IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & OKWENGU, JJ.A)

CIVIL APPEAL NO. 204 OF 2014

BETWEEN

JUSTUS KINIU MUINDI.....1ST APPLICANT

RICHARD MWENDWA MUINDI.....2ND APPLICANT

JANET MARTHA SAVA.....3RD APPLICANT

GRACE TEMEA KALUYU.....4TH APPLICANT

JEDIDAH NDUNGI NGOMA.....5TH APPLICANT

AND

THE SENIOR RESIDENT MAGISTRATE KITUI.....1ST RESPONDENT

KITUI DISTRICT LAND DISPUTES TRIBUNAL.....2ND RESPONDENT

SAMMY MWOVA MUINDI.....3RD RESPONDENT

(Being an application for leave to file Notice of Appeal out of time in an appeal from the whole of the ruling and orders of the High Court of Kenya at Machakos, (A. Makhandia, J.) dated 15th May, 2012

in

H. C. Miscellaneous Civil

Application No. 185 of 2008)

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JUDGMENT OF THE COURT

The Appellants **Justus Kiniu Muindi** (**Justus**); **Richard Mwendwa Muindi(Richard); John Kalya Muindi** (**John)**; **Janet Martha Sava**(**Janet); Grace Temea Kaluyu** (**Grace**) and **Jedidah Ndungi Ng oma** (**Jedidah**) sought leave of court to apply for an order of certiorari to remove to the High court and quash the 2nd respondent's award, and an order of prohibition against the same court, prohibiting it from

enforcing and executing the said order against the appellants or in any other way proceeding further with land case number 1 of 2007.

Leave was granted on the 18th day of April, 2007 by **Emukule J** (as he was then). The Notice of Motion was dated, the 7th day of May, 2007 and filed on the 8th May 2007. The motion was based on the grounds in its body, a statement of facts; a verifying affidavit together with annextures thereto. It was opposed by a replying affidavit of the 3rd respondent deposed on the 23rd day of May, 2007 and filed on the 24th May, 2007 and a supporting affidavit of **Peter Kimwele Mutuni** (**Peter**) deposed on the 8th day of June, 2007 and filed on the 12th day of June, 2007. The merit disposal of the above competing interests is what resulted in the impugned ruling of Asike Makhandia J. (as he then was) dated the 5th day of May, 2012.

The appellants initially raised ten (10) grounds of appeal, but subsequently abandoned grounds 5&6 at the hearing. The rest can be compressed into four (4) grounds as follows:

That the honourable Judge erred and misdirected himself in law:-

1. When he dismissed the appellant's application dated the 7th day of May 2007 on the ground that it was fatally defective.

2. When he made his decision based on an affidavit sworn by **Peter K. Mutuni** who was not a party to the proceedings.

3. When he held that the 2nd respondent was properly constituted by reason of the participation of **Peter K**. **Mutuni** in its proceedings.

4. When he held that the 2nd respondent did not exceed its jurisdiction.

Learned counsel **Mr. Musyoki** submitted that failure to cite **sections 8** and **9** of the **Law Reform Act Cap 26** of the Laws of Kenya (the Act) was a mere technicality, not raised as one of the issues for determination before the learned Judge, and was therefore not fatal to the appellant's Notice of Motion; that the learned Judge fell into error when he relied on the affidavit of **Peter** who was not a party to the Judicial Review proceedings; that the said affidavit together with the annexures thereto could not cure the annomally in the names of **Peter Kimwele Mutemi** for **Peter K. Mutuni** as these were not originated by the appointing Authority, namely the office of the Attorney General. Neither could these serve as a corrigendum substituting the name of **Peter Kimwele Mutemi** for that of **Peter K. Mutuni**.

Turning to the issue of want of jurisdiction, **Mr. Musyoki** submitted that the 2nd respondent had no jurisdiction to deliberate on matters touching on the ownership of registered Land. On lack of composition of the 2nd respondent, learned counsel submitted that there was want of composition on account of the participation in the said proceedings by **Peter** who was not a gazetted member of the 2nd respondent. In **Mr**. **Musyoki's** view, once the participation of **Peter** in the said deliberations was discounted, the 2nd respondent lacked quorum, thereby rendering the resultant award null and void.

To buttress his submissions, **Mr. Musyoki** cited the case of **M'Marete versus Republic and 3 others [2004] eKLR** for the holding that Land Disputes Tribunals (as they were known then) had no mandate to adjudicate over matters touching on ownership of Land registered under the Registered Land Act (now repealed) in terms of the provisions of Section 3(1) of the Land Disputes Tribunal Act 1990 (now repealed); (the Tribunals Act) and, the case of **Moijo Mataiya ole Keiwua versus Chief Justice of Kenya & 6 others [2008] eKLR** in which the court ruled that receiving and acting on affidavits filed by persons not party to the proceedings was highly irregular and improper.

