



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO.150 OF 1998

REPUBLIC.....APPLICANT

VERSUS

THE LAND DISPUTES TRIBUNAL, NUU DIVISION

MWINGI DISTRICT.....RESPONDENT

AND

WAMBUA MUTUI.....1ST INTERESTED PARTY

DANIEL SUA KIOKO.....2ND INTERESTED PARTY

AND

DAVID KALII MUNYAO.....EX-PARTE APPLICANT

JUDGMENT

1. In the Notice of Motion dated 19th October, 1998, the Ex-parte Applicant prayed for the grant of the following orders of Judicial Review:
 - a. That an order of certiorari do issue to call into this court and quash the order of the Land Disputes Tribunal, Nuu Division, Mwingi District in Tribunal Land Case No. 1 of 1998, undated but read to the parties in Mwingi Resident Magistrate's Court on 8th July, 1998.*
 - b. That the court makes such other or further orders as the end of justice may require.*
 - c. That costs of this Application be provided for.*
2. The Motion is supported by the Affidavit of the Applicant who has averred that the matter that was before the Land Disputes Tribunal, Nuu Division, Mwingi District in Tribunal Case Number 1 of 1998 (*the Tribunal*) was *Res judicata*; that the Tribunal did not have jurisdiction to entertain the claim and that the Application should be allowed.
3. According to the Applicant, the dispute in respect to the suit land started in Kitui DMCC No. 388 of 1975 between the Applicant and the Interested Parties; that the 1st Interested Party was represented by his mother who died in 1997 and that the court delivered its Judgment on 22nd August, 1977 in which it awarded the suit land to the Applicant.
4. The Applicant has averred that when the Interested Parties filed an Appeal against the Judgment in Kitui RMCA No. 66 of 1977, the court delivered its Judgment in favour of the Applicant and that the High Court in Nairobi HCCA No. 85 of 1978 upheld the decision of District Magistrate in DMCC No. 388 of 1975.
5. The Applicant finally averred that he applied to the court for the eviction of the Interested Parties which Application was allowed and that it was after the said eviction that the Interested Parties filed a dispute in the Land Disputes Tribunal.
6. In reply, the 1st Interested Party deponed that Land Dispute Case No. 66 of 1977 was instituted by his late mother; that in 1998, the

Applicant started laying a claim on his land which was subject to the proceedings in the Magistrate's Court and that the Tribunal heard the matter and made a determination in his favour.

7. On the other hand, the 2nd Interest Party (*now deceased*) deponed that he was a party to the cases that were filed in the Magistrate's Court; that the land which was subject in the Land Disputes Tribunal is not the same land that was litigated upon in the Magistrate's Courts and that the Application should be dismissed.

8. In his submissions, the Applicant's advocate submitted that the matter that was before the Tribunal was *Res-judicata*, the Magistrate's Courts having dealt with it; that the Tribunal did not have jurisdiction to deal with the issue of ownership of land and that although the Tribunal was informed of the decisions of the Magistrate's courts and the High Court, it ignored those decisions and proceeded to hear the matter.

9. The 1st Interested Party's advocate submitted that the Applicant was granted the right to be heard by the Tribunal but he declined; that the dispute that was filed by the 1st Interested Party in the Tribunal related to his land and not his mother's land and that it was the duty of the Applicant to have proved that the issue before the Tribunal related to the same land.

10. It is not in dispute that the Applicant sued the 1st Interested Party's mother, Kyutu Mutui and the 2nd Interested Party in Kitui DMCC No. 388 of 1975 in which case the court made a decision in favour of the Applicant. On appeal in Kitui RMCA No. 66 of 1997, the Applicant herein lost whereafter he filed an Appeal in Nairobi HCCA No. 85 of 1978. In its decision, the High Court agreed with the decision of the District Magistrate and set aside the Judgment of the Resident Magistrate in RMCA No. 66 of 1997.

11. The 1st Respondent's mother then died in 1997. In the meantime, the Applicant obtained the orders of eviction of the Interested Parties from the land that had been litigated over in the courts. It is the Applicant's case that after evicting the Respondents, they filed a dispute with the Disputes Land Tribunal, the subject of this Application. The issue that is before me for determination is: a) whether the matter that was before the Tribunal was *Res judicata* and b) whether the Tribunal had jurisdiction to deal with the matter.

12. The Interested Parties response to the issues raised in the Application is that the disputed land in the two matters are distinct. According to the 1st Interested Party, the land that was in dispute before the Magistrate's Court belonged to her late mother and that after evicting her late mother from the said land, the Applicant moved onto his land.

13. For this court to determine if indeed the suit property in Kitui DMCC No. 388 of 1975 is the same as the suit land in Nuu Division Land Disputes Tribunal, it must be ceased with the pleadings and proceedings in the two cases. I say so because according to the proceedings which have been annexed on the Applicant's Affidavit in Land Disputes Tribunal Case No. 1 of 1998, the 1st Interested Party informed the Tribunal that he inherited the land in dispute from his father. After visiting the land in dispute, the Tribunal drew two sketches, one in respect to the 1st Interested Party's land and the 2nd Interested Party's land.

14. Although the land in dispute in the Nuu Land Disputes Tribunal Case No.1 of 1998 is well defined by the sketch maps drawn by the Tribunal, there is no description of the land that was in dispute in Kitui DMCC No. 388 of 1975. Indeed, the proceedings and Judgment in DMCC No. 388 of 1975 have not been exhibited by the Applicant.

15. Considering that the proceedings in Kitui DMCC No. 388 of 1975 were in respect to a specific parcel of land, and formed the backbone of the Applicant's case, which culminated in the decision of the High Court, it was of paramount importance that those proceedings and Judgment are exhibited to enable this court to determine if indeed the two suit properties in Land Case No. 1 of 1998 and DMCC No. 388 of 1995 were one and the same. Having failed to exhibit the proceedings and Judgment in DMCC No. 388 of 1995, I find and hold that the Applicant has failed to prove that Land Case No. 1 of 1998 is *Res judicata*.

16. In any event, the Applicant refused to participate in the proceedings in Land Case No. 1 of 1998 even after the Tribunal had invited him. Considering that it was the responsibility of the Applicant to inform the Tribunal about the proceedings in the lower court, and raise the issue of *Res judicata* with the Tribunal, he cannot accuse the Tribunal of having arrived at the decision it arrived at, and more so without the benefit of the proceedings and Judgment of the lower courts.

17. The Interested Parties herein accused the Applicant for having trespassed on their portions of land, which land did not have a title document. Section 3(1) (c) of the Land Disputes Tribunal Act (*repealed*) granted the Tribunal the jurisdiction to deal with all cases of a civil nature involving a dispute as to trespass to land. The Tribunal therefore had the requisite jurisdiction to deal with the dispute that was before it.

18. For those reasons, I dismiss with costs the Notice of Motion dated 19th October, 1998.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE