



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

MISCELLANEOUS APPLICATION. NO. 91 OF 2011

IN THE MATTER OF AN APPLICATION BY M'MUGAMBI M'TUERANDU TO APPLY

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF

IN THE MATTER OF MERU CENTRAL DISTRICT LAND DISPUTES TRIBUNAL CASE

NO. 26 OF 2011 AND IN THE MATTER OF LAND PARCEL NO. KIIRUA/ RUIRI/528

AND

IN THE MATTER OF THE LAW OF SUCCESSION ACT CAP 160 LAWS OF KENYA

AND IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT NO. 18 OF 1990

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

LAND DISPUTES TRIBUNAL – MERU CENTRAL.....RESPONDENT

M'RIMBERIA M'TUERANDU.....1ST INTERESTED PARTY

KITHINJI M'TUERANDU.....2ND INTERESTED PARTY

STEPHEN M'TUERANDU.....3RD INTERESTED PARTY

ERASTUS GITTONGA M'TUERANDU....4TH INTERESTED PARTY

DAVID MAINGI M'TUERANDU.....5TH INTERESTED PARTY

HENRY KINYUA.....6TH INTERESTED PARTY

EX-PARTE APPLICANT

JUDGMENT

1. The ex-parte applicant filed a chamber Summons dated 6th December 2011 where he sought leave to apply for orders of certiorari to quash the decision of the Land Disputes Tribunal – Meru Central District dated 28th September 2011 in respect to Land Parcel NO.KIIRUA/RUIRI/528 and other orders made therein. On 14th December 2011, the leave was granted by this court. Subsequently, the substantive Judicial Review Motion was filed on 19th December 2011.
2. The grounds in support of the Motion are set out in its body, the statutory statement of facts and verifying affidavit sworn by M'Mugambi M'tuerandu sworn on 3rd December 2011. He avers that the Land Parcel NO.KIIRUA/RUIRI/528 (hereinafter referred to as the '*the suit land*') was the subject matter of the Meru High Court Succession Cause No. 6 of 1990 through which it was distributed. He has taken possession of his share of the Suit Land which he has developed extensively. That with utter disregard of the decision made, the interested parties filed Land Dispute Tribunal Case No. 26 of 2011 with respect to the Suit Land, where the said land was to be distributed all over again. The Ex-parte Applicant contends that the respondent had no jurisdiction to hear and or determine the dispute, that he acted *ultra vires* and that the decision made was illegal, biased, irrational and unjust.
3. The Motion was opposed vide the replying affidavit of Stephen Kimathi M'Tuerandu sworn on 24th August 2012. He deponed that the ex-parte applicant is his elder brother and the other interested parties are his brothers as well. That the Suit Land belonged to their late father M'Tuerandu M'Bagine. After his death the exparte applicant filed the said succession cause secretly where the court ordered that the latter gets 5 acres and Zipporah Kamwitu, their father's wife, to get 4 Acres. But for unknown reasons the exparte applicant got 9.40 acres and not 5 acres and no explanation regarding 8.60 acres as the Suit Land measures 18 acres. That the issues raised by the ex-parte applicant are the subject matter in Meru High Court Land and Environment Case No. 24 of 2012 and it is only fair and just that this case be consolidated or stayed pending the hearing of the said case. He affirmed that the applicant's application has no merits and the same should be dismissed with costs.
4. The suit was dismissed on 1/11/2017. It was later reinstated. By the time the court was giving directions on how the suit will be heard on 14/2/2018, the interested parties were being represented by Kiogora advocate. However, it appears that some of them have filed notices to act in person.
5. The court had given directions for the suit to be canvassed by way of written submissions. Only the ex-parte applicant complied with this direction. He reiterated what he had stated earlier in his statement of facts and verifying affidavit. He affirmed that the tribunal had no jurisdiction as per the *Land Disputes Tribunal Act No.18 of 1990 (repealed)* to distribute the Suit Land amongst the interested parties, Since it did not have the mandate to deal with and determine a dispute as to ownership of land and jurisdiction to review any orders of the High Court. He relied on the cases of *Daniel Mose Nchore & another v Nyamache Land Disputes Tribunal & 2 others [2016] eKLR* and *Muthoni Van Someren v Kieni West Land Disputes tribunal & 4others [2014] eKLR* to support his claim.
6. The issues of determination are: *whether to consolidate this suit with Environment and Land case No. 34 of 2012* and *whether or not to quash the decision made by the Land Dispute Tribunal delivered on 28th September 2011.*

Consolidation

7. Judicial review matters are said to be *sui generis* that is unique. According to Ringera J in the case of *Jotham Mulati Welamondi v Chairman, Electoral Commission of Kenya [2002] eKLR* he stated that:

“I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure rules are a special procedure. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction *sui generis*”.

This was equally echoed by Ali-Aroni J in the case of *B & M MINING COMPANY LTD v Minister of Environment and Mineral Resources and Commissioner of Mines & Geology, [2011] eKLR* where she stated:

“I am persuaded by the above sentiments of the court, the same position pertains to the circumstances of this case that sections of the Civil procedure are not applicable to proceedings of this nature. It follows therefore in the absence of any provisions of consolidation under Order 53, the other provisions allowing consolation is inapplicable, the court cannot therefore consolidate the 2 suits as prayed and the application fails.”

8. I therefore find that this suit cannot be consolidated with Environment and Land Case No. 34 of 2012.

Whether the Land Tribunal had jurisdiction to determine the matter before it?.

9. *Section 3* of the repealed *Land Disputes Tribunal Act* provided as follows;:

“(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.”

10. From the proceedings of the Land Tribunal it shows that the determination that was reached is with regard to distribution of the Suit Land which is undisputedly under the name of M'Tuerande M'Bagine, father to the parties. This decision was dated 28th September 2011. However, prior to that a succession cause had already been initiated under Meru High Court Succession Cause No. 6 of 1990.

11. Musyoka J in the case of **In re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** stated the jurisdiction of the probate and administration court as:

“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested....”.

12. A perusal of point **(d)** in the findings contained in the **decision of the tribunal dated 28/9/2011** reveals that not only was the tribunal aware of the succession cause, but it also poked holes in that case averring that the letters of administration were obtained through misrepresentation. It is as if the tribunal had clothed itself with appellate powers over the High court matter. It follows that the tribunal over stepped its mandate.

13. The parties agree that there is an ELC Case no 34 of 2012 which is before the court. The parties should hence ventilate their claims of rights and interests in the suit land in that forum.

14. From the foregoing, I am of the view that the suit is meritorious and it ought to be allowed, and I proceed to grant orders as follows;

1) That a Judicial Review order of certiorari is hereby issued to remove to this court and quash the proceedings and decision made in respect of Land Parcel **No. Kiirua/Ruiri/528** dated 28th September, 2011 and read to parties on 25th November, 2011.

2) Taking into account that parties herein are family members, then I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 8TH NOVEMBER, 2018

IN THE PRESENCE OF:-

C/A: Janet

Muchiri for applicant

Kiongo for respondent

Kiogora A. for interested party

HON. LUCY. N. MBUGUA

ELC JUDGE