



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC JR. CASE NO. 4 OF 2017

ALICE ANYANZWAAPPLICANT

VERSUS

KHWISERO LAND DISPUTES TRIBUNAL 1ST RESPONDENT

BUTERE PRINCIPAL

MAGISTRATE'S COURT 2ND RESPONDENT

PETER ONDUSO ALELA..... INTERESTED PARTY

JUDGEMENT

This application is dated 25th September 2012 and is brought under order 54 rule 1 of the Civil Procedure Rules 2010 seeking the following orders;

1. That the honourable court be pleased to grant leave to the applicant to apply for orders of judicial review by way of certiorari to remove into this honourable court and quash the purported and undated decision of the alleged Khwisero Land Disputes Tribunal filed in Butere SRMC CIVIL CASE NO. 74 OF 2010 filed in court on 20/3/2012 and adopted on 7/5/2012 by the Butere Principal Magistrate's court over L.R. NO. KISA/KHUSHIKU/289 and an order of prohibition against the interested party and or his agents, employees, representative and or any other persons acting on his order, direction and or instruction from implementing/effecting the said purported decision.
2. That the said leave do operate as stay against the said purported decision of the alleged tribunal.
3. That the costs of this application be provided for.

The applicant submitted that she was sued by the interested party herein in the Khwisero Land Disputes Tribunal Case No. 21 of 2011 – Kisa/Khushiku/289. That in the said case, the purported tribunal, which ceased to exist on 27/8/2010, proceeded to find for the claimant therein/interested party herein, who sought to adopt the same in Butere SRMC Civil Case 74 of 2010 (decision filed therein on 20/3/2012 vide an application of the same date). That the purported tribunal was non-existent at law at the time of its alleged decision rendering the alleged decision illegal, improper, irregular, null and void. That it lacked the requisite jurisdiction to entertain the nature of claim laid before it. That the claim, if any, by the interested party herein was already barred by the limitation of actions as well as the doctrine of adverse possession as he has occupied and made use of the said parcel of land for over 68 years, since 1944 or thereabouts. That the honourable Principal Magistrate's Court representative who proceeded to adopt the purported decision failed to warn herself of potential conflict of interest as well as bias and consequently proceed to disqualify herself given her previous substantive engagement and or employment in the firm of the advocates for the interested party/plaintiff therein, contrary to his reasonable and or legitimate expectations as well as the rules of natural justice. That indeed given all the circumstances of the case, the honourable Principal Magistrate's Court at Butere failed in its duty and acted ultra vires in proceeding to adopt the said purported decision under wrong procedure as well as within a wrong and or separate civil Case not provided for under the law, as no separate miscellaneous application for adoption was instituted seeking to adopt the said purported decision.

The respondents submitted that they were not opposed to the application. The Interested Party was served but failed to attend court or file any submissions.

This court has carefully considered the application and the submissions therein. In Republic v Kenya Revenue Authority & Another Ex-Parte Tradewise

Agencies [2013] eKLR, para. 21 G.V. Odunga, J. in quoting from Pastoli vs. Kabale District Local Government Council and Others [2008] 2

EA 300 observed thus:

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.....”

In Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited [2008] e KLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003 [2004] 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See Welamondivi The Chairman, Electoral Commission of Kenya (2002) 1 KLR,

"..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis"

In the case of Republic v Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & another [2014] eKLR it was held that;

“Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "Judicial Remedies in Public Law" by Clive Olive, it is noted that "there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy.”

In Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo JA stated as follows;

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

Be that as it may, this application is based on the grounds that the purported tribunal was non-existent at law at the time of its alleged decision rendering the alleged decision illegal, improper, irregular, null and void. That even if it existed, which is challenged and or denied, it lacked the requisite jurisdiction to entertain the nature of claim laid before it. That the claim, if any, by the interested party herein was already barred by the limitation of actions as well as the doctrine of adverse possession. That the honourable Principal Magistrate's Court's representative who proceeded to adopt the purported decision failed to warm herself of potential conflict of interest as well as bias and

consequently proceed to disqualify herself given her previous substantive engagement and or employment in the firm of the advocates for the interested party/plaintiff therein, contrary to the legitimate expectations of the ex parte applicant as well as the rules of natural justice. That the honourable Principal Magistrate's court failed in its duty to take judicial notice of the fact that the law under which the decision sought to be adopted was long repealed as at the time of making the decision under wrong procedure as well as within a wrong and or separate civil case not provided for under the law. That the alleged Khwisero Land Disputes Tribunal whose purported decision was adopted by Butere Principal Magistrate's court on 7/5/2012 was legally non-existent and or without jurisdiction as the powers to arbitrate over and or determine disputes over land wee, inter alia, vested in the Environment and Land Court by virtue of both the constitution under Article 162 (1) as well as the Environment and Land Court Act, No. 19 of 2011, that came into force on 30/8/2012. That the honourable Principal Magistrate's court acted irregularly and contrary to practice in proceeding to adopt an undated decision. That the leave of this honourable court is mandatory and necessary in seeking the Judicial Review orders of Prohibition and Certiorari intended.

The issues to be determined in this application is firstly whether or not the tribunal had jurisdiction to entertain this dispute and secondly whether or not it was in existence at the material time. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows-

“3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) The division of or the determination of boundaries to, land including land held in common;

(b) A claim to occupy or work land, or,

(c) Trespass to land, shall be heard and determined by a Tribunal established under section 4.”

I have perused the documents before me and indeed the dispute seems to be one of boundaries and hence the tribunal did have jurisdiction to entertain the same. Be that as it may the applicant submitted that, the alleged Khwisero Land Disputes Tribunal whose purported decision adopted by Butere Principal Magistrate's Court on 7/5/2012 was legally non-existent and or without jurisdiction as the powers to arbitrate over and or determine disputes over land were, inter alia, vested in the Environment and Land Court by virtue of both the constitution under Article 162 (1) as well as the Environment and Land Court Act, No. 19 of 2011, that came into force on 30/8/2012. I concur with these submissions. The application has not been opposed. I find the same has merit and I grant the following orders;

1. An order of certiorari to remove into this honourable court and quash the purported and undated decision of the alleged Khwisero Land Disputes Tribunal filed in Butere SRMC CIVIL CASE NO. 74 OF 2010 filed in court on 20/3/2012 and adopted on 7/5/2012 by the Butere Principal Magistrate's court over L.R. NO. KISA/KHUSHIKU/289 and an order of prohibition against the interested party and or his agents, employees, representative and or any other persons acting on his order, direction and or instruction from implementing/effecting the said purported decision.
2. That the costs of this application to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22ND DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE