IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, J. MOHAMMED & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO 71 OF 2014

BETWEEN

JAMES KARIKO BACHA ……1ST APPELLANT

HARRY BACHA NJUGUNA …….. 2ND APPELLANT

MATHEW NJOROGE BACHA …….. 3RD APPELLANT

AND

THE LAND DISPUTES TRIBUNAL KIAMBU WEST…..….. 1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT

KIKUYU.....2ND RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya, at Nairobi ***(Osiemo, J.)*** *dated 10th December, 2008* **in Misc. JR ELC No. 88 of 2008**)

JUDGMENT OF THE COURT

On 22nd October, 2008, the appellants, **James Kariko Bacha, Harry Bacha Njuguna** and **Mathew Njoroge Bacha** and two others, namely **Walter Kabetu Bacha** and **Harry Bacha Njuguna** who are not parties to this appeal moved the High Court at Nairobi by an Ex-parte Chamber Summons application under section 8 and 9 of the Law Reform Act and Order LIII Rules 1 & 2 of the Civil Procedure rules seeking leave to commence judicial review proceedings for orders of certiorari and prohibition. The order for certiorari was to remove into the High Court and quash the decision of the Land Disputes Tribunal, Kiambu West *"the 1st respondent"* made on 23rd May, 2008 allocating one acre to be hived off from LR NO. **Kabete/Kibichiku/49,** hereinafter "**the suit land"** to one H**otensiah Millicent Kibiru**, deceased hereinafter "**Hotensiah**" and prohibition was to prohibit the respondents from enforcing the aforesaid decision of the tribunal. The appellants also prayed that the leave so granted do operate as stay of the said decision and lastly that the Senior Resident Magistrate's Court, Kikuyu *"the 2nd respondent"* be stopped from enforcing the aforesaid decision of the 1st respondent.

In support of the application, the appellants in their supporting affidavit sworn by Walter Kabetu Bacha deponed that the decision of the 1st respondent was ultra vires its powers and authority; was contrary to the law; and enforcement of the same by the 2nd respondent would not only be unlawful and illegal but would also be prejudicial to the appellants' rights.

The brief facts with regard to this litigation are that there was a land dispute between the appellants and Hotensiah, the sister in-law to the appellants with regard to the suit land. All the parties were related to one Ernest Bacha "**deceased**". Whereas the appellants were sons of the deceased, Hotensiah was the deceased's daughter in law. Hotensiah filed a claim before the 1st respondent being **No. KW/LND/9/6/32/2008** in which she prayed for a share of the suit land which at the material time was registered in the name of the deceased in her capacity as the deceased's daughter in-law, by virtue of her late husband being the eldest son of the deceased. Both parties appeared before the 1st respondent and agreed that the issue to be determined was whether Hotensiah's late husband, **Lewis Kibiru Bacha** was entitled to a share of the deceased's estate. During the proceedings each party presented evidence through witnesses. At the end of the hearing, the 1st respondent made a finding that Hotensiah was entitled to a share of the deceased's estate and was given a portion of the suit land where her late husband's remains were interred. The 1st respondent further directed that the executive officer, Kikuyu Law Courts do execute and sign all the necessary documents to effect the transfer of one acre from the suit land to Hotensiah.

Though aggrieved with the decision, the appellants did not appeal against the decision of the 1st respondent as envisaged in the repealed Land Disputes Tribunal Act, hereafter *"the Act"*. Instead they filed the application the subject of the present appeal and challenged the jurisdiction of the tribunal to handle the dispute. The learned Judge in dismissing the application for leave to commence judicial review proceedings held that the Act provided that any party aggrieved by the decision of the tribunal could within 30 days appeal to the Appeals Committee constituted for the Province in which the land, the subject matter of the dispute is situated. The decision of the Appeal Committee would be final on any issue of fact and no appeal would lie therefrom to any court. The learned Judge further observed that the National Assembly in its wisdom foresaw that there could be occasions when the tribunal could act outside its jurisdiction and provided a right of appeal to the High Court within 60 days from the date of the decision complained of and such an appeal would not be admitted to hearing unless a Judge had certified that an issue of law other than customary law was involved.

The learned Judge then held that the appellants had failed to appeal against the decision of the 1st respondent and the said decision had been adopted as the judgment of the Court in accordance with section 7 (1) of the Act. That to the extent that the appellants submitted themselves to the jurisdiction of the tribunal and failed to raise the issue of jurisdiction, they were estopped from raising the issue before him. He further ruled that the appellant should have followed due procedure and only accessed the High Court as provided for in the Act. The appellants should not have abandoned that jurisdiction mid-way and jumped to an alternate jurisdiction. Accordingly, the learned Judge held that the appellants had not placed sufficient material before him to persuade him to exercise his discretion in their favour and subsequently declined to grant the leave sought.

Dissatisfied with the ruling and order aforesaid, the appellants lodged the instant appeal in which they raised the following grounds to wit that the learned Judge erred in law in failing; to exercise his discretion judiciously; consider the law; find that the appellants had established grounds for finding that the 1st respondent's decision was so irrational that it warranted review; finding that the appellants were estopped from raising the issue of jurisdiction; denying the appellants the right to be heard on the issues raised; finding that Hotensiah was a daughter to the deceased whilst that was not her claim and to take into consideration the appellants' registration as proprietors and occupation of the suit land for over 26 years.

During the hearing of the appeal, **Miss Akoth,** learned counsel represented the appellants whereas **Mr. Eredi,** Deputy Chief State Counsel appeared for the respondents. The appellants relied on their written submissions that they had filed earlier and opted not to highlight while the respondents submitted orally.

The appellants in their written submissions took the view that the learned Judge's decision was based on wrong principles of law and faulted him for refusing to grant them leave and denying them the opportunity to be heard. The Court had a duty to examine whether the issue of lack of jurisdiction which was at the heart of the matter would manifest an arguable case. That the learned Judge erred in finding that the appellants submitted to the tribunal's jurisdiction when in fact their response and written submissions before the tribunal indicated that they objected to the tribunal's jurisdiction to deal with the dispute. That the appellants satisfied all the requirements for granting leave and ought therefore to have been granted the same.

Opposing the appeal, Mr. Eredi submitted that the learned Judge could not be faulted for exercising his discretion properly. That the learned Judge looked at the proceedings of the 1st respondent and noted no procedural impropriety to invite judicial review order of certiorari. That the 1st respondent had jurisdiction to entertain the proceedings pursuant to section 3 of the Land Disputes Act. That the appellants failed to make a prima facie case at the leave stage hence the denial of leave was justified.

We have considered the record, the submissions by learned counsel and the applicable law. The issue that warrants determination is whether based on the material placed before the learned Judge, he erred in declining to grant the appellants leave to commence judicial review proceedings.

There was no contestation that there was a claim before the 1st respondent in which all the parties involved participated and a decision was rendered. That the said decision by the 1st respondent was adopted as a judgment of the Court by the respondent pursuant to section 7 of the Act. There was also no dispute that the appellants did not pursue their right of appeal under section 8 of the Act, to the Provincial Appeals Committee within 30 days after which they would have been entitled to a further appeal to the High Court on points of law only within 60 days. The appellants abandoned the said avenues to seek redress and instead invoked the provisions of the Law Reform Act and the Civil Procedure Rules which entitle a party to seek judicial review orders.

However, leave to apply for judicial review proceedings is not granted as a matter of course or mere formality. The purpose of leave is meant to scrutinize and sieve claims to ensure that those that proceed to the next stage are not frivolous but serious enough to warrant interrogation by the court. For an application for leave to succeed therefore, the Court hearing the application must satisfy itself that the applicant has demonstrated a prima-facie or arguable case that calls for consideration by the court that will eventually hear the substantive application. That was not the case in the matter before us. The learned Judge was not satisfied that the appellants had exhausted all remedies available to them under the Act before moving the High Court for leave to commence judicial review proceedings. It is trite that where the Constitution or statute provides a remedy and confers jurisdiction upon a Court, tribunal, person, body or any authority, that jurisdiction should be invoked and exhausted. In **Secretary, County Public Service Board & another v Hulbhai Gedi Abdille, [2017] eKLR** this Court expressed itself as

follows:

> ***"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectvely be delt with in that other forum. Such party ought to seek redress under the other regime.***

We are only too aware that the existence of another forum for the resolution of a dispute does not bar a party from instituting judicial review proceedings. Judicial review may still be invoked, non-exhaustion of the alternate remedies notwithstanding. Section 9 (4) of the Fair

Administrative Action Act provides as follows:

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

The principles to be considered to determine whether a case falls within the exception were outlined in the case of **Republic v National Environment Management Authority**, **(2011) eKLR** where this Court observed:

> ***"...in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."***

It is our view that the appellate process set out in the Land Disputes Tribunal Act was best suited to determine once and for all the dispute. The question of jurisdiction would have been canvassed as a pure point of law in the High Court at the tail end of the appellate process set out in the Act had the appellants invoked it. The Judge was therefore right in rejecting the application on that score.

The learned Judge was also not satisfied that the material placed before him was sufficient to persuade him to exercise his discretion. It is trite law as was held in **Kenya Revenue Authority & 2 others v Darasa Investments Limited, [2018] eKLR** that:

> ***"Judicial review orders are discretionary in nature and whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice".***

We do not discern any misdirection or wrong on the part of the learned Judge in the manner that he exercised his discretion. We therefore find no reason to interfere with that exercise.

The upshot is that we find no merit in the appeal which we hereby dismiss with no order as to costs as this was a family dispute.

Dated and delivered at Nairobi this 8th day of November, 2019.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR