IN COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), MAKHANDIA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 58 OF 2010

BETWEEN

SAMUEL MAINA NJOROGE .....APPELLANT

AND

LAND DISPUTE TRIBUNAL RUIRU.....1ST RESPONDENT

CHIEF MAGISTRATE COURT AT THIKA.....2ND RESPONDENT

JANE WANJIKU NGUGI.....3RD RESPONDENT

(An appeal from the Ruling of the High Court at Nairobi (J.L.A. Osiemo, J.), dated 6th March, 2009

in

H.C. Misc Civil Appl. No.106 of 2008)

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JUDGMENT OF THE COURT

The genesis of this appeal is an award by the Ruiru District Lands Tribunal in Case No. 25 of 2007 whereby the 3rd respondent was declared to be the owner of two disputed plots, being LR. Ruiru/Ruiru East Block 943 and 944 respectively (the suit properties). As a result, the appellant was ordered to release the respective title deeds of the two plots for cancellation. The award was adopted by the 2nd respondent as an order of the court. Aggrieved by the decision, the appellant filed chamber summons before the High Court for leave to institute judicial review proceedings for orders of *certiorari* to quash the proceedings of both the tribunal and the order of the 2nd respondent adopting as judgment of the court the decision of the tribunal and; that leave, if granted to operate as a stay of all proceedings before the 2nd respondent being D.O No. 60 of 2008.

The application was premised on the ground that the tribunal had no jurisdiction to grant the impugned relief. Osiemo. J, heard the application and dismissed it declaring that: the appellant, having submitted to the jurisdiction of the tribunal by appearing before it, presenting evidence and calling witnesses to testify was estopped from raising the issue of jurisdiction; that the appellant failed to appeal against the decision of the tribunal and the judgment of the court and; that the appellant had failed to comply with the strict rules of procedure that required decisions from the Tribunal to be challenged in the Provincial Appeals Committee and thereafter, on matters of law, to the High Court. On those grounds, he declined to grant leave.

Once more, this decision aggrieved the appellant who has lodged this appeal on four grounds that the learned Judge erred in; finding that the Tribunal had jurisdiction to cancel a title; ignoring all the evidence in favour of the appellant and; failing to appreciate that the judgment of the Magistrate's Court was a nullity.

Learned counsel for the appellant relied on the case of **Samuel Kamau Macharia V. Kenya Commercial Bank Ltd & 2 Others**, Supreme Court Application No. 2 of 2011, to urge that both the tribunal and the Magistrate's court arrogated themselves power beyond their scope and their decision ought to have been rendered ineffective; and that it was immaterial that parties submitted to the tribunal's jurisdiction. To support this argument further, counsel cited the cases of **Council of Civil Service Union & Others V. Minister for the Civil Service** (1984) 3 All ER 936, and submitted that the award by the tribunal and the consequent judgment were administrative actions subject to control by judicial review under three headings of illegality, irrationality and procedural impropriety. Also cited was **Pastoli V. Kabate District Local**

Government Council and Others (2008) 2 EA 300, where it was stated that where a tribunal acts without jurisdiction, its decision would amount to an illegality. Counsel further submitted that it was erroneous for the High Court to hold that an appeal ought to have been filed in the Provincial Appeals Committee yet it would be a waste of time to appeal against an order that had no legal effect whatsoever.

For the 3rd respondent, in opposition to the appeal, counsel submitted that there was no justification to interfere with the award and judgment; that the appellant ought to have appealed to the Provincial Appeals Committee first before applying to the High Court, if still aggrieved but only on points of law as stipulated under **section 8 (9) of the Land District Tribunals Act** (now repealed). This Court on this occasion, sits as a first appellate court, the decision appealed against having arisen from the High Court's refusal to grant leave to bring judicial review application. This being a first appeal, the Court;

> **" … will not lightly differ from the judge at first instance on a finding of fact but it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary.**

See **Mwanasokoni V. Kenya Bus Services Limited & 3 Others** (1982-88) 1 KAR at page 872.

The refusal to grant leave marked the end of the road for the respondent. **Section 9** of the Law Reform Act and **Order 53 Rule 1(1)** of the Civil Procedure Rules require, in mandatory terms that an application for *mandamus*, prohibition or *certiorari* can only be brought upon the court granting leave to do so. Without leave, as this Court stressed in **R V. Communications Commission of Kenya & 2 others Ex Parte East Africa Televisions Network Ltd.** (2001) KLR 82, no proceedings under **Order 53** can commence.

Leave may only be granted if on the material available, the court is of the view, without definitive conclusions, that the application is arguable- fit for further investigation at an *inter partes* hearing of the substantive motion. This is how Lord Scarman in the case of **Inland Revenue Commissioners V. National Federation of the Self-Employed and Small Business Ltd** [1981] 2 All ER 93 at page 113 cited with approval by this Court in **Mirugi Kariuki V. Attorney General** Civil Appeal No. 70 of 1991 [1990-1994] EA 156; explained the necessity and importance of obtaining leave before instituting judicial review proceedings;

> **"…If he fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers…"**

Did the learned Judge properly exercise his discretion in rejecting the summons for leave? The learned Judge supposed that by failing to exhaust the alternative appellate mechanism and having fully participated in the proceedings before the tribunal, the appellant was not deserving of leave.

Generally, it is now accepted that where Parliament has provided statutory mechanism for resolving disputes, parties must exhaust those mechanisms before invoking judicial review; that judicial review, in situations where there are alternatives will only be resorted to in exceptional circumstances. For this last reason, it follows that availability of other remedies or mechanisms is not, in itself a bar to the granting of the judicial review relief, but a factor the court considers in granting or rejecting the relief. See **Cortec Mining Kenya Limited V. Cabinet Secretary Ministry of Mining & 9 others** [2017] eKLR, **Kenya Revenue Authority & 5 others V. Keroche Industries Limited -**Civil Appeal No. 2 of 2008 and **Kenya Revenue Authority & 2 others V Darasa Investments Limited** [2018] eKLR. 23.

Today the issue has found expression in law. **Section 9(4)** of the Fair Administrative Action Act stipulates that:-

> **"Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."**

Secondly, it is not enough to insist, as the Judge did that the appellant having participated in the proceedings before the tribunal he was barred from raising questions of jurisdiction. As **Samuel Kamau Macharia V. Kenya Commercial Bank Ltd** (supra) and the time-honoured **Owners of the Motor Vessel "Lillian S" V. Caltex Oil (Kenya) Ltd** [1989] KLR 1 keep reminding us, jurisdiction is everything. Without it, a court has no power to make one more step; that a Court's jurisdiction flows from either the Constitution or legislation or both; that a Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law and; that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. The authorities also confirm that jurisdiction cannot be conferred by consent of the parties or acquiescence.

In the end, we are of the considered view that the appellant's application was not idle. The issue of jurisdiction goes to the core of any litigation. It was not suggested that he was in an abuse of the court process. He was certainly not a busybody, crank or a mischief-maker. The learned Judge erred in his detailed approach to the question of leave by considering matters reserved for the main motion. In our view, the appellant made out an arguable case, fit for further investigation at an *inter partes* hearing of a substantive motion.

Accordingly, we allow the appeal, set aside the ruling and orders of 6th March, 2009 and in its place, we allow chamber summons dated 4th December, 2008. The appellant shall file before the Environment and Land Court, Nairobi a notice of motion for judicial review within 21 days from the date of this judgment. We make no orders as to costs.

Dated and delivered at Nairobi this 22nd day of February, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR