



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET
E&L JUDICIAL REVIEW 12 OF 2013
FORMERLY HCC MISC APPLICATION 1 OF 2008

REPUBLIC.....APPLICANT

VS

CHAIRMAN, UASIN GISHU LAND DISPUTES TRIBUNAL1ST RESPONDENT

ATTORNEY GENERAL OF KENYA.....2ND RESPONDENT

RONALD SOME NGELECHEI.....INTERESTED PARTY

KAPTICH ARAP MOROGO.....EX PARTE APPLICANT

(Application seeking to quash decision of Land Disputes Tribunal; Tribunal having made orders declaring interested party and others as being owners of the land of the ex-parte applicant; whether Tribunal had the requisite jurisdiction; failure to enjoin the magistrate's court which adopted the award; whether such omission fatal to proceedings; Application allowed; decision of Tribunal quashed.)

RULING

This is a Judicial Review application seeking orders of prohibition and certiorari. As drawn it seeks the following orders :-

1. *THAT this Honourable Court do find it fit to grant orders of Prohibition Mandamus and Certiorari, prohibiting the Chief Magistrate's Court from signing and sending to the Land Control Board the application forms for consent to sub-divide LR No. 5593.*
2. *THAT costs of this application be provided for.*

What is in issue is a decision of the Land Disputes Tribunal which was made on 28 June 2007. That decision was adopted by the Chief Magistrate's Court on 26 July 2007 and a decree was issued.

A little background will shed light as to why these orders are being sought.

The subject matter of litigation is the land described as LR No. 5593 which is said to be land registered under the Registration of Titles Act (the suit land). A dispute arose between the applicant one and Ronald Some Ngelechei, the Interested Party, which dispute was referred by the Interested Party to the Uasin Gishu Land Disputes Tribunal, established by the Land Disputes Tribunal Act, CAP 303 Laws of Kenya (now repealed by the Environment and Land Court Act, Act No. 19 of 2012). The Tribunal proceeded to

hear the dispute. In the Tribunal, the case of the Interested Party was that he purchased 20 acres of the suit land at a price of Kshs.18,000/= on 29 June 1976. Later more money was added which entitled the Interested Party to additional acreage. In total, the Interested Party claimed 31 acres of the suit land. He also presented evidence that the suit land has been sold to other people who have not yet been given titles. The applicant presented his evidence to oppose the case of the Interested Party. In its verdict the Tribunal held that 31 acres of the suit land belong to the Interested Party. It further made an order that the Government Surveyors do move to sub-divide the suit land into 13 portions, on the basis that 114 acres of the suit land had been sold to 12 persons, and the applicant was only entitled to the remainder of 8.5 acres. It is that decision which the applicant wants quashed.

The grounds upon which the applicant wants the said decision quashed are inter alia, that the Tribunal did not have jurisdiction, that the Tribunal took into account extraneous matters, that the Tribunal failed to consider that the transaction between the applicant and Interested Party was void for want of consent of the Land Control Board, and that the claim of the Interested Party was time barred.

The Interested Party filed a Replying Affidavit. He more or less repeated the evidence that he tabled at the Tribunal. He affirmed that the Tribunal made a decision on 28 June 2007 which was adopted as the judgment of court on 26 July 2007. He annexed a copy of the decree. He has averred that there has been no appeal against the said judgment. He has stated that on 5 November 2007, he filed an application seeking orders to have the Executive Officer of the Court sign the Land Control Board forms so that the suit land may be sub-divided. The application was heard and allowed on 12 November 2007, and on 15 November 2007, the Executive Officer signed the Land Control Board forms. On 20 December 2007, the Soy-Turbo Land Control Board gave consent to the sub-division of the suit land as proposed by the Tribunal. He has averred that the prayers in the main Motion seeking orders of Prohibition to prohibit the Chief Magistrate's Court from signing and sending to the Land Control Board the application to sub-divide the suit land has been overtaken by events. He has averred that the applicant has not made any substantive prayer for mandamus or certiorari. On those reasons he has asked that the Motion be dismissed.

In the course of time, the ex-parte applicant died, and he was substituted by his representatives, Dickson Kiptoo Morogo and Lily Jepkorir Morogo, who continue this suit on behalf of the estate of the deceased.

In his submissions, counsel for the applicant argued that the Tribunal proceeded to hear a matter in which it had no jurisdiction. Counsel referred to the provisions of Section 3 (1) of the Land Disputes Tribunal Act. He argued that what the Tribunal decided was to make an order for specific performance which was outside its jurisdiction. He further argued that the Tribunal had no jurisdiction over registered land. Counsel also faulted the Tribunal for proceeding to make awards involving other people who were not party to the dispute. He relied on the case of *Judethius Kiplagat Malakwen v Rift Valley Land Disputes Tribunal*, Court of Appeal at Eldoret, Civil Appeal No. 82 of 2006; *Mcfoy v United Africa Co Ltd* (1961) 3 All ER 1169; and *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* (1989) KLR 1.

Ms. Lydia Lung'u, counsel for the respondent, on the other hand argued that the application is defective for failure to enjoin the Chief Magistrate yet the orders sought are against the Chief Magistrate. She relied on the case of *Wycliffe Malesi v Central Division Land Disputes Tribunal & 2 Others, High Court at Kitale, Misc. Application No. 55 of 2007 (2011)* eKLR. She also argued that the applicant has not substantially sought orders to quash the decision of the Tribunal and submitted that this court ought not to interfere with the decision of the Tribunal and subsequent order of the court. She further argued that there is no proceeding pending before the Chief Magistrate's court to warrant the issuance of a prohibitory order. She relied on the case of *Republic v Attorney General & Another, High Court at Machakos, Misc. Application No. 59 of 2002, (2005)* eKLR. She also submitted that there was no evidence tendered to show that the land was registered land.

The interested party's counsel submitted that the Tribunal had jurisdiction since the process of subdivision and survey is the establishment of boundaries for each parcel of land. He further argued that once the decision of the Tribunal was adopted, the aggrieved party had only the avenue of appeal to the Provincial Appeals Tribunal. He also argued that there was no prayer in the substantive motion to quash the award of

the Tribunal or the subsequent decree of the Chief Magistrate's Court. He also argued that there was no statement served together with the application but that the Statement was served later in contravention of the Rules. He also argued that the affidavit is only supportive and does not cure the fatal defects in the Notice of Motion.

It is with the above rival submissions that I need to decide this matter.

I will begin with the nature of the order sought since a lot has been said about it. I have already set out in the beginning of this ruling, the order as drafted. As drafted, the applicant has sought orders of "*prohibition mandamus and certiorari, prohibiting the Chief Magistrate's Court from signing and sending to the Land Control Board the application forms for consent to sub-divide LR No. 5593.*" However, the supporting affidavit contains the following at paragraphs 12 and 13

12. That an order of mandamus ought to issue to compel the Chief Magistrate's Court to deliver to this court any forms that have been issued and signed in pursuance to the Decree for purposes of rendering them inoperational and for cancellation.

13. That an order of certiorari ought to issued (sic) quashing the proceedings, award in the Tribunal and the Decree in the Chief Magistrate's Court.

Mr. Etyang for the interested party argued that the supporting affidavit is merely evidence in support, and cannot supplement the orders in the main motion. In principle I agree. However, when one looks at the totality of the pleadings tendered, one cannot escape the fact that, substantially, what the applicant wants, is to quash the proceedings and award of the Tribunal, and everything else that followed thereafter, for the main reason that the Tribunal acted without jurisdiction. The Motion as drafted could no doubt have benefited from better artistry. But I cannot punish the applicant for the reason that the draftsmanship of his counsel was poor when I can clearly see exactly what he is looking for. Neither can the respondents or interested party plead that they will be prejudiced, for paragraphs 12 and 13 above, should have alerted them as to what the applicant wanted, and indeed, they were given opportunity to respond. This to me is a fit case in which the court ought not to be too stringent on procedural technicalities and apply substantive justice pursuant to the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010. I will therefore construe the Motion as also including the prayers set out in paragraphs 12 and 13 of the supporting affidavit.

