE TRIBUNAL

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

REPUBLIC..... APPLICANT

VERSUS

THE HON. THE ATTORNEY GENERAL..... 1ST RESPONDENT

DISTRICT LAND DISPUTE TRIABUNAL EMBU WEST 2ND RESPONDENT

CHIEF MAGISTRATE EMBU 3RD RESPONDENT

AND

JOHN NTHIGA ZACHARIA..... INTERESTED PARTY

DANIEL NJAGI (as *Legal representative of*

PAUL NJAGI KAPINGAZI (Deceased)..... EX-PARTE APPLICANT

JUDGEMENT

1. By a chamber summons dated 11th August 2011 brought under the provisions of **Order 53 Rules 1 & 2 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act (Cap 26)**, the *ex-parte* Applicant (hereinafter the *Applicant*) sought leave to apply for an order of *certiorari* to quash the proceedings and award of Embu West District Land Tribunal (hereinafter the *Tribunal*) dated 26th April 2011 in case No. 12 of 2011. The Applicant also sought leave to apply for an order of *prohibition* to “stay” the execution of the order of the Chief Magistrate dated 20th June 2011.

2. The grounds of the said application were contained in the statutory statement and verifying affidavit filed with the said chamber summons. The main ground was that the Tribunal had no jurisdiction to try the matter since it related to a claim for adverse possession and title to land. It was also contended that the claim before the Tribunal was *res judicata* as a similar claim had been dismissed by an earlier Tribunal. The Applicant contended that the Tribunal lacked jurisdiction to sit on appeal over and quash a decision of the earlier Tribunal.

3. According to the record, the said application was heard before the Hon. Justice H.I. Ong’udi who heard and allowed the said application for leave on 17th January 2012. The Applicant was directed to file the substantive application for judicial review within 21 days.

4. On 3rd February 2012, the Applicant filed a notice of motion dated 2nd February 2012 seeking the following reliefs;

a) *The honourable court be pleased to issue/grant orders of certiorari to remove into the High Court the decision of the 2nd and 3rd Respondents made on 26th April 2011 and dated 23rd June 2011 respectively for purpose of investigation and quashing the same.*

b) *An order of prohibition restraining the Chief Magistrate Embu from executing or proceeding with hearing or exercising jurisdiction in Chief Magistrate Court Award Suit No. 42 of 2011.*

5. When the Applicant filed the said notice of motion, he introduced one additional ground namely, that the claim by the interested party was statute-barred under the **Limitation of Actions Act (Cap 22)**. The court record also shows that the Applicant filed a supporting affidavit sworn on 2nd February 2012 in which he asserted that he had acquired the property in dispute, that is, *Title No. Gatari/Nembure/307* (hereinafter the *suit property*) through adverse possession.

6. There is no indication on record if any of the 3 Respondents filed any replying affidavits or grounds of opposition to the said application for judicial review. There are no affidavits or grounds of opposition on record on behalf of the Respondents who were represented by the Attorney General.

7. The interested party herein filed a replying affidavit sworn on 12th March 2018 in opposition to the said application. He asserted that he was the registered proprietor of the suit property and that the original Applicant, Paul Kuria Kapingazi (hereinafter the *deceased*) was a total stranger to him. He stated that although the Arbitration Board had not allowed his claim in Embu SPMCC No. 138 of 1982, a second Board heard his case in Award Case No. 12 of 2010 and allowed his case against the deceased.

8. The interested party further stated that the deceased and the Applicant had buried several bodies of his family members on the suit property without his consent. He contended that the application for judicial review lacked merit and the same should be dismissed.

9. The record shows that the Attorney General filed written submissions on or about 3rd October 2012 whereas the Applicant filed his on 22nd May 2013. The interested party, on the other hand, filed his written submissions on 14th March 2018.

10. It is important to point out that the original Applicant in this matter was Paul Kuria Kapinganzi (the deceased) who died whilst the instant application for judicial review was pending. He was thereupon replaced by his son, Daniel Njeru Njagi, who is his legal representative as the Applicant.

11. The court has considered the application for judicial review, the statutory statement, the affidavits in support thereof and the annexures thereto as well as the replying affidavit in opposition thereto. The court has also considered the written submissions on record which were filed by the parties.

12. The history of the dispute giving rise to the instant application is not altogether very clear. The Applicant has referred to a 1st *tribunal* and a 2nd *tribunal*. The 2nd *tribunal* obviously refers the defunct Land Disputes Tribunal established under the repealed **Land Disputes Tribunals Act, 1990** (hereinafter the *LDT Act*). The nature and legal status of the 1st *tribunal* was not clearly brought out by the Applicant in his various documents and affidavits.

13. On the other hand, the interested party made matters worse by referring to an “Arbitration Board” which first considered the dispute and then later on a “tribunal” acted as a “Court of Appeal” and allowed his claim against the Applicant’s deceased father. The proceedings and decision of the “*Arbitration Board*” were, however, not exhibited in the replying affidavit.

14. In his supporting affidavit sworn on 2nd February 2012 and filed with the notice of motion on 3rd February 2012, the deceased referred to the decision of the 1st “*Arbitration Board*” made in 1995 and the decision of the 2nd “*Arbitration Board*” made in 2011. It was then contended that the decision of the 2nd Arbitration Board was invalid on account of *res judicata*.

15. In the court’s view, the following issues arise for determination;

- a) Whether the application for judicial review was time-barred by virtue of the provisions of **Order 53 of the Civil Procedure Rules and section 9 (3) of the Law Reform Act (Cap 26)**.
- b) Whether the Embu West Land Disputes Tribunal (the Tribunal) had jurisdiction to entertain the claim before it.
- c) Whether the Applicant had made out a case for the grant of the judicial review orders sought.
- d) Who shall bear the costs of the suit.

16. In their written submissions, the Respondents submitted that the instant application for judicial review was time-barred because the application for an order of *certiorari* was instituted beyond the 6 months limitation period provided for in **Order 53 Rule 2 of the Civil Procedure Rules and section 9 (3) of the Law Reform Act**. The Respondents relied on the case of **Kenya Breweries Ltd Vs Municipal Council of Mombasa & 4 Others [2009] eKLR**.

17. The material provisions of **Order 53 Rule 2 of the Civil Procedure Rules** provide as follows;

“Leave shall not be granted to apply for an order of *certiorari* to remove any judgement, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time of appealing has expired.

18. The court is of the view that the reference to “or other proceeding” in **Rule 2** must be interpreted *ejus dem generis* to mean a proceeding in the nature or class of a judgement, order, decree or conviction which are ordinarily products of a judicial review. It would not cover

proceedings before other bodies or tribunals whose decisions do not result into products of the same class or category as those specified in the rule. Consequently, the court finds that the decision or award of a tribunal is not subject to the statutory limitation in **Order 53 (2) of the Civil Procedure Rules and section 9 (3) of the Law Reform Act.**

19. The second issue relates to the jurisdiction of the Tribunal to entertain the proceedings before it. The Applicant's contention in this regard were twofold. First, it was contended that the Tribunal had no jurisdiction to deal with registered land and or title to land. Second, it was contended that the claim before the Tribunal was statute-barred under the **Limitation of Actions Act** hence the Applicant had acquired the suit property through adverse possession. That is the summary of the Applicant's case on the issue of the Tribunal's jurisdiction.

20. The court is of the view that the provisions of the **Land Disputes Tribunals Act, 1990** (now repealed) did not preclude the Tribunal from any claim with respect to *registered land*. The provisions of the Act only precluded it from making a determination on *title to land*. The Tribunal had jurisdiction under section 3 of the Act to determine matters on trespass to land, boundary disputes and claims to work and occupy land under customary law. In respect of trespass to land and boundary disputes, it did not matter that the land the subject of adjudication was registered under any law relating to registration of land.

21. So, what was the nature of the dispute before the Tribunal and did the Tribunal make a determination or award with respect to title to land? The proceedings of the Panel of Elders (hereinafter the *Panel*) upon a reference from Embu SPMCC No. 138 of 1982 and proceedings of the Tribunal in Land Disputes Tribunal Case No. 12 of 2010 may shed light on the matter.

22. The interested party's case before the Panel was captured in just one short paragraph. He simply accused the deceased of unlawful occupation of the suit property which was registered in his name (i.e. the interested party). So, he wanted to know why the deceased was occupying the suit property and why he had cautioned it.

23. The interested party's case before the Tribunal in Land Disputes Tribunal Case No. 12 of 2010 was essentially the same. Being the registered owner of the suit property, he wanted the deceased to vacate the same or give a lawful justification for his occupation of the land. The response to the case was that the deceased had bought the suit property from the interested party. The Tribunal found no evidence of such purchase and ordered the eviction of the deceased in addition to awarding costs and compensation.

24. The court is of the opinion that the claim before the Tribunal could well fall within the realm of trespass to land. It was a claim by a registered owner against an occupant whom he considered to be in occupation without lawful justification. He sought to recover his land from somebody he considered as a trespasser. According to **Black's Law Dictionary (9th Edition)** trespass is defined as;

a) **An unlawful act committed against the person or property of another.**

b) **A legal action for injuries resulting from an unlawful act of this kind.**

25. **Black's Law Dictionary** (supra) also makes reference to **R.F.V. Henston, Salmond on the Law of Torts (17th edition)**, and quotes the following passage;

“The term trespass has been used by lawyers and laymen in three senses of varying degrees of generality. (1) In its widest and original signification it includes any wrongful act – any infringement or transgression of the rule of right. The use is common in the Authorised Version of the Bible, and was presumably familiar when the version was first published. But it never obtained recognition in the technical language of the law, and is now archaic even in popular speech. (2) In a second and narrower signification – It's true legal sense – the term means any legal wrong for which the appropriate remedy was a writ of trespass – viz any direct and forcible injury to person, land, or chattels. (3) The third and narrowest meaning of the term is that in which, in accordance with popular speech, it is limited to one particular kind of trespass in the second sense – viz the tort of trespass to land (*trespass quare clausum fregit*).

(Emphasis added)

26. The court is, therefore, not satisfied that the Applicant has demonstrated that the claim before the Tribunal was outside or beyond its statutory mandate under the Constitutive Act.

27. The second limb challenging the jurisdiction of the Tribunal was that the claim before it was statute-barred and or that the Applicant had otherwise acquired the suit property through adverse possession. The court has perused the proceedings before both the Panel and the Tribunal. It was never contended that the defence of limitation applied. Similarly, it was never contended at any stage that the deceased or the Applicant had acquired the suit property through adverse possession.

28. The court is of the view that limitation of actions is a *defence* to an action or claim. A formidable defence, or one which is likely to succeed, does not deprive a Tribunal of jurisdiction to entertain the claim if it had such jurisdiction in the first instance. There is no indication that such a defence was raised and rejected. It should also be borne in mind that the rejection of what a party considers to be a valid defence to an action may not necessarily constitute a ground for judicial review.

29. The court is also of the view that even if the defence of limitation had been raised before the Tribunal, it may not have been of much avail because the nature of trespass with respect to the suit property was of a continuing nature. The deceased was still in occupation of the suit property at the time the matter was taken to the Tribunal by the interested party.

30. The contention that the Applicant or the deceased had acquired the suit property on account of adverse possession is not well founded and is for outright rejection. The law provides an elaborate procedure for acquisition of such right. A party who considers himself to be a

beneficiary of **section 38 of the Limitation of Actions Act (Cap 22)** is obliged to take steps to file proceedings for a declaration that he has become entitled to specified property by virtue of adverse possession. There is no evidence that such steps had been taken at the time the Tribunal was seized of the dispute.

31. The 3rd issue is whether the Applicant has demonstrated the grounds for the grant of the judicial review orders sought. The purpose of judicial review was summarized in the case of **Municipal Council of Mombasa Vs Umoja Consultants Ltd Civil Appeal No. 185 of 2001** as follows;

“Judicial review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision...”

32. The main contention by the Applicant was that the Tribunal was wrong in overturning the decision of the first tribunal or first “arbitration board”. To put it in the Applicant’s chosen words, the Tribunal had no “jurisdiction” to “reverse” the earlier “tribunal” orders given in 1995. It was also contended that the matter which was handled and decided by the Tribunal was *res judicata* on account of the earlier proceedings of the “first tribunal” or “arbitration board.”

33. The court has perused and considered the material on record on this issue. The court is unable to find any evidence to support the contention that the Tribunal sat on appeal over the decision of an earlier tribunal or arbitration board. There is no evidence that the Tribunal overturned or reversed either its own decision or the decision of another tribunal made earlier on.

