



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. CIVIL APPL. NO. 66 OF 2003

REPUBLIC.....APPLICANT

VERSUS

WAITALUK LAND DISPUTES TRIBUNAL

COMPRISING OF MBOTO KIDAI

EZEKIEL KESSIO

PAUL KAROP.....1ST RESPONDENT

SENIOR MAGISTRATE'S COURT AT KITALE....2ND RESPONDENT

FRANCIS METTO.....3RD RESPONDENT

EXPARTE: CHESERET ARAP MAINA

RULING

1. The ex-parte applicant **Cheseret Arap Maina** took out a notice of motion dated **3rd July, 2003** under the provisions of **Order 53 Rules 3 & 4 of the Civil Procedure Rules** seeking an order of *certiorari* to remove into this court and quash the decision of Waitaluk Land Disputes Tribunal which was read and adopted as judgment of **Kitale SPMCC Land Case No. 54 of 2002** on **29/4/2003**.

2. The application was made on the grounds that the Tribunal had no jurisdiction to order specific performance of a void contract; that the Tribunal had no jurisdiction to determine the validity/legality of a land sale contract; that the Tribunal had no jurisdiction to change or modify a land sale contract; that the decision of the Tribunal violated the rules of natural justice in that the **2nd** buyer (**Vincent Kusimba**) and who has at all material times been in occupation of the suit land was condemned unheard, and that the Tribunal members were not gazetted.

3. The application was further grounded on the supporting affidavit of the applicant and the statement of particulars which were filed with the application for leave. The applicant contends that he was not served with any claim as *per Section 3(2), (3), (4) and 5 of the Land Disputes Tribunal Act. Section 3(4) of the Land Disputes Tribunal Act* (now repealed) provided as follows:-

“Every claim shall be served on the other party, or, where there are more than one, on each of the parties to the dispute and the provisions of the Civil Procedure Act as regards service of summons shall thereafter apply”.

4. The applicant further contends that after the **3rd** respondent failed to pay for the land which he had sold to him in **1989**, he sold the same to one **Vincent Kusimba** who fully paid and took possession in 2001. It is the applicant's contention that the agreement between him and the **3rd** respondent became null and void for want of payment of consideration and lack of Land Control Board consent.

5. The **3rd** respondent filed a replying affidavit. It is his contention that the application is bad in law and procedurally defective. He averred that the Tribunal had jurisdiction to determine the dispute and that it did not order for specific performance of a void contract but only determined who should occupy the land in dispute. That the Tribunal only recognised the land sale contract but not its validity.

The **3rd** respondent states that the Tribunal found as a fact that he was the one in occupation and argues that the applicant cannot purport to talk on behalf of a third party (**Vincent Kusimba**). He added that there was no proof of agreement between the applicant and the said **Vincent Kusimba**.

6. According to the 4th respondent, the Tribunal Members were duly gazetted vide Kenya Gazette dated **4th February, 1994**.

7. The Attorney General filed grounds of opposition dated 8th June, 2018 as follows:-

(1) The application is fatally defective, incompetent and untenable both in substance and form and contrary to the provisions of Order 53 under which it is brought.

(2) The application is outrightly misconceived, bad in law and an abuse of the due process of this Honourable Court.

(3) That the applicant has not attached a true copy of a decree issued, signed and sealed by the Senior Principal Magistrate's Court as provided under Order 53 rule 7 thus making the instant motion incompetent.

(4) That the alleged handwritten document (decree) is not verified hence not a legal document capable of being quashed.

(5) That there is no leave annexed to the application to confirm if indeed leave was granted to the applicant to commence judicial review herein.

(6) That in any case if at all leave was granted then the application for leave was filed out of time contrary to the provisions of Order 53 rule 2.

(7) That if at all leave was granted none has been exhibited then the main application was filed out of time contrary to the provisions of Order 53 rule 3(1).

(8) That the application herein is overtaken by events and the orders being sought incapable of being enforced.

(9) That Waitaluk Land Disputes Tribunal had jurisdiction to deal with the claim as provided under Section 3 of the Land Disputes Tribunal Act.

(10) That the ex-parte applicant lost interest of this matter long ago and the court cannot therefore issue orders in vain.

(11) That the application dated 3rd July, 2003 ought to be dismissed with costs.

8. On 25th October, 2018 the notice of motion came up for hearing and the parties agreed to dispose of the application by way of written submissions. Only the applicant filed his submissions.

9. The applicant submitted that the Tribunal Members were not gazetted hence their decision is an illegality. The applicant further submitted that the Tribunal had no jurisdiction to order specific performance of a void contract and lacked jurisdiction to handle claims based on contracts. The applicant also submitted that the Tribunal violated the rules of natural justice by condemning the third party who bought the land from the applicant and who was in and remains in possession unheard.

10. The decision which is subjected to judicial review was passed by Waitaluk Land Disputes Tribunal which was a public body established pursuant to the provisions of the Land Disputes Tribunal Act (now repealed). This being a public body which existed before the repeal of the Act, its decisions are amenable to judicial review. The role of this court in its supervisory jurisdiction is to ensure that decisions arising from such public bodies are reached in accordance to the law and that parties appearing before such bodies are treated fairly.

11. The respondents have attacked the competency of the motion on the grounds that there was no leave granted or the application for leave was filed out of time. **Order 53 rule 2** provides as follows:-

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by an 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 for appealing has expired”.

12. In the present case, the decision of the Tribunal was made on 1st October, 2002. The same was adopted as judgment of the court on 29th April, 2003. The ex-parte applicant filed the application for leave on 11th June, 2003. This was within the six months period and therefore was within stipulated time.

13. On the merits of the motion, the applicant contends that the Tribunal had no jurisdiction to determine the validity or legality of a land sale contract or to change or modify the land sale contract.

14. In their decision, the Tribunal ruled *“that the first agreement between the plaintiff and the defendant is a true owner of the plot be acknowledged and the second revoked as whoever sold to him was not the owner of the plot....”*.

15. The jurisdiction of the Land Disputes Tribunal is set out in **Section 3(1) of the Land Disputes Tribunal Act** (now repealed). The Section provides as follows:-

“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.**

16. The powers of the Tribunal were limited to the disputes mentioned under **Section 3(1)** and as such the Tribunal could in no way purport to have powers to solve a dispute over sale of land. Where a Tribunal acts in excess of its powers then the only remedy is to have the whole proceedings emanating therefrom be declared null and void. The framers of the Act never intended the Tribunals formed under the Act to deal with sale of land agreements or enforce contract. In purporting to do so, the Tribunal acted *ultra vires*.

17. Another issue raised by the ex-parte applicant is that the decision of the Tribunal is an illegality as the Members of Tribunal that rendered the impugned decision were not gazetted as provided under the Act. **Section 5(1) of the Land Disputes Tribunal Act** (now repealed) provides as follows:-

“The Minister shall, by notice in the Gazette, appoint a panel of elders for each registration district”.

Section 4(1) provides as follows:-

“(1) There shall be established a Tribunal, to be called the Land Disputes Tribunal for every registration district.

(2) Each Tribunal shall consist of:-

(a) a Chairman who shall be appointed from time to time by the District Commissioner from the Panel of Elders appointed under Section 5; and

(b) either two or four Elders selected by the District Commissioner from a Panel of Elders appointed under section 5”.

18. The registration district under which Waitaluk Land Disputes Tribunal falls is Trans-Nzoia District. The membership of the Land Disputes Tribunal for Trans-Nzoia District were gazetted vide Gazette dated 4th February, 1994. The list contained the names of **Mboto Giddi, Paul Rop** and **Hezekiah Kesio**. The three Elders who sat to hear and determine the dispute in question are shown as **Mboto Kidai, Ezekiel Kessio** and **Paul Karop**. It is not clear whether these were one and the same persons. They may or may not be so. This court will not make its decision based on the mismatch of these names.

19. It is also the applicant’s argument that the Tribunal violated the rules of natural justice.

I have perused the proceedings at the Tribunal. It is clear that the applicant was given a hearing. This ground is therefore unfounded. The applicant is also faulting the Tribunal for condemning a third party (Vincent Kusimba) unheard. The said third party is not a party to these proceedings and the applicant cannot purport to plead on his behalf.

20. The Tribunal was clearly in excess of jurisdiction in purporting to deal in a matter or cause of action relating to a contract for sale of land. **Section 3(1)** of the then Land Disputes Tribunal Act was very specific on the jurisdiction of the Tribunal. It would follow that the proceedings of the Tribunal and the decision arrived at thereafter were all flawed, null and void.

21. Consequently, this application must succeed. The application is allowed. The proceedings and decision of Waitaluk Land Disputes Tribunal adopted by the 2nd respondent in **Kitale SPMCC Land Case No. 64 of 2002 on 29/4/2003** are hereby removed into this court and quashed. The applicant shall have the costs of the application.

It is so ordered.

Dated, signed and delivered at Kitale on this 7th day of December, 2018.

C. K. YANO

JUDGE

7/12/2018

Coram:

Before - C.K. Yano, Judge

Court Assistant - Collins

Ms. Mufutu holding brief for Kiarie for Applicant

N/A for Respondent

ORDER

Ruling delivered in open court in the presence of Ms. Mufutu holding brief for Mr. Kiarie and in the absence of the Respondents.

C.K. YANO

JUDGE

7/12/2018