



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 60 OF 2017

(Formerly Machakos Misc Civil Application No. 62 of 2012)

IN THE MATTER OF: LAW REFORM ACT CAP. 26 OF THE LAWS OF KENYA

IN THE MATTER OF: LAND DISPUTES TRIBUNAL CAP.18 OF THE LAWS OF KENYA

**IN THE MATTER: AN APPLICATION BY SIMEON KINYUA OLE LEKASI FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW TO PROCEED AGAINST (1) SENIOR RESIDENT
MAGISTRATE KAJIADO (2) KAJIADO CENTRAL LAND DISPUTE TRIBUNAL (3)
KAJIADO DISTRICT LAND SURVEYOR BY WAY OF CERTIORARI AND PROHIBITION**

SIMEON KINYUA OLE LEKASI.....APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE KAJIADO.....1ST RESPONDENT

KAJIADO CENTRAL LAND DISPUTE TRIBUNAL.....2ND RESPONDENT

DISTRICT LAND SURVEYOR KAJIADO.....3RD RESPONDENT

AND

NDERI OLE KAMAU MAHINDA.....1ST INTERESTED PARTY

NCHINJIRIAN MUSARA.....2ND INTERESTED PARTY

RULING

The application before Court is a Chamber summons dated 12th March, 2012 brought pursuant to Order 53 Rule 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Laws of Kenya and Section 9(2) and (3) of the Law Reform Act Cap and all the other enabling provisions of the law.

The application is based on the grounds set out in the Statutory Statement which in summary is that the Applicant is the registered owner of land parcel number KAJIADO/DALALEKUTUK/46. The decision of the Kajiado Central Land Tribunal Case TC No. 603/11/2010 and adopted by the Senior Resident Magistrate Court Kajiado in LAND TRIBUNAL CASE No. 4 of 2011 is legally unsound and to that extent null and void. Further the Kajiado Central Land Disputes Tribunal acted ultra vires its powers by entertaining an action in contravention of Section 21(4) of the Registered Land Act (now repealed) while there was a pending boundary dispute involving Land No. Kajiado/Dalalekutuk/46 and an adjoining land

No. Kajiado/Dalalekutuk/1031, 1032, and 1033 respectively before the District Land Registrar. By the order confirmed by the Senior Resident Magistrate Court in the said case, a survey team visited the site on 14th March, 2012 at 11.00 am to establish beacons defining the boundaries between parcels 1032 and 1033 which belong to the parties to the dispute but instead the surveyor made incursions to the Applicant's land no.Kajiado/Dalalekutuk/46. The decision of the Kajiado Central Land Disputes Tribunal cannot be enforced without affecting land parcel number Kajiado/Dalalekutuk/46. The boundary dispute between the Applicant's land parcel number Kajiado/Dalalekutuk/46, the adjoining land belonging to ENKORIKA GROUP RANCH, Kajiado/Dalalekutuk/1031, 1032 and 1033 respectively started around 1987 which dispute has not been finalized. The Senior Resident Magistrate erred in law and fact in adopting the Kajiado Central Land Disputes Tribunal Award while the District Surveyor proceeded on a faulty order.

The application is further supported by the affidavit of **SIMEON KINYUA OLE LEKASI** who is the Applicant herein, where he reiterates the facts of his claim.

The application is opposed by the 1st Interested Party NDERI OLE KAMAU MAHINDA who swore a replying affidavit and deposed that the application is fatally defective since the proceedings sought to be quashed are not produced or shown in court. He claims the annexure attached to the verifying affidavit generally address issues that are not the substance of the application and that the dispute before the Kajiado Central Land Disputes Tribunal was properly before court. He avers that the issue of jurisdiction was specifically raised with the Tribunal considering what was before it before making a decision. He insists that the Land Dispute Tribunal (LDT) exercised its jurisdiction properly under the provisions of Section 3 of the Land Dispute Tribunal (LDT) Act thus: (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 the Tribunal established under section 4. He reiterates that the Land Dispute Tribunal (LDT) decision was not challenged on appeal and that the Applicant's claim on infringement of constitutional rights is not a ground for judicial review.

The applicant filed a further affidavit where he deposed that the application is not fatally defective since the proceedings/decision sought to be quashed have been filed in court under a supplementary affidavit dated 26th April, 2012 and filed in court on 26th April, 2012. He insists he was never a party to the previous proceedings in the Land Dispute Tribunal (LDT) and there was no way he could have been aware of their decision which was later adopted by the Senior Resident Magistrate Kajiado. He affirms that he came to know of the Land Dispute Tribunal's (LDT) decision when the District Land Surveyor visited the site to put beacons as ordered by the Decree to settle the dispute between the two parties in the Decree instead they encroached on his property and placed beacons inside it.

On 9th October, 2017 the Applicant and the 1st Interested party's counsel submitted on the application. Counsel for the Applicant stated that they were seeking prerogative orders as there was a judgement of court. Counsel for the 1st interested party submitted that the current application had been overtaken by events. He stated that the award by the Land Dispute Tribunal (LDT) was on 26th January, 2011 while this application for leave was filed on 27th March, 2012. He submitted that Order 53 rule 1 requires that orders of Certiorari can only be brought to court within six months. The Counsel for the Applicant reiterated that Order 53 applied only at the time the Magistrate adopted the Award/Judgement. Further that the Court has jurisdiction to deal with the matter which involves land that has been pending for a while until the various land laws were repealed.

Analysis and Determination

Upon perusal of the Chamber Summons including the supporting/replying and further affidavits as well as the annexures thereon, I find that the only issue for determination is whether the Applicant is entitled to leave to commence judicial review proceedings.

I note that the award by the Land Dispute Tribunal (LDT) was on 26th January, 2011 while the application for leave was filed on 27th March, 2012, almost 10 months later. The Applicant claims the

Land Dispute Tribunal (LDT) did not have jurisdiction while the 1st Interested party insists that the Land Dispute Tribunal (LDT) had it, and that the application has been overtaken by events.

In the Court of Appeal at Nyeri vide Civil Appeal No. 211 of 2013 between Stephen Kibowen vs The Chief Magistrate’s Court Nakuru, The Bahati Land Disputes Tribunal and Ruth Njoki Waweru, Justices Waki, Nambuye and Kiage recently held that: ‘ we agree with the opinion of the 3 Judge bench of the High Court in REPUBLIC vs. JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS EX PARTE MALULU & 3 OTHERS(supra) that ‘nullities are not covered by the six months limitation both on the wording of the rules and as a matter of principle to the nature of nullities.’ We agree further that courts are possessed of an inherent jurisdiction not confined to order 53(now order 54) that can be invoked, whenever the courts are moved, to quash any nullities and illegalities. It would be an abdication of its duty for the court to which acts that are such nullities are exposed to fail to invalidate and quash them by appropriate orders and declarations. Since it is indisputable that the Land Disputes Tribunal had no jurisdiction to purport to determine ownership and to cancel the appellant’s title to the land in question. We have no hesitation in finding that the tribunal’s decision was ultra vires, made without jurisdiction and therefore null and void.’

I find that failure by the Land Dispute Tribunal (LDT) to include the Applicant in the proceedings over the disputed parcels of land, where the Applicant also had an interest was indeed a nullity. In relying on the case above, I find that since the Applicant did not participate in the Land Dispute Tribunal (LDT) proceedings which outcome has affected him, his application for leave to institute Judicial Review proceedings is indeed merited. In the circumstances, I will allow the Applicant’s Chamber summons application dated 12th March, 2012 and order that the Applicant do file the substantive Judicial Review proceedings within the next 21 days from the date hereof.

Costs will be in the cause

Dated, signed and delivered in open court at Kajiado this 19th day of December, 2017.

CHRISTINE OCHIENG

JUDGE

Present:

Mungla holding brief for Masese for Applicant

Masese holding brief for Tobiko for Respondent

CC Mpoye