



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT KISII

MISC. APPLICATION NO. 35 OF 2012

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF NYANZA LAND DISPUTE TRIBUNAL CASE NO. 18 OF 1990 AND KISUMU SRMCC LAND CASE NO. 45 OF 2009

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE LAND DISPUTES TRIBUNAL – KISUMU 1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE’S COURT OYUGIS 2ND RESPONDENT

AND

CHARLES OTIENO ADUKE INTERESTED PARTY

EX PARTE

FANUEL OKOTH ONYANGO

J U D G M E N T

1. The ex parte applicant, Fanuel Okoth Onyango (hereinafter referred to only as “the applicant”) was on 23rd May, 2012 granted leave to apply for an order of certiorari to quash the decision of Nyanza Land Disputes Appeals Committee in Appeal No. 45 of 2009 and the decision of Oyugis Principal Magistrate’s Court in Misc. Application No. 7 of 2009. Following that grant of leave, the applicant filed the application for judicial review through the Notice of Motion dated 12th June, 2012 on the same day. By the application the applicant sought the following order:-

“That this Honourable court be pleased to grant an order of certiorari to bring into the High Court the decision of Nyanza Land Disputes Committee No. 45 of 2009 and Oyugis Principal Magistrate’s Court Misc. No. 7 of 2009 for the purposes of being quashed.”

2. The application was grounded on the grounds that the Tribunal lacked the jurisdiction to deal with the

matter and that the tribunal acted ultra vires its powers in making the impugned orders. The application was further predicated on the statement of facts and the verifying affidavit that were filed simultaneously with the application for leave. The applicant in the statement in support of the application stated that he was the registered proprietor of land parcel **Kabondo/Kowidi/304**. That the District Land Tribunal made an order for the subdivision of the parcel of land into two portions and directed that one of the portions be registered in the name of the interested party. The applicant further stated that he appealed the decision of District Land Tribunal to the Nyanza Land Disputes Appeals Committee vide Case NO. 45 of 2009 but the appeals committee upheld the decision of the District Land Disputes Tribunal. That the Land Disputes Appeals Committee decision was filed at the Oyugis Principal Magistrate's Court vide Misc. App. No. 7 of 2009 and adopted as judgment of the court on 24th January 2012 provoking the present application.

3. Charles Otieno Oduke, the interested party swore a replying affidavit dated 10th July 2014 filed in court on 14th July 2014 in opposition to the applicant's application for judicial review. The interested party vide the replying affidavit set out what can be described as the history of the dispute involving the applicant and the interested party's deceased father. The interested party avers that the dispute relates to a portion of land parcel **Kabondo/Kowidi/248** (which was owned by his late father) which the applicant appropriated and was included in the applicant's land parcel **Kabondo/Kowidi/304** and the applicant has refused and/or neglected to return the portion to parcel number **248**.

4. The interested party averred that the dispute has been the subject of litigation vide Kisumu HCCC No. 19 of 1986 where the applicant had sued his father as per the copy of plaint annexed as "**C002**" claiming that the interested party's father had alienated a portion of the applicant's land parcel **304**. The interested party however stated the Kisumu High Court case was not prosecuted and it is not clear or apparent what the status of that case is today. The interested party further averred the land registrar had dealt with the dispute between his late father and the applicant whereby the land registrar awarded a portion of the applicant's land parcel to his late father. The interested party stated that the Land Disputes Tribunal merely confirmed what the land registrar had determined that the applicant's land be demarcated to give off the portion that belonged to his late father. The interested party contended that the applicant cannot be entitled to the orders of judicial review that he seeks vide the Notice of Motion dated 12th June 2012.

5. The ex parte applicant and the interested party argued the application by way of written submissions. The interested party filed his submissions dated 10th November 2015 on 16th November 2015 while the ex parte applicant's submissions dated 10th July 2016 were filed on the same date.

6. Having perused and reviewed the pleadings and having considered the submissions by the parties the issues that arise for determination is firstly, whether the Land Disputes Tribunal acted in excess of its jurisdiction in hearing and determining the dispute and secondly, if the Tribunal lacked jurisdiction, whether the adoption by the magistrate's court of the award was null and void.

7. Issue of jurisdiction;

The jurisdiction of the Land Disputes Tribunal established under the Land Disputes Tribunals Act, 1990 (repealed) was conferred by Section 3 (1) of the Act which provided 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;

(c) Trespass to land

Shall be heard and determined by a Tribunal established under Section 4.

The Court of appeal in the case of **Kimote Musau –vs- Makumi Mulura Muthwethau & 2 Others [2015] eKLR** while restating that an order of certiorari will issue where a decision is made without jurisdiction cited the court’s earlier decision in the case of **Kenya National Examination Council –vs- Republic ex parte Godfrey Gathenji Njoroge & 9 Others [1997] eKLR (Civil Appeal No. 266 of 1996)** where the court stated thus:-

“Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...”.

8. A record of the proceedings before the District Land Disputes Tribunal shows that the interested party was the complainant and that he was claiming a portion of land out of land parcel **Kabondo/Kowidi/304** which he claimed to have used and occupied since 1968. The panel of elders in their observations regarding land parcel **Kabondo/Kowidi/304** stated as follows:-

(i) There was need for re-survey.

(ii) There was need for re-demarcation

(iii) There was need for subdivision

(iv) There was need for each member to be given his own parcel number and title deed issued to each of them.

9. The tribunal made an award ordering the subdivision of land parcel **Kabondo/Kowidi/304** and directing the land registrar and the district surveyor to subdivide **Kobondo Kowidi/304** into two portions of land and to register each portion in the name of the claimant and objector and to issue each with a title deed. The abstract of title in respect of land parcel number **Kabondo/Kowidi/304** annexed to the ex parte applicant’s verifying affidavit as **“D0A1”** shows land parcel **Kabondo/Kowidi/304** was registered in the name of David Okoth on 6th January 77 and following change of name in the name of Fanuel David Okoth Onyango on 5th December 1997. It is clear therefore at the time the tribunal heard the matter and rendered the award dated 30th April 2009 the suit property was registered in the ex parte applicant’s name.

10. The Tribunal as is clear from the proceedings before it was dealing with issues relating to the ownership of land parcel **Kabondo/Kowidi/304** or a portion of the same. The claimant’s claim was that a portion of his land was included in land parcel **Kabondo/Kowidi/304** whose title was issued to the ex parte applicant. The claimant could only recover such portion by challenging ownership of land parcel **Kabondo/Kowidi/304** and such challenge could not be before the Tribunal since the Tribunal under Section 3 (1) of the Land Disputes Tribunal Act never had any jurisdiction to deal with matters relating to title yet that is what they dealt with. Effectively, the decision by the Tribunal was ordering the annulment of the title issued to the ex parte applicant and declaring that the land parcel is owned by the ex parte applicant and the interested party in portions that were to be determined through re-demarcation of the land and subdivision by the surveyor. That is an exercise that would have called for the cancellation of the title to the suit property held by the ex parte applicant to pave the way for the re-demarcation and subdivision.

11. The Tribunal lacked the mandate and/or jurisdiction to determine ownership and/or direct the cancellation of a registered title and such jurisdiction exclusively then lay with the High Court. There are a myriad of court decisions that restate this position and I will content myself by stating that the Tribunal acted in excess of its jurisdiction and that its decision was null and void and therefore amenable to judicial review. It matters not that an appeal was preferred before the provincial appeals committee. If the decision by the Tribunal was null and void, there is nothing that could change that position. The Tribunal acted ultra vires and its decision was void abinitio.

12. In the case of **Kimote Musau –vs- Makumi Muluva Muthwethau & 2 Others [2015] eKLR** in an

appeal arising from an award where the tribunal had granted a claimant a portion of land that had title the Court of Appeal stated as follows:-

“To implement this award of the Tribunal would result in a fresh demarcation of the land, so that a portion of land would have to be excised out and a portion therefrom transferred to the claimant. Indeed the Tribunal did not have power to order transfer or registration of land and on this score alone, we find that it made this order ultra vires its jurisdiction.”