In a brief response to the appellant's submissions, **M/s Wambui** submitted that once the award was adopted by a court of law, it was immune from any attack on whatever grounds; that the 2nd respondent was properly seized of the proceedings as it dealt with issues of trespass only; that the 2nd respondent was

properly constituted as the law provided for 2 or 4 elders, and even if the participation of **Peter** was to be discounted, the remaining Tribunal members would validly transact the business of the 2nd respondent.

Mrs. Mwangangi on the other hand, left to court the issue as to whether the failure to cite **section 8** and **9** of the Law Reform Act (supra) was fatal to the judicial review proceedings. She also associated herself with the findings of the learned trial judge and the submissions of **Ms. Wambui**, that the 2nd respondent was properly seized of the matter as it was only dealing with matters of trespass to the suit property. It was also properly constituted as the disparity in the names of **Peter K. Mutuni** and **Peter Kimwele Mutemi** was sufficiently explained by the averments in the affidavit of **Peter** and the contents of the documents annexed thereto.

In reply to the respondents' submissions, Mr. **Musyoki** reiterated that, in law, an affidavit cannot correct a gazette notice. Such an annormally can only be cured by the appointing authority through another Gazette Notice (Corrigendum).

This being a first appeal, our duty is as was put more appropriately in the case of **Selle versus Associated Motor Boat Co. [1968] EA 123,** thus:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that is has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270."**

This court further stated in **Jabane vs. Olenja [1986] KLR 664,** thus

> "**More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial Judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi vs. Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88)1KAR 870."**

The learned judge after assessing and analizing the record made findings, *inter alia*, that the complaint the 3rd respondent lodged before the 2nd respondent was one touching on Trespass to the suit property and therefore fell within the ambit of the jurisdiction donated to the 2nd respondent under **section 3(1**) of the Tribunals Act; that on the basis of the facts reviewed by the learned Judge, the 2nd respondent had arrived at the correct decision in ordering the eviction of the adjudged trespassers from the suit property; that the composition of the 2nd respondent was proper as it comprised five members inclusive of the chairman.

He further found that though the panel included **Peter,** who had not been gazetted as such, the annormaly in the gazettement of **Peter** was curable, by the depositions in the affidavit of **Peter** and the documents annexed thereto as in his view, they were plausible; second, they had not been controverted by the appellants, and lastly no prejudice was suffered by the appellants by reason of **Peter's** participation in the said proceedings.

On lack of jurisdiction, or otherwise of the 1st respondent, the learned judge reasoned that no error was committed by the 1st respondent when it received the award and adopted it as the jurisdiction then donated under **section 7(2**) of the Tribunals Act, was mandatory; all that the magistrate was mandated to do was to read and adopt the award as a judgment of the court. In the learned Judge's view, this was a

purely administrative action, mechanically performed. There was therefore no mandate for the court to look at the award and satisfy itself that it met all the criteria or requirements of the law.

On the regularity or otherwise of the Judicial review proceedings, the learned Judge faulted the substantive Notice of Motion on account of the failure to cite section 8 and 9 of the Law Reform Act.

We have considered the above reasoning, in the light of the totality of the record and the rival submissions set out above. In our view, the following issues fall for our determination:-

1. Whether the second respondent had jurisdiction to determine the dispute before it?

2. Whether the 2nd respondent was properly constituted when it deliberated upon the dispute then before it?

3. Whether the first respondent fell into error when it received, read the award to the parties and simply explained to the parties their right of appeal to the Provincial Appeals Board without adopting the award as a judgment of the court.

4. Whether failure to cite section (8) and (9) of the Law Reform Act Cap 26 of the Laws of Kenya was fatal to the Judicial Review proceedings.

In response to issue number 1, it is not in dispute that the 2nd respondent derived its jurisdiction from the provisions of section 3(1) of the Tribunals Act. It provided thus:

"Subject to this Act land 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."

From the content of the proceedings before the 2nd respondent, it is our finding that the suit property was registered land; that the 3rd respondent asserted his absolute right of ownership of the suit property and that the assertions of **Justus** in defence were also rights of ownership through their deceased father, Muindi Kang'we. In this regard, we agree with the submissions of the appellants that as the suit property is registered land, and since it is now trite law, that elders had no jurisdiction to adjudicate over matters touching on ownership of registered land, the 2nd respondent had no jurisdiction to adjudicate over the said dispute. See the case of **M'Marete versus Republic** (supra).

Turning to issue number 2, section 4 of the Land Disputes Act (now repealed) stipulated that in order for the 2nd respondent's panel to be properly constituted, it ought to have comprised a chairman sitting with either 2 or 4 elders also duly gazetted in a Kenya gazette Notice. From the record, the 2nd respondent while deliberating on the issues resulting in this appeal, comprised five elders inclusive of **Hannington K. Kathama** as the chairman, and **Peter K. Mutuni** as one of the members. **Peter** was however not gazetted as such member vide gazette notice number 2881 of 13th Aril, 2001. Though not a party to the Judicial Review proceedings, he swore a supporting affidavit in which he confirmed that he was indeed one of the elders who deliberated over the subject dispute before the 2nd respondent. Paragraph 6 of the affidavit read as follows:

"6 That however my last name was inadvertedly printed as Mutumi (see copy of the letter from the Ministry of Lands and Settlement marked K3."

In the light of the principle in the case of **Moijo Mataiya Ole Keiuwa** (supra), we hold that the affidavit of **Peter** was irregularly admitted and acted upon by the learned judge first because it had been deposed by a person not party to the proceedings; and second because it could not correct the error made in the Kenya Gazette Notice which required correction through a corrigendum. As long as gazette No. 2881 of 13th April 2004 stood, **Peter** was a stranger to the 2nd respondent's panel membership. It therefore follows that the proceedings in which **Peter** participated stood vitiated for this reason and therefore null and void for lack of quorum, in terms of **section 4** of the Tribunals Act (supra), The resultant award was also null and void for all intents and purposes and incapable of protection in law.

On the role of the 1st respondent with regard to the award filed before it, the learned judge absolved it of any blame on the basis that the 1st respondent was only obligated to simply mechanically receive the award, and perform a simple administrative function by reading it to the parties and then adopting it as a judgment of the court. The proceedings as to what transpired before the 1st respondent with regard to the said award were as follows;-

> ***"Court: Award read and Right of Appeal before the Provincial Board is explained***"

From the above record it is clear that all that the first respondent did was to receive the award, read it to the parties and simply proceeded to explain to the parties their right of appeal to the Provincial Appeals Board. It was therefore not correct as held by the learned judge that the award was in fact adopted as a judgment of the court and was capable of enforcement by the same forum at an appropriate time.

When faced with a similar challenge in the case of **Peterson Nguchi Kaburi vs Joseph Thuku Kaburi [2015] Eklr,** the court made observations *inter alia* as follows:

> **"Our reading of the repealed Land Disputes Tribunal**
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> **Act, specifically section 3 thereof, shows that……**
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> **The court is duty bound to prevent illegalities and it would be a dereliction of duty for it to adopt a patent nullity as a judgment of itself. We would respectfully endorse the sentiments of Ombwayo J in Theuri Ndirangu & Anor -vs- Mutahi Ndirangu & Anor Civil Application No. 5 of 2002.**
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> '*The learned magistrate… did not have the power to ratify nullities but had the duty to ensure that the decision of the Tribunal sought to be adopted was arrived at properly by a body that had a mandate to do so. Magistrates adopting the awards of Tribunals had the residual power to reject an award that was illegal. This residual power is recognized by the law as the inherent power to do justice.'*
>
> **It is clear from what we have stated that the learned Judge fell into error in allowing to stand a nullity in the name of the purported award."**

We wish to associate ourselves fully with those sentiments. In our view, the use of the words "***the court* shall"** did not give the 1st respondent a licence to admit nullities and illegalities. Had it been vigilant, it would have noted the existence of want of jurisdiction on the part of the 2nd respondent as the subject of the proceedings was basically a claim of ownership of registered land. This alone even without delving into the legality of the membership of the 2nd respondent as then constituted, would have been sufficient to vitiate the legality of the said proceedings. We also wish to add that the learned judge also fell into error when he assumed that the subject of the proceedings before the 2nd respondent was a mere trespass claim and that the 2nd respondent was properly constituted and that the resultant award was a valid award. In terms of what we have stated above, the resultant award fell short of what was intended by the applicable law. It only qualified as "a purported award" incapable of protection by law.

As to the failure to cite **section 8** and **9** of the **Law Reform Act** (supra), it is not disputed that there was

an omission in both applications. **Section 8(1)** prohibited the High Court of Kenya either in the exercise of its civil or criminal jurisdiction to issue prerogative writs as they were then known under the law of England. Instead, **section 8**(**2**) thereof donated power to the High Court to issue orders of mandamus, prohibition or certiorari in the same manner as the High Court of England under the provisions of **section 7** of the Administration of Justice (Miscellaneous Provisions) Act 1938, of the United Kingdom. Subsection **8(3)** donates a right of appeal as the only mode of challenge to such an order.

Subsection (**4**) donates the power to delete the word "writ(s) whenever it appeared in any written law and replace it with the word "**order".** While sub **section 5** is the substantive provision for the right of appeal.

