



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
JUDICIAL REVIEW NO.57 OF 2011

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN

KANDARA DISTRICT LAND DISPUTES TRIBUNAL1ST RESPONDENT

THE CHIEF MAGISTRATE, THIKA LAW COURTS.....2ND RESPONDENT

JOHN GACHOKA CHARAGU.....INTERESTED PARTY

AND

GODFREY MUNGAIEXPARTE APPLICANT

J U D G M E N T

On the 25/10/2011, John Gachoka Charagu, hereinafter referred to as the **Interested Party** lodged a Land Dispute at the Kandara District Land Disputes Tribunal against Godfrey Mungai hereinafter referred to as the **exparte applicant** in respect to an issue of sale of land reference **No.LOC.4/KAGUTHI/621** measuring 0.6 Ha.

The gist of the dispute was that when the Interested Party's father was alive, he had a written agreement of sale of the piece of land measuring 0.2 acres with the exparte applicant at a consideration of Kshs.200,000/ whereupon he had paid the latter Kshs.102,200/= leaving a balance of Kshs.97,800.00.

On the 25/6/2003 there was a meeting of the elders of the seller who decided that the agreement to be concluded by the balance being paid in their presence however, unfortunately, his father fell sick and passed on before the sale could be concluded.

The clan elders took the agreement to the Chief who stamped the same and immediately after the stamping, the interested party moved the Tribunal to award him the parcel of land.

The Tribunal heard the **interested party** and the **exparte applicant** and considered the evidence and ordered the exparte applicant to transfer a piece of land measuring 0.20 ha from land reference **No.LOC.4/NG'ARARIA/1045** to **interested party** herein the son of Charagu Gachoka (deceased) on payment of Kshs.97,800 at the cost of the interested party .

The Tribunal was presided over by the Chairman and 6 members contrary to the previous of **Section 4 of the LDT Act No.18 of 1990**. This fact alone renders the decision of the Tribunal a nullity which issue I will address later.

The award was adopted by the Chief Magistrate's Court Thika in D.O case No.50 of 2011 on the 27/9/2011.

On the 25/10/2011, the *ex parte* applicant moved court by way of chamber summons under certificate of urgency for orders that he be granted leave to apply for an order of **certiorari** to remove into the High Court to quash the proceedings and order issued on 26/9/2011 and dated the 27/9/2011 by the Chief Magistrate's Court, Thika in D.O. Case No.50 of 2011 as well as the proceedings and award of Kandara District Land Dispute Tribunal made on 2/8/2011 in L.D.T case No.18 of 2011 in respect to land parcel No.Loc.4/Ng'araria/1045.

Moreover that he be granted leave to apply for an order of **prohibition** to prohibit the Chief Magistrate's Court, Thika and Kandara District Land Dispute Tribunal and or their agents from enforcing and executing the order issued on 26/9/2011 and dated 27/9/2011 in D.O. Case No.50 of 2011, Thika law courts as well as the award dated 2/8/2011 made by Kandara District Land Dispute Tribunal in LDT case No.50 of 2011.

Lastly, that the grant of leave do operate as a stay of the proceedings in Chief Magistrate's Court, Thika D.O. Case No.50 of 2011.

The court after hearing the *ex parte* applicant granted the orders. And directed the applicant to file substantive application within **twenty one (21) days** of the date of the orders.

On the 4/11/2011 the applicant lodged in court the Notice of Motion dated 3/11/2011 seeking for substantive orders namely an order of **certiorari** do issue to remove into the High Court for purposes of quashing the proceedings and order issued on 26/9/2011 and dated the 27/9/2011 by the Chief Magistrate's Court, Thika in D.O. Case No.50 of 2011 and an order of **certiorari** do issue to remove into the High Court for purposes of quashing the proceedings and award of Kandara District Land Dispute Tribunal made on 2/8/2011 in Land Dispute Tribunal case No.18 of 2011 in respect to land parcel No.Loc.4/Ng'araria/1045 and costs of the application. This application was made **on grounds** that the applicant was the registered owner of the freehold land parcel No.Loc.4/Ng'araria/1045 under cap 300 Laws of Kenya. **Moreover** that the interested party referred a dispute to Kandara District Land Dispute Tribunal in case No.18 of 2011 in respect to land parcel No.Loc.4/Ng'araria/1045 pertaining to ownership and title to land and upon hearing the dispute **despite** the fact that they lacked the requisite jurisdiction the Tribunal **ordered** the applicant to transfer a portion measuring 0.20 Ha to the interested party herein **and therefore** the Tribunal's award, and order issued by the Chief Magistrate's Court, Thika are **illegal, null and void** as the Tribunal lacked jurisdiction to hear and determine the dispute lodged by the interested party in view of **section 3 of the Land Disputes Tribunal Act No.18 of 1990**, the provisions of Law of **Contract Act Cap 23** and **Law of Succession Act Cap 160** Laws of Kenya. **Lastly** that the interested party referred a dispute on behalf of the estate of Charagu Gachoka without the necessary letters of administration as required by law and that he has filed an application for the enforcement and execution of the said illegal award and order.

On the 9/5/2012, the matter was fixed for directions for 8/10/2012 on which date it was agreed before Hon. Justice Sergon in the presence of **Mr. Muthoni** for *ex parte* applicant and **Ms Gathagu** Deputy Chief Litigation Counsel on behalf of the Attorney General for the 1st and 2nd respondent and in the absence of the Interested Party that the matter be dealt with by way of submission.

On the 13th of June 2012, the matter was mentioned for further directions and it was agreed that the court makes its decision based on the filed submissions.

The **gravamen** of the applicants submissions is that, the Tribunal lacked jurisdiction to entertain a dispute on breach of contract. Section 3 of the L.D.T Act No.18 of 1990 (now repealed) limited the

jurisdiction of the Tribunal to the division of, or the determination of boundaries to, land, including land held in common; a claim to occupy or work land; or trespass to land.

I agree with the submissions of the *ex parte* applicant that the claim of breach of contract is not contemplated in the said section and therefore the Tribunal had no power to deal with a claim based on contract under the said section. Any attempt by the Tribunal to deal with such a claim would be *ultra vires* and any decision made by the Tribunal on the said claim would be a nullity. This court has jurisdiction under the Law Reform Act Cap 26 Laws of Kenya section 8 & 9 to issue orders of *certiorari* to quash nullities.

I agree with the decision of *Hon. Justice D.S. Majanja* in **Humphrey Kigotho Thiongo -VS- LDT at Makuyu and others NBI H.C. J.R/ELC NO.21 OF 2011** that Land Disputes Tribunals had no jurisdiction to deal with issues of breach of contract to sell land.

The Court of Appeal in **Asman Maloba Wepukhulu and Wycliffe Barasa and Francis Wakwabubi Biketi. C.A.C.A. No.157 of 2001 at Kisumu** held that the title to the suit land was unlawfully interfered with by bodies that lacked jurisdiction hence all orders made were illegal. This decision is relevant to this case as the Tribunal was dealing with interest in registered land despite the fact that it could not interfere with the ownership of land as it lacked jurisdiction.

On the issue of the constitution of the Tribunal raised earlier by this court, I do find that the Tribunal was not properly constituted when *eight members* sat and heard the dispute contrary to the provisions of *section 4 of the Land Disputes Tribunals Act No.18 of 1990 repealed* that provides;

1. **(1) There shall be established a Tribunal, to be called the Land Disputes Tribunal, for every registration district.**
- 2.
3. **(2) Each Tribunal shall consist of -**
4. **(a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and**
5. **(b) either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5.**
- 6.

The fact that more than five members sat to determine the dispute and one of the members did not sign the award makes the same illegal, null and void *abinitio*.

The upshot of the above is that the application dated **3rd November 2011** must succeed and is allowed and the proceedings and award of the Tribunal dated 2/8/2011 LDT Case No.18 of 2011 are hereby brought to court and quashed. Likewise the proceedings and order of the Chief Magistrate's Court at Thika issued on 26/9/2011 and dated on 27/9/2011 are hereby brought to court and quashed. Costs of the application to be paid by the respondents and the interested party. Orders accordingly.

Dated, signed and delivered at Nyeri this 8TH day of AUGUST 2013.

A. OMBWAYO

JUDGE