The Court of Appeal also in the case of **Jotham Amunavi –vs- Chairman Sabatia Land Disputes Tribunal & Enos Kenyani Amunavi (Civil Appeal No. 256 of 2002)** unreported the court observed that the implementation of the decision of the Tribunal would require a subdivision of the suit land, and thus would fall outside the purview of Section 3 (1) of the Act.

13. The Interested Party through his filed submissions submitted that the application for leave to institute judicial review proceedings was instituted outside the mandatory period of 6 months provided under Order 53 Rule 2 of the Civil Procedure Rules. Section (7) of the Land Disputes Tribunal Act (repealed) provided as follows:-

7(1) The chairman of the tribunal shall cause the decision of the Tribunal to be filed in the magistrates court together with any depositions or documents which have been taken or provide before the Tribunal.

(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

14. D. K Maraga Ag. Judge (as he then was) had occasion to consider a similar submission as the one raised by the Interested Party herein in the case of **Republic –vs- Resident Magistrate Kaloleni & 2 Others ex parte (Msa Misc. App. No. 117 of 2004 – unreported)** where he stated as follows:-

“It is clear from this section (7 of the Act) that the proceedings before the Tribunal are concluded when its decision has been made a judgment of the court. Before that is done, no decree can issue and the Tribunal decision is not enforceable. The six months’ period provided for the making of applications for certiorari in the case of the Land Disputes Tribunal Proceedings in my view therefore starts to run from the date of entry of judgment by the court. This application is therefore not time barred and is properly before the court.”

15. I approve of the position taken by the Judge in regard to when time starts running in regard to awards emanating from the defunct tribunals. In the instant matter, the ex parte applicant filed an appeal against the tribunal’s award dated 30th April 2009 so that although the same had been filed in the Magistrate’s court on 2nd June 2009 and adopted as judgment of the court no decree was issued. The decision of the provincial appeals committee was subsequently filed in the same Magistrate’s Court on 29th August 2011 and was adopted as judgment of the court on 24th January 2012 in the presence of the parties. It is out of this judgment that the decree of the court was issued which the land registrar sought to execute as per his letter of 4th April 2012. Hence when the ex parte applicant moved the court for leave to institute judicial review on 22nd May 2012 he was within the prescribed period of time under Order 53 Rule 2 of the Civil Procedure Rules.

16. Having held that the Tribunal had acted ultra vires its jurisdiction in entertaining a dispute relating to title to land and that its decision was null and void, it follows that there was nothing really to go on appeal before the provincial appeals committee and that the decision by the provincial appeals committee was equally a nullity.

17. The principal magistrate’s court, Oyugis likewise could not validate and give effect to a decision of the provincial appeals committee emanating from the award of the Tribunal which was itself a nullity.

Nothing comes out of nothing. This court exercises supervision over the tribunals and the subordinate courts whose decisions relate to matters in regard to which this court has jurisdiction over and will not permit or allow the cause of justice to be perverted. Parties pursuing justice ought to follow due process as failure to do so could easily lead to a degeneration of the rule of law where the law of the jungle takes centre stage. The court has a role and duty of ensuring predictability in the application of the law and in consequence upholding the rule of law. While I have sympathy for the interested party for the rather lengthy route he has trodden in pursuit of justice and he now finds himself back at the beginning, I invite him to take solace in the fact that the court of justice remains steadfast and will at all times endeavour to fearlessly uphold the rule of law and serve all and sundry without fear or favour.

18. For all the reasons I have discussed hereinabove, the ex parte applicant's Notice of Motion dated 12th June 2012 is for granting. I accordingly grant:

(i) An order of certiorari to bring into this court the decision of the Nyanza Land Disputes Appeal Committee No. 45 of 2009 and Oyugis Principal Magistrate's Court Misc. No. 7 of 2009 decision adopting the said decision as judgment of the court on 24th January 2012 for the purposes of being quashed.

(ii) Each party to bear their own costs of the application.

Judgment dated, signed and delivered at Kisii this 24th day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the applicant
..... for the 1st and 2nd respondents
..... for the interested party
..... For the ex parte applicant
..... Court assistant

J. M. MUTUNGI

JUDGE