Section 9 on the other hand donates the power to make rules governing Judicial Review application procedures in pursuance of which **Order 53** of the **Civil Procedure Rules,** was made. **Rule** (**1**) thereof makes provision that any substantive application for judicial review for mandamus, prohibition and certiorari has to be preceded by an application for leave. **Rule** (**2**) limits the period within which to apply for an order of certiorari to six months from the date of the order intended to be quashed. **Rule 3** prescribes both the mode and form of presentation of the substantive notice of motion, as well as accompanying documents. **Rule 4** makes provision for the content of the supportive statement, and affidavits. **Rule**

(**5**) and (**6**) provide for the mode of procedure at the hearing, giving the right to begin to the applicant (**rule 5**) and the right to respond to the respondent (**rule 6**). Rule 7 on the other hand makes provision as to orders of certiorari for purposes of quashing proceedings.

When withholding the relief of judicial review, from the appellants', the learned judge relied on the case of **Republic versus Central Provincial Land Disputes Appeal Committee and 2 others (2010)** eKLR in which Sitati J. withheld the relief of Judicial Review for the failure to cite section 8 and 9 of the Law Reform Act. In **Republic versus Town Council of Mutito Andei ex-parte Shadrack Mwau [2012] eKLR** the superior court also faulted an application for Judicial review on the same grounds.

In **Muriuki Kimondo versus Maina [1976-1980] IKLR 554** Sachdeva, J. (as he then was) declined to strike out an application for leave to apply for judicial review presented by way of a Notice of Motion" as opposed to a Chamber Summons. In **Nyaga versus Republic [1990] KLR 29,** Bosire, J (as he then was) ruled that the power to make rules which are embraced in Order LIII is donated by section 9(1) of the Law Reform Act.

In **Ndete versus Chairman Land Disputes Tribunal, and Another [2002] IKLR 392,** Ringera J (as he then was) held inter alia that **section 8** of the Law Reform Act (supra) is the basis for the grant of the reliefs of certiorari, mandamus, or prohibition; that the Civil Procedure rules enshrined in Order 53 is a special jurisdiction as the rules therein are made under the provisions of **section 9** of the Law Reform Act, and lastly that whereas an error of want of form may be curable, an error of want of substance is incurable where the relief sought is expressly excluded by statute. In **Buyu versus Wasamba [2003] KLR 377** the Court of Appeal held *inter alia* that even if an application for judicial review was brought under the wrong provision of the law, that would not be fatal to the application for review.

In **Republic** versus **Public Procurement Complaints, Review and Appeals Board & Another ex-parte Kenya Air Ports Authority [2015] IKLR**

Nyamu and Makhadia, JJ. (as they then were) held inter alia that under **Order LIII rule 3(1)** of the Civil Procedure Rules, no format of the Notice of Motion has been provided for. In **John Mugo Ngunga versus Margaret M. Mwangi [2014] eKLR** wherein one of the grounds of appeal was that the learned Judge of the Superior Court fell into error when she held that an application for judicial review under

Order LIII of the Civil Procedure Rules was fatally defective unless section 8 and 9 of Cap 26 laws of Kenya were cited. The court ruled inter alia that as long as the application for leave stood unfaulted, the substantive notice of motion was immune from attack on account of want of form and deserved a merit disposal.

When the above case law is considered in the light of the learned Judges' reasoning on this issue, it is our finding that it is the chamber summons for leave that forms the anchor for the substantive Notice of Motion. It therefore follows that, unless the application for leave is vitiated, the substantive motion deserves a merit disposal. Second, declining jurisdiction solely on the ground of want of form in Judicial Review proceedings was declined. Third, there is nothing in either **sections 8 and 9** of the law reform Act or the rules made under order LIII pursuant to section 9 of the said Act that mandatorily requires any party seeking to avail itself of these provisions to specifically cite them as access rules. Had this been the intention of parliament when enacting the said Act, it would have specifically stated so in section 9 or alternatively a specific rule could have been promulgated to that effect under Order LIII. We therefore reiterate that failure to cite section 8&9 of the Law Reforms Act is not fatal to a judicial Review application.

The upshot of all the above, is that we find merit in this appeal. We accordingly allow it, set aside the impugned Ruling and decree of the learned judge dated 15th May, 2012, and substitute therefor, an order allowing the appellant's

Notice of Motion in Machakos High Court Misc. Application No. 185 of 2008 dated 7th May, 2008, as prayed. As parties are family members, we order each party to bear its own costs.

Dated and Delivered at Nairobi this 12th day of May, 2017.

P.N. WAKI

…….……

JUDGE OF APPEAL

R.N. NAMBUYE

……...

JUDGE OF APPEAL

H. M. OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR