REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC J.R 15 OF 2014

IN THE MATTER OF THE APPLICATION BY JUDY NJERI MACERE TO APPLY FOR ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF THE PROVINCIAL APPEALS COMMITTEE

AND

IN THE MATTER OF MWEA LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF PROCEEDINGS IN WANGURU SENIOR RESIDENT MAGISTRATE'S ARBITRATION CASE NO. 3 OF 2009

REPUBLIC……..……APPLICANT

VERSUS

THE CHAIRMAN MWEA LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE WANGURU…….…….....…2ND RESPONDENT

EMMANUEL NJOGU MUCHINA……..……..3RD RESPONDENT

AND

JUDY NJERI MICERE……..…….EX-PARTE APPLICANT

JUDGMENT

By her Notice of Motion dated 4th November 2011 the Applicant herein **JUDY NJERI MACERE** seeks the following orders:-

1. ***That an order of certiorari do issue to move into the High Court for purposes of quashing the***

award of Mwea Land Disputes Tribunal and the order of Wanguru Senior Resident Magistrate given on 26th March 2009 adopting the award as judgment of the Court.

2. ***That costs of this application be provided for.***

The application is supported by the statement of facts and the affidavit in verification of the same together with the annextures.

From what I can glean in the application, the Applicant's case is that she is the registered proprietor of the parcel of land known as L.R KIINE/SAGANA/3362 (the suit land) and had filed a claim of trespass against the 3rd respondent **EMMANUEL NJOGU MUCHINA** at the Mwea Land Disputes Tribunal (the Tribunal). However, instead of dealing with the issue of trespass, the Tribunal made an award in which it awarded the 3rd respondent three (3) acres out of the suit land. That award was on 26th March 2009 adopted as a judgment of the Court in Senior Resident Magistrate's Court Wanguru in Arbitration Case No. 3 of 2009. It is the Applicant's case that the Tribunal had no jurisdiction to make the award that it did and therefore the order that it made is ultra vires ***Section 3 (1) of the then Land Disputes Tribunal Act*** and ought to be quashed.

The 1st and 2nd respondents, as is now the norm in such cases, did not file any response to the application though served.

The 3rd respondent, though the firm of Mathaiya Baru Advocates, filed a Notice of Preliminary Objection dated 20th November 2014 in which it argued that the application is an abuse of the Court process for failure to comply with ***Rule 2 of Order 53 of the Civil Procedure Rules***. I shall revert to this later on in this judgment.

The 3rd respondent also filed a replying affidavit in which he deponed on several issues which were primarily based on the merits of the case before the Tribunal for instance, he depones:-

- ***That on 13th January 1997 the Applicant's step mother and herself entered into a sale agreement whereby they sold him two (2) acres out of the suit land.***
- ***That when his wife died in March 1997, he requested the applicant and her family to allow him to bury her in his portion of land but they showed him a different portion and after burial he built his residential house on that portion.***
- ***When he requested the applicant to complete the sale agreement, she refused and when the suit land was sub-divided into KIINE/SAGANA/3362 and 3363, his home remained on parcel No. KIINE/SAGANA/3362 belonging to the applicant and in order to get that land, he filed Muranga Principal Magistrate's Court Civil Case No. 43 of 2006 which was however dismissed for want of jurisdiction.***
- ***That he was then given one (1) acre out of land parcel No. KIINE/SAGANA/3362 and when the applicant filed Arbitration Case No. 3 of 2009, the Tribunal ordered that he should be given two (2) acres of land one (1) acre each from land parcels No. KIINE/SAGANA/3362 and 3363.***
- ***That he has been living on the said two (2) acres on which he has done extensive developments.***
- ***That he did not trespass on the applicant's land and the Tribunal was right in its decision since the applicant had indeed sold him land and is therefore barred from bringing this application for Judicial Review which was filed after six (6) months.***

This application was originally filed at the High Court in Embu before being transferred to this Court by **Ong'udi J.** on 28th February 2014.

The matter first came before me for mention on 14th July 2014 when Mr. Abubakar advocate for the applicant informed the Court that what was coming up was the applicant's Notice of Motion dated 4th November 2014. I directed that the 3rd respondent be served for directions on 29th September 2014. On that date however, counsel for the applicant and the 3rd respondent informed the Court that they had agreed to have the matter mentioned on 12th November 2014. On that day, Mr. Baru advocate for the 3rd

respondent informed the Court that he needed time to respond to the Notice of Motion dated 4th November 2011 and the Court granted him two weeks to do so and listed the matter for mention on 2nd December 2014. Come that day, Mr. Magee advocate for the applicant now informed the Court that what was coming up was the 3rd respondents Preliminary Objection dated 20th November 2014 which I have alluded to above. Mr. Baru advocate for the 3rd respondent agreed and the Court directed the advocates to file their submissions on that Preliminary Objection on or before 11th March 2015. However, no submissions had been filed by that day and a further mention was taken for 14th April 2015. When the advocates next appeared before me on 29th October 2015, submissions had yet to be filed and on 2nd December 2015, both Ms Kimotho advocate for the applicant and Mr. Gikonyo advocate holding brief for Mr. Baru advocate for the 3rd respondent told the Court that they had filed submissions and asked for a judgment date.

I have referred to that chronology of events because of what I am about to state. It is clear from the record that although the 3rd respondent had filed a Notice of Preliminary Objection dated 20th March 2014 on the ground that this application is fatally defective for failure to comply with ***Rule 2 of Order 53 of the Civil Procedure Rules,*** the 3rd Respondent also filed a replying affidavit dated the same day in response to the substantive Notice of Motion application. There may have been an intention on the part of the advocate for both parties to canvass that Preliminary Objection but somehow in the middle of all the mentions, that was not done. What I have before me are the submissions by the applicant's advocate on the main Notice of Motion dated 4th November 2011 while the 3rd respondent has filed submissions on the Preliminary objection dated 20th November 2014.

I have agonized on whether I should proceed and write a judgment on the Notice of Motion dated 4th November 2011 or further adjourn this matter to await submissions by the 3rd respondent's advocate on the same. After giving a careful thought to all the above, I have decided to write a judgment on the Notice of Motion rather than adjourn this matter further. In doing so, I have taken the following into account:-

1. ***I can consider the Preliminary Objection together with the substantive Notice of Motion.***
2. ***I have enough material including the 3rd respondents replying affidavit upon which I can base my judgment.***
3. ***I do not think that the absence of submissions by counsel will make any difference as the facts of this case are on record and such submissions can only be on issues of law and the Judge is presumed to know the law.***
4. ***This case has been in Court since 2009 and it is in keeping with the principle of expeditious disposal of cases that the same be brought to an end.***

I shall therefore at this stage address the Preliminary Objection in which the 3rd respondent has deponed that this application offends the provisions of ***Order 53 Rule 2 of the Civil Procedure Rules*** and should therefore be struck out. That provision prohibits the filing of applications for orders of certiorari after six (6) months from the date of the proceedings sought to be quashed. The 3rd respondent is therefore submitting that **Ong'udi J**. should not have granted the leave which she granted on 18th October 2011 for purposes of filing this application. It is clear from the record herein that the Chamber Summons by which leave to file these proceedings was sought was filed on 11th September 2009. The award sought to be quashed by an order of certiorari was the award of the Tribunal and which was adopted as a judgment of the Court by the Senior Resident Magistrate at Wanguru Court in Arbitration Case No. 3 of 2009 on 26th March 2009. The application for leave having been filed on 11th September 2009, it was well within the six (6) months period provided in law. Indeed it was a narrow escape because the applicant beat the deadline by a mere two weeks. Although the Tribunal's award is un-dated, it must be remembered that the said award became subsumed in the decision of the Senior Resident Magistrate's Court at Wanguru adopting the same as a judgment of the Court on 26th March 2009 thus enabling the parties to execute the decision. **Ong'udi J.** was alive to this because in her ruling dated 18th October 2011 in which she granted

leave, she addressed herself as follows:-

> ***"The application for certiorari has been filed within 6 months of the adoption by the Court of the Tribunal's award. As I said, the award is un-dated. This is a matter filed in 2009 and I wonder why it has taken this long to be prosecuted"***

In the circumstances, the Preliminary Objection lacks merit and is dismissed.

I shall now consider the Notice of Motion on its merit.

In Judicial Review applications, the Court is concerned not with the merits of the decision but rather, by the process by which that decision was arrived at. In the case of ***PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300,*** it was held as follows:-

> ***"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 complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles are instances of illegality…. Irrationality is where there is such gross un-reasonableness 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…… Procedural impropriety is 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"***

As indicated above, the applicant's case is that the Tribunal had no jurisdiction to make the order that it did and therefore the adoption of that order as a judgment of the Court on 26th March 2009 in Wanguru Senior Resident Magistrate's Court Arbitration Case No. 3 of 2009 should be quashed.

In adjudicating over the dispute subject of this case, the Mwea Land Disputes Tribunal was exercising its jurisdiction under the now ***repealed Land Disputes Tribunal Act*** which provided as follows under ***Section 3 (1):-***

> ***"Subject to this Act, all cases of a civil nature involving a dispute as to –***
>
> a. ***the sub-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"***

The applicant states that when she filed her case before the Tribunal, her complaint was based on trespass but the Tribunal went ahead to award the 3rd respondent two (2) acres out of the suit land. I have looked at the proceedings before the said Tribunal and it is indeed true that whereas the applicant's complaint against the 3rd respondent was one of trespass to land (which was within the Tribunal's jurisdiction), the Tribunal over-stretched its powers and proceeded to award the 3rd respondent two (2) acres out of the suit land. This is what the applicant told the Tribunal when she testified before it:-

> ***"I have sued the defendant Mr. Emmanuel Njogu Muchina because he has built his house in my land parcel No. 3362 of KIINE/SAGANA/farms"***

She then concluded her testimony as follows:-

> ***"My prayer to this Court is that Mr. Emmanuel Njogu Muchina who is the defendant in this case be ordered to move out of my shamba with immediate effect"***

That was a simple case of trespass. After hearing the defendant, the Tribunal made the following award:-

> ***"The Mwea Land Disputes Tribunal has ruled that two acres of land should be curved between the land parcel No. KIINE/SAGANA/3362 which is marked A on the mutation form and the land marked B on the same mutation form (see Mutation form attached) to belong to the defendant Mr. Emmanuel Njogu Muchina. Both parties to book for the Government Surveyor over this exercise. Mr. Emmanuel Njogu Muchina should pay the balance if (sic) Ksh. 10,500 (ten thousand five hundred) to Ms Judy Njeri Machere and also pay Ksh. 500 (five hundred) to Hana Karu Machere when this matter is in progress. Ms Judy Njeri Machere should also facilitate issue of the Title deed for the family of Hana Karu and her daughter Milka Muthoni since she has collected hers from the Land office. The grave of Mr. Muchina's wife should remain in the area he is going to be given"***

That award was of course made a judgment of the Senior Resident

Magistrate's Court Wanguru in Arbitration Case No. 3 of 2009 on 26th March 2009 and a Decree was issued on the same day - see 3rd respondent's annexture "**ENM 6".** Thereafter, an order was made by the same Court on 23rd May 2011 ordering the Court's Executive officer to sign all the necessary documents to effect the transfer of the two (2) acres out of the suit land to the 3rd respondent. No doubt the Tribunal was moved by its sense of justice and equity to make those orders because there was an agreement by which the applicant and her mother had agreed to sell two (2) acres out of the suit land to the 3rd respondent who had even gone into possession and buried his wife in his portion. However, the applicant thereafter reneged on the agreement – 3rd respondent's annexture "**ENM 1".** That was certainly a very cruel act on the part of the applicant that can bring tears even to the most callous person. It is that wicked conduct on the part of the applicant that moved the Tribunal to make the award that it did. Unfortunately for the 3rd respondent, and I can say so with a lot of sympathy for him, the Tribunal had no jurisdiction to make that order. In the case of ***JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISTRICT DISPUTES TRIBUNAL C.A CIVIL APPEAL NO. 256 OF 2002***, the Court of Appeal held that a Tribunal established under the repealed Land Disputes Tribunal Act would have no jurisdiction to make an order for the sub-division of registered land. A similar position was taken by the Court of Appeal in the case of ***ASMAN MALOBA WEPUKHULU & ANOTHER VS FRANCIS WAKWABUBI BIKETI C.A CIVIL APPEAL NO. 157 OF 2001***. That is the route that Courts have consistently taken in such cases and I am bound by those decisions of a Superior Court.

Jurisdiction is everything and it follows that where a Court or Tribunal has no jurisdiction, any decision taken by it is null and void. In the case of ***SIR ALI B.N. SALIM VS SHARIE MOHAMED SHARY (1938) K.L.R 9,*** the Court stated thus:-

> ***"If a Court has no jurisdiction over the subject matter of the litigation, its judgment and orders, however precisely certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented".***

The Supreme Court in ***SAMUEL KAMAU MACHARIA & ANOTHER VS KENYA COMMERCIAL BANK & TWO OTHERS APPLICATION NO. 2 OF 2011 2012 e K.L.R*** pronounced itself as follows on the issue of jurisdiction:-

> ***"A Court's jurisdiction flows from either the Constitution or Legislation or both. Thus,***

> ***a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law".***

The same applies to a Tribunal such as the one established under the ***repealed Land Disputes Tribunal Act.*** It could only exercise the jurisdiction bestowed upon it by the Act and no more. The dispute before it was one of trespass but it exceeded that jurisdiction and proceeded to sub-divide the suit land. As I have stated above, it is not lost on this Court that the Tribunal's conscience, mercy and sense of equity drove it to make the decision that it did. However, as the Court of Appeal held in the case of ***MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS C.A CIVIL APPEAL NO. 185 OF 2001***:-

> ***"Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision makers had the jurisdiction….. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself….".***

Notwithstanding the sympathy that the Tribunal no doubt had for the 3rd respondent, and this Court shares that sympathy as well, the Tribunal was bound to obey the law because, like a Court, it is guided by the law and not sympathy. Indeed even equity follows the law. In the circumstances of this case therefore, as the Tribunal had no jurisdiction to order a sub-division of registered land, its award and the order of the Senior Resident Magistrate's Court in adopting it as a judgment in Arbitration Case No. 3 of 2009 were all nullities which this Court must quash.

Ultimately therefore, this Court makes the following orders:-

1. ***An order of certiorari is issued moving into this Court for quashing the un-dated award of the Mwea Land Disputes Tribunal and the order of the Senior Resident Magistrate's Court Wanguru issued on 26th March 2009 in Arbitration Case No. 3 of 2009.***
2. ***The applicant was the author of this unfortunate state of affairs and so she is not entitled to costs.***

It is so ordered.

B.N. OLAO

JUDGE

16TH MARCH, 2016

Judgment delivered this 16th day of March 2016 in open Court

Mr. Abubakar for the Applicant present

No appearance for the Respondents

Right of appeal explained.

B.N. OLAO

JUDGE

16TH MARCH, 2016