34. The record may not be complete in every respect but this is the court’s understanding of the matter. The interested party herein filed Embu SPMCC No. 138 of 1982 against the deceased sometime in 1982 even though copies of the relevant pleadings were not exhibited by any of the parties. This suit was then referred to a Panel of Elders for resolution, presumably under the provisions of the **Magistrates Jurisdiction (Amendment) Act, 1981**. The Panel did not determine the matter but referred it back to court. The claim was not dismissed.

35. There is no record of what happened to the court case thereafter. The parties did not exhibit copies of the court proceedings or the final order or decree of the court in Civil Suit No. 138 of 1982. What follows next was the filing of a claim before the Land Disputes Tribunal i.e. case No. 12 of 2010 by the interested party. It is the award resulting from the said Tribunal which provoked the instant application for judicial review. It is, however, clear that the Tribunal was not sitting on appeal over the earlier decision of the Panel.

36. So, how did the interested party come to file his claim before the Tribunal under the provisions of the **Land Disputes Tribunals Act, 1990**? There is no clear evidence on record on this issue. The explanation given by the interested party before the Tribunal was that after the Panel declined to determine his claim, the matter was referred back to the Magistrate’s Court for resolution. The said court reportedly referred the interested party to the Tribunal hence the filing of **Land Disputes Tribunal Case No. 12 of 2010**. He claimed that he was advised to move to the Tribunal in 1996 but due to financial constraints he was only able to lodge his claim in 2010.

37. The explanation by the interested party may have some truth in it. Upon the enactment of the **Land Disputes Tribunals Act, 1990** all pending land cases which had not been concluded by Magistrates’ Courts were to be adjudicated upon by the Tribunal. The provisions of **section 13 (1) of the said Act** provided that;

“Where any proceedings to which section 3 (1) of this Act applies have, at the commencement of the Act been filed in a Magistrate’s court, then, unless the court has at that time heard and pronounced judgement thereon, the proceedings shall be discontinued until the dispute has been referred to the Tribunal and determined in accordance with this Act.”

38. The Applicant would have assisted the court by providing the proceedings and the decree or final orders made in SPMCC No. 138 of 1982. As matters stand now, there is no evidence that the suit was decided with finality. There is, therefore, no basis for holding that the subsequent proceedings before the Tribunal were *res judicata* within the meaning of **section 7 of the Civil Procedure Act (Cap 21)**. It is also doubtful if the doctrine of *res judicata* would apply to a decision of a Panel of Elders or the Tribunal under the **Land Disputes Tribunals Act, 1990**.

39. Be that as it may, the court is not satisfied that the Applicant has demonstrated any of the grounds for judicial review known to law. Even if the Applicant had established the application of the doctrine of *res judicata*, it is doubtful if the doctrine, by itself, would constitute a good ground for judicial review.

40. It has not been demonstrated that the Tribunal acted in excess of its jurisdiction or unreasonably. It has not been shown that it took into account irrelevant matters or that it failed to take into account some relevant considerations. There was no allegation of violation of the rules of natural justice on the part of the Tribunal. In the court’s view, the Applicant was aggrieved by the Tribunal’s decision because it was unfavourable to him. It was, in reality, a challenge on the merits of the case hence the framing of the case in the manner in which it was framed.

41. The 4th issue is on costs of the action. The general rule on costs as enunciated in **section 27 of the Civil Procedure Act Cap 21** is that costs of the action are at the discretion of the court, subject to the proviso that costs shall follow the event. So, a successful party should be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co Ltd [1967] EA 287**. There is no good reason why the successful party should not be awarded costs of the action.

42. The court's summary on the issues for determination is as hereunder;

- a) The application for judicial review is not time-barred under the provisions of **Order 53 of the Civil Procedure Rules or section 9 (3) of the Law Reform Act (Cap 26)**.
- b) The Tribunal had jurisdiction to entertain the claim before it in Land Disputes Tribunal Case No. 12 of 2010.
- c) The Applicant has not made out a case for granting the judicial review orders sought in the application.
- d) The unsuccessful party shall bear the costs of the successful parties.

43. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 2nd February 2012 and the same is hereby dismissed with costs to the Respondents and the interested party.

44. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 26th day of JULY, 2018

In the presence of Mr. P.N. Mugo for the ex-parte Applicant, Mr. Siro for the Respondents and the interested party in person.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

26.07.18