The other argument raised is that the Motion is defective for failure to enjoin the Chief Magistrate. I agree that technically, when a party seeks orders against an entity, that entity needs to be enjoined. Thus, if all that the applicant wanted was to quash the decision of the Chief Magistrate, then the Chief Magistrate ought to have been enjoined. However, I have already construed this Motion as also seeking orders to quash the proceedings and award of the Tribunal. If the proceedings and award of the Tribunal are quashed, everything else flowing from that, is null and void. It follows that even if I did not touch the decree, nor the action of the Chief Magistrate in executing the applications to the Land Control Board, and I proceeded to declare the proceedings and award of the Tribunal as null and void, everything done pursuant to those proceedings and the award will automatically have to fall by the wayside. It will indeed be absurd for me to quash the award, yet, let everything else that followed stand, on the basis that there are no clear pleadings seeking to void what has been done in furtherance of the award. The decree and the latter action by the Chief Magistrate were all founded on the basis of the award. Without the award, such decree and actions are not on solid rock, but on quicksand, and they must sink. It is therefore irrelevant that the Chief Magistrate was not enjoined to these proceedings. I do not think that failure to enjoin the Chief Magistrate is therefore fatal to the applicant's case. With respect I am not persuaded by the decision in the case of ***Sammy Wycliffe Malesi***.

The substantial question in these proceedings is whether or not the Tribunal had jurisdiction to hear the matter before it. The case presented before the Tribunal was that the interested party was entitled, through purchase, to 31 acres of the suit land. Was that a dispute that the Tribunal had jurisdiction to entertain? The jurisdiction of the Land Disputes Tribunal was laid out in Section 3 of the Land Disputes Tribunal Act. It 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.

It will be seen from the above, that the jurisdiction of the tribunal, was only on matters related to the division or determination of boundaries; claims to occupy or work land; and trespass to land. The Land Disputes Tribunal did not have jurisdiction to issue declaratory orders on the ownership of land and, neither did it have jurisdiction, to determine disputes revolving around ownership of land. The argument that determining ownership, would be determining a matter of division or determination of boundaries to land, is to me too farfetched. It follows that the Land Disputes Tribunals could not award land to a litigant, for that, would be beyond their jurisdiction. That is exactly what the Tribunal did in this instance. It had absolutely no jurisdiction to determine the question posed by the interested party, that is , whether or not the applicant had sold to the interested party 31 acres of land. I have no doubt in my mind that the Tribunal rendered an award in a matter in which it had no jurisdiction to do so.

Anything done out of jurisdiction is null and void. This is well captured in the dictum of Nyarangi JA in the case of **Owners of the Motor Vessel " Lillian S" v Caltex Oil (Kenya) Ltd**, where he stated : - "*Jurisdiction is everything. Without it, a court has no power to make one more step.*" Any decision, however well reasoned, made out of jurisdiction is a nullity and cannot be given effect. That is the fate that must befall the award of the Tribunal in this matter. I do not hesitate to issue an order of certiorari, quashing the entire award of the Tribunal.

Having found that the award was outside jurisdiction, it is not necessary for me to go into the merits or demerits of it.

It follows that once the award is quashed, every other consequential order must automatically be invalidated. This is what must befall the decree, the order signing the consents of the Land Control Board, and any other act done in furtherance of the award of the Tribunal. They are all hereby nullified . Further, no party ought to move to give effect to that award. The effect of quashing the award is to put the parties back to the positions that they were in prior to the proceedings before the Tribunal. If the Interested party feels that he has an issue to pursue, then he ought to pursue it in the correct forum, and his case will be given due consideration. He cannot hinge on a decision made out of jurisdiction.

The upshot of the above is that this Motion succeeds. The mistake was one of the Tribunal, but I take note that the Tribunals no longer exist owing to the repeal of the Land Disputes Tribunal Act in 2011. It is therefore best that I make no orders as to costs.

In summary I make the following orders :-

(a) The proceedings and award of the Uasin Gishu Land Disputes Tribunal and all other subsequent orders made in executing the award and/or decree are hereby quashed.

(b) The parties are put back to the positions that they were in prior to the proceedings before the Uasin Gishu Land Disputes Tribunal.

(c) There shall be no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Delivered in the presence of:

Mr. P.K. Birech present for the Ex-parte applicant.

Mr. J.M. Ngumbi of the state Law office present for the Respondents.

Mr. A.G.A. Etyang present for the Interested party.