



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO 18 OF 2013

REPUBLICAPPLICANT

VERSUS

NDARAGWA DIVISION LAND DISPUTE

TRIBUNAL.....1ST RESPONDENT

EX-PARTE

MURICHO RANCHING CO (LTD)

AND

ESHIBAN THEURI NGATIAINTERESTED PARTY

S.P.M COURT – NYAHURURU.....2ND RESPONDENT

JUDGEMENT

1. This is a judicial review application commenced on 29 April 2013, pursuant to leave granted on 19 April 2013. The principal orders sought by the applicant are for certiorari to quash the decree given on 14 March 2013, which adopted the award of the Nyahururu Division Land Disputes Tribunal in Case No. 7 of 2004. The reasons given for the application are inter alia that the award was arrived at without jurisdiction; that the application for adoption was made more than 6 years after the date of the award and was time barred by virtue of the Limitation of Actions Act, CAP 22, Laws of Kenya; and that the award and decree affects the proprietary rights of some members of the applicant company who were not accorded the right to a hearing thus making the award null and void.

2. The motion is supported by the affidavit of Cyrus Gikonyo Wambugu, who is the secretary of the Board of Directors of the ex-parte applicant company. The case of the ex-parte applicant is that the company was the owner of the land parcel Nyandarua/Ndaragwa/Ndaragwa Block 4 (Muricho)/198 (the suit property) among others, which was procured with the aim of sub-dividing it and allocating it to its members. On 13 September 2004, the interested party, Eshiban Theuri Ngatia (now deceased but represented by Hannah Wanjiku Theuri the personal representative of his estate) instituted a claim in the Ndaragwa Division Land Disputes Tribunal, claiming that he has been denied occupation of the suit property. The tribunal heard the case and made an award on 13 September 2005 in the following terms :-

(i) *The complainant was given the right to occupy and utilize the plot No. 198 (Muricho) in 1973 having paid the initial sum of Kshs. 700/= and we therefore award Mr. Eshiban Theuri Ngatia right to continue occupying the plot as per the Limitation Act.*

(ii) *The sub-division and allocation of the smaller plots hived from Plot No. 198 (Murichu) be revoked by the honourable court of law.*

(iii) *The District Land Registrar and the District Land Surveyor to amend their records accordingly while the court executive officer will sign the transactions on behalf of the Murichu Ranching Company Directors.*

3. The company was not satisfied with the above award and they appealed to the Central Province Land Disputes Appeals Committee. The committee in its award, found that the land belongs to 10 members who hold title deeds and that the claimant has no business occupying the land against the wishes of the members. The Committee ruled that the interested party should vacate the suit property and leave it to the rightful owners.

4. This time, it was the interested party who was not happy with the award. He filed a Judicial Review application before the High Court and asked that the decision of the Appeals Committee be quashed. Before the matter could be decided, the parties entered into a consent whereby they agreed that an order of certiorari may issue to quash the decision of the Appeals Committee and an order of prohibition may issue to stop the Magistrate's Court from adopting the award of the Appeals Committee. The consent was entered into on 13 December 2011.

5. On 7 June 2012, the interested party filed an application seeking the adoption of the original award made on 13 September 2005. A ruling was delivered on 14 March 2013 whereby the application was allowed and a decree issued. It is this decree which the ex-parte applicant wants quashed.

6. It is averred in the supporting affidavit that the suit property did not exist as it had already been sub-divided and new title deeds issued yet the owners were not parties to the tribunal proceedings. The applicant has annexed title deeds to the land parcels Nyandarua/Ndaragwa Ndaragwa Block 4 (Muricho)/63, 145, 455,702,703, and 799 all of which are owned by persons who are not parties to this suit. It is the argument of the ex-parte applicant that the said owners were not given an opportunity to be heard.

7. The State Law Office, for the respondents, filed Grounds of Opposition. Inter alia it is averred that the decree was issued within the jurisdiction and mandate of the Land Disputes Tribunal.

8. The interested party filed a Replying Affidavit. He stated that the Tribunal was duly constituted and annexed Kenya Gazette Notice No. 8833 of 11 December 2003 showing that the panel members were duly gazetted. It is his view that the decree issued by the Magistrate's Court is a proper and valid decree made within jurisdiction. He also raised issue that the argument that the award was adopted out of time is not supported by the Limitation of Actions Act. He averred that it is the directors of the company who illegally sub-divided the suit property. He has pointed out that none of the persons mentioned as title holders have gone to court to challenge the tribunal award and that the applicant cannot be heard to argue that some persons were never heard. He has asked that this motion be dismissed.

9. Counsels filed written submissions in support of their clients' positions. Mr. Gakuhi Chege for the ex-parte applicant, inter alia submitted that the Tribunal was not properly constituted. He submitted that Gazette Notice No. 8833 of 11 December 2003, established only 25 Tribunals among them the Nyandarua District Land Tribunal. He submitted that there was no tribunal established and described as the Ndaragwa Division Land Disputes Tribunal. He submitted that even if the three panel members were duly gazetted, they could not constitute a tribunal in any other name other than the one gazetted by the Minister. On this point, he relied on the cases of ***R vs Ndaragwa Land Disputes Tribunal & Another, Nakuru High Court Misc. Application No. 83 of 2009*** and ***R vs Ol' Joro'Orok Division Land Disputes Tribunal & Others , Nakuru High Court, Judicial Review No. 52 of 2012***. On jurisdiction, he submitted

that the tribunal had no jurisdiction to adjudicate over the issue of ownership to land. He relied on Section 159 of the Registered Land Act (CAP 300)(now repealed) and submitted that the dispute did not fall within the parameters of Section 3 of the Land Disputes Tribunal Act (now repealed). He relied on the decision of ***R vs Ol'Kalou Land Disputes Tribunal & Another ex parte Hannah Wanjiku Mwangi, Nyeri High Court, Misc. Application No. 11 of 2008*** and ***R vs Ngarua Land Disputes Tribunal & 2 Others ex-parte Francis Ndukui Kinuthia, Nakuru High Court Judicial Review Application No. 45 of 2011***. He submitted that execution of the decree will lead to a rectification of the land register and cancellation of ten titles belonging to the applicant's members who benefitted from sub-division of the suit property. He further submitted that there was denial of a right to be heard as the 10 persons who hold titles were not heard in the dispute. He relied on the decision in the case of ***Ogotu & Another vs Okumu (1986) KLR 780***. On costs, he submitted that the same should be shouldered by the interested party who initiated the proceedings in the wrong forum.

10. The State Law Office for the respondent, submitted that this suit is res judicata. Counsel submitted that the applicant conceded to the withdrawal of the Judicial Review matter which sought to quash the award of the Provincial Committee and cannot now be heard to complain. He submitted that this matter has already been adjudicated in Nyeri High Court Civil Application No. 5 of 2009 wherein the consent was recorded that the decision of the Appeals Committee be quashed. He relied on the case of ***Gichuki v Gichuki, Court of Appeal at Nairobi, Civil Appeal No. 21 of 1981***.

11. Mr. Kinyua Njogu for the interested party, submitted that the tribunal was properly constituted as its members had been properly appointed and gazetted through Gazette Notice No. 8833 of 11 December 2003. He submitted that the Tribunal established for the Nyandarua Registration District could hear and determine disputes filed from all over Nyandarua and that the fact that the award was titled "Ndaragwa Division Land Disputes Tribunal" did not change the fact that the said members were duly appointed and gazetted to hear disputes in Nyandarua District. On jurisdiction, learned counsel submitted that the tribunal had jurisdiction to hear disputes involving ownership or title to land. He relied on the case of ***Republic vs Chairman Land Disputes Tribunal, Kirinyaga District & Another ex-parte Kariuki (2005) 2 KLR 10***. On whether there was a breach of natural justice, he submitted that none of the persons said to have title deeds to the sub-divided portions have gone to court to challenge the award on the ground that they were not made parties to the proceedings before the tribunal. On limitation of time, he submitted that Section 4(1) (c) of the Limitation of Actions Act (CAP 22) relates to arbitral awards and not awards passed by the Land Disputes Tribunal.

12. Mr. Chege in his replying submissions, submitted that the matter is not res judicata as the subject matter in Nyeri High Court Misc. Application No. 5 of 2009 was different. He submitted that the consent therein did not affect the award of the Land Disputes Tribunal. He reiterated his submissions that the tribunal could not have been properly constituted and that it was a kangaroo tribunal.

13. It is with the above pleadings and submissions that I need to determine this matter. In my view, the following issues need determination.

- (i) *Whether this judicial review motion is res judicata.*
- (ii) *Whether the Tribunal in issue was properly constituted.*
- (iii) *Whether the Tribunal had jurisdiction to determine the dispute.*
- (iv) *Whether there was a breach of the right to be heard.*
- (v) *Whether the adoption of the award was time barred.*

14. On the first issue, it is the view of the respondent that owing to Nyeri High Court Misc. Application No. 9 of 2009, this suit is res judicata. On my part, I do not think so.

15. The award sought to be quashed in Nyeri High Court Misc. Application No. 9 of 2009 was the award

of the Appeals Committee, not the award of the Land Disputes Tribunal. The award of the Appeals Committee was quashed by consent. I do not know the reasons why the parties came to this agreement for none of the parties shed light on this consent. I wouldn't want to speculate, save to state, that the matter before this court is not the same as the matter that was canvassed in Nyeri High Court Misc. Application No. 9 of 2009. The subject matter herein is not the award of the Appeals Committee but the award of the Land Disputes Tribunal. I do not think that it is necessary for me to say more on this point. I hold that this suit is not res judicata.

16. The second issue is the argument raised by the ex-parte applicant, that the entity "Ndaragwa Division Land Disputes Tribunal" did not exist, and cannot be one of the tribunals envisaged by the Land Disputes Tribunal Act (LDTA) (now repealed by the Environment and Land Court Act, 2011). I think the point that is being pressed is that the Land Disputes Tribunals could only exist in accordance with their registration districts and in no other fashion, so that there could not exist an entity called the "Ndaragwa Division Land Disputes Tribunal." Support for this argument can be found in the decisions of Emukule J and Waithaka L J, in the cases of ***R vs Ndaragwa Land Disputes Tribunal & Another ex-parte Miriam Wambui Mwangi*** and the case of ***R vs Ol-Jororok Division Land Disputes Tribunal & Others***, both cited by counsel for the interested party. In the former, Emukule J, held that the Ndaragwa Land Disputes Tribunal could not have been properly established as it was not among those contained in the Minister's Gazette Notice. In the latter case, Waithaka L J, held that Section 4 of the LDTA provided for tribunals for each registration district, yet Ol-Jororok was not a registered district. She held that the registered district for the area was Nyandarua and therefore the Divisional Tribunal lacked jurisdiction.

17. The above two decisions are only persuasive in nature but I think the point made in the said decisions is valid. Section 4 (1) of the LDTA provided as follows :-

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

18. The registration districts were spelled out in a Schedule to the statute. Of course in the schedule, there is no Ndaragwa Division Land Disputes Tribunal. In Gazette Notice No. 8833 of 11 December 2003, Nyandarua Registration District is mentioned, and the persons who sat in the tribunal in question were members falling under Nyandarua Registration District. The consensus herein seems to be that Ndaragwa falls within Nyandarua District but the question still remains whether the description Ndaragwa Division Land Disputes Tribunal made the award one which has been reached by an entity which did not exist.

19. It could be that because Districts were large in geographical size, the tribunal members appointed by the Minister were empanelled in Divisions within these Districts. If this was the case, then it ought to have been made clear that the panelists are sitting as the Nyandarua District Land Disputes Tribunal sitting in Ndaragwa Division so that there is no contention that the members have sat within a body that is not recognized by law.

20. But assuming that the body that sat to hear the dispute was properly empanelled, did it have jurisdiction to hear the dispute? In my opinion, it did not. The jurisdiction of the tribunal was set out in Section 3 (1) of the LDTA 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; or

(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

21. The dispute before the tribunal was on who should have title to the suit property which is not a matter that fell within the jurisdiction of the tribunals. Although the award was couched in terms that the decision therein was on who should occupy land, that terminology was a misnomer, as the dispute was

never one on a claim to occupy land. The award proclaimed that the interested party has a right to continue occupying the plot as per the "Limitation Act". The only doctrine that comes to my mind which can give title based on long occupation is the doctrine of adverse possession which is addressed in Section 38 of the Limitation of Actions Act. The court with jurisdiction, according to Order XXXVI of the Civil procedure Rules that was operative at the time, was the High Court, and not the Land Disputes Tribunal. It was argued by Mr. Njogu that the Land Disputes Tribunals had jurisdiction to address matters of title but I do not agree with that.

22. Section 159 of the Registered Land Act (now repealed by the Land Registration Act, 2012), under which the suit property is registered, provided as follows on the question of jurisdiction :-

159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.

23. The above provision speaks for itself. Proceedings relating to title or possession of land or to any interest in land were to be heard by the High Court, although the Magistrates Courts were granted jurisdiction where the value of the subject matter did not exceed the sum of Kshs. 500,000/= (which is the sum equivalent to 25,000 pounds). The Land Disputes Tribunals only had jurisdiction as provided by Section 3 (1) of the Land Disputes Act, which I have already outlined above, and the said provision of the law, never gave Land Dispute Tribunals, the jurisdiction to handle matters relating to title to land. Mr. Njogu in his submissions argued that the tribunals had jurisdiction to handle matters touching on title to land and relied on the case of ***R vs Chairman Land Disputes Tribunal, Kirinyaga District & Another ex parte Kariuki***. I have read the decision, which is not binding on me, and with the utmost of respect, I am not persuaded by it, at least in so far as it was held that a Land Disputes Tribunal has jurisdiction to adjudicate disputes over title to land.

24. The core issue in the dispute before the tribunal was who should be the owner of the suit property, which was a matter that could only be determined by the High Court, or the Magistrate's Court, depending on whether the value of the suit property fell within the limits of Kshs. 500,000/= as provided by Section 159 of the Registered Land Act. The Land Disputes Tribunal did not have jurisdiction to adjudicate over this dispute. Having not had jurisdiction, the decree is also misplaced and is liable to be set aside.

25. The 4th issue is whether there a breach of the right to be heard? The short answer is yes. Even if the tribunal had jurisdiction, they could not proceed to hear the dispute in the absence of the proprietors of the land parcels in issue. It appears as if the suit property had already been subdivided into smaller plots which were owned by different persons. The dispute could not be heard without the proprietors of those subdivided parcels being litigants in the matter. A determination was going to be made which affected their proprietorship, and they deserved to be heard in the matter, not as witnesses, but as parties. It matters not that they have not complained; simply because they have not filed any proceedings of their own does not mean that they acquiesced to the decision or that they waived their right to be heard. Probably they were not even aware of the proceedings now that they were not parties thereto. It is enough that the one litigant in the matter, who is the ex-parte applicant, has raised the flag, that the matter before the tribunal proceeded in the absence of vital parties. The persons who were most affected by the litigation were never heard and there was a clear breach of the law of natural justice.

26. The fifth and last issue is whether the award was adopted out of time. The award was made on 13 September 2005. It was adopted on 13 March 2013, which is between 7 and 8 years. The argument is that it ought to have been adopted within 6 years and Section 4(1) of the Limitation of Actions Act was cited as authority. The same provides as follows :-

S. 4 (1) The following actions may not be brought after the end of six (6) years from the date on which the

cause of action accrued :-

(a) ...

(b) ...

(c) *Actions to enforce an award.*

27. Counsel for the applicant argued that the decision of the tribunal was an award falling within the parameters of Section 4 (1) (c) of the Limitation of Actions Act. On this point, I do not agree. I concur with Mr. Njogu's submissions that the term "award" in the Limitation of Actions Act, means an award of an arbitrator for the purposes of the Arbitration Act, or a foreign award within the meaning of the Arbitration (Foreign Awards) Act, pursuant to the definition of "award" given in Section 2 of the Limitation of Actions Act. The award in question is not one of an arbitrator but one of the Land Disputes Tribunal. It is therefore not captured by Section 4 (1) (c) of the Limitation of Actions Act. I cannot on my part find any fault in the timeline within which the decision of the tribunal was adopted as a decree by the Magistrates Court especially given that the award was subjected to an appeal, and the appeal was then subjected to a judicial review application, the totality of which took a considerable amount of time.

28. My core finding however, is that the Land Disputes Tribunal did not have jurisdiction to determine the matter. The decree that adopted the award cannot therefore stand and it is hereby quashed by an order of certiorari. With it, the award also falls by the wayside and cannot be enforced.

28. The only matter left is costs. Costs are in the discretion of the court. I note that in other litigation between the parties, the litigants had agreed to have each party bear its

own costs. In the same spirit, I make no orders as to costs.

30. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 23rd day of September 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

N/A for M/s Gakuhi Chege & Co for applicant

N/A for M/s Kinyua Njogu & Co for Interested party

N/A for state Law Office for respondent

Court assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU