



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, KARANJA & KOOME, JJA)

CIVIL APPEAL NO. 220 OF 2015

BETWEEN

JOHN KASIMU KILATYA.....APPELLANT

VERSUS

THE CHAIRMAN MACHAKOS LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

MAINGI WAMBUA.....3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Machakos (Makhandia J.,) dated 29th November, 2012 in Machakos Judicial Review

in

Misc. Appl No. 158 of 2002)

JUDGMENT OF THE COURT

[1] John Kasimu Kilatya, (appellant) filed suit by way of judicial review proceeding before the High Court Machakos challenging the decision by Machakos Land Disputes Tribunal in Case no 150 of 2002, which was read in court as an award of the Machakos Senior Resident Magistrate's Court on 23rd August, 2002 in Misc. Civil Application No. 118 of 2002. In the said award, the land disputes tribunal ordered the Land Registrar, Machakos, to deregister parcel No Kalama/Kitini/420 (suit land) from the name of the appellant to Maingi Wambua and others (3rd respondent).

[2] A brief background facts of the matter are that; sometime in 1982, the appellant entered into a sale agreement with one Kimeu Muli and Makau Nzioka (vendors) for sale of the suit land measuring 3.8 hectares at an agreed price of Ksh. 16,000/= . The appellant paid the full purchase price. On 9th February, 1999 the appellant, together with the vendors, they applied and obtained the Land Control Boards' consent to transfer the suit land to the appellant. The land was finally transferred in favour of the appellant on 18th September, 2000 and title deed was issued.

[3] In February, 2002 the 3rd respondent filed a dispute against the appellant before Machakos Land Disputes Tribunal being Tribunal Case No. 150 of 2002 claiming the suit land. The appellant indicated to the tribunal his desire to call some 5 witnesses to support his case but the chairman of the tribunal give him an opportunity to call only one witness. Upon hearing the dispute and deliberating on the same, the Tribunal found the suit land should be registered in favour of the 3rd respondent while the appellant would be refunded Ksh. 15,000/- being the amount he had allegedly used to purchase the suit land. The elders further requested the Land Registrar Machakos to de-register the appellant and replace his name with that of the 3rd respondent and others (it is not clear from the award who the 'others' were).

[4] The appellant was aggrieved by the said award and on 11th November, 2002 he sought leave to institute judicial review proceedings in the nature of *certiorari* to quash the said award which was already made an order of the court. Leave was granted and also operated as stay of the order issued on 23rd August, 2002 by Resident Magistrate's Court at Machakos. Eventually on 29th July, 2003 the appellant filed a substantive motion seeking an order of *certiorari* to issue, directing the award of the Land Disputes Tribunal in Land Case No. 150 of 2002 and subsequent orders made on 23rd August, 2002 in Machakos SPMCC Misc. Appl. No 118 of 2002 be removed to the High Court for purposes of quashing.

[5] The matter fell for hearing before Makhandia J., (as he then was) who after considering the matter, had the following to say in a pertinent paragraph of the impugned ruling:-

“I have no reservation in my mind that the 1st respondent had no jurisdiction to entertain the claim. Clearly, the claim before the 1st respondent was about validity of sale of the suit premises. There was a sale agreement between the applicant and the vendors, named above. The vendors having received part of the purchase price decided to transfer the land to the applicant and even accompanied him to the land control board to obtain consent to subdivide the land. The interested party thereafter aggrieved by the sale and transfer of the land to the applicant sought relief from the land disputes tribunal. The question that arises here is whether the tribunal had power or jurisdiction to hear this dispute. Section 3(1) of the Land Disputes Tribunal Act, sets out limitations to the jurisdiction of the 1st respondent. It was meant to hear cases of civil nature concerning-

The division of or the determination of boundaries of land

A claim to occupy or work land. Or Trespass to land

The interested party claim did not fall within any of these perimeters. His claim had to do with the contract of sale of land which gave rise to transfer of that land to the applicant who thereafter took out a title deed in his name. The 1st respondent has no jurisdiction whatsoever to deal with issues of sale of land. It is not in dispute that the vendors sold the suit premises to the applicant at a consideration of Ksh 16,000/=. The interested party has candidly admitted to that fact. The 1st respondent had no jurisdiction whatsoever to sit in judgment of it. That kind of dispute does not clearly fall within the disputes contemplated by section 3(1) of the Land Disputes Tribunal Act. Moreover, section 159 of the Registered Land Act (Cap 300), as it was then provided for the limits of the jurisdiction of the land tribunal... On all these grounds, clearly the applicant has made out a case for the grant of an order of *certiorari*.

Regrettably, however, the application must fail on other grounds. The order sought to be issued is aimed at a person or entity that is not party to these proceedings. Judicial review orders are prerogative and in the form of directions. They ought therefore to be directed to a specific body or person who is a party to the proceedings for compliance and not by proxy. In this case, the proceedings sought to be quashed by an order of *certiorari* are in the Province of the Senior Principal Magistrate's Court at Machakos. Yet the court has not been made a party to these proceedings. It therefore follows the order sought cannot issue. Even if it was to issue, such an order will be in vain...”

[6] That is the gravamen of this appeal, predicated on three grounds of appeal that challenges the conclusion by the learned Judge that there were errors of law and fact; the proceedings before the tribunal were fatally defective for non-compliance with law; for holding the threshold of granting orders of *certiorari* were not met after indeed finding the tribunal lacked jurisdiction; and for dismissing the application with costs. During the plenary hearing, Mr Muumbi, learned counsel for the appellant relied on his written submission and made some brief highlights to elaborate on the above grounds. He referred to **Article 159 (2) (d)** of the Constitution which enjoins courts to focus on substantive justice without undue regard to technicalities. Counsel cited the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others** Civil Appeal No. 228 of 2013. In the said case, this court differently constituted held inter alia;-

“That in modern times, the courts do not apply or enforce the words of statute or rules but their objects, purposes and spirit or core values. The mischief rule of construction is much the same as the spirit of a statute or rules of procedure...”

[7] Further, counsel for the appellant submitted that the learned Judge held as a matter of fact and law, the Land Disputes Tribunal lacked jurisdiction to deal with the dispute that touched on sale and transfer of land. Yet the learned Judge found the application must fail because the Senior Principal Magistrate’s Court was not made a party to the proceedings. Thus, said counsel, failure to enjoin the court which had no role to play in the implementation of the orders and was not going to suffer any prejudice as it had no interest whatsoever in the matter, was a procedural technicality that the learned Judge ought to have ignored especially after he clearly made a conclusion that the tribunal lacked jurisdiction to deal with the dispute in the first place.

[8] On the other hand, Ms Maina learned counsel for the 1st and 2nd respondents relied on her written submissions. In her oral highlights, counsel maintained that the Senior Principal Magistrate’s Court at Machakos was a necessary party to the judicial review proceedings. This was because the Chairman of the Land Disputes Tribunal had forwarded the award of the Tribunal for adoption as an order of the court and it was duly made the order of the court on 23rd March, 2002. The magistrates’ court therefore ought to have been enjoined as a party. Counsel cited the case of **Law Society of Kenya vs Centre for Human Rights and Democracy and 12 others** [2014] eKLR where a two judge Bench of the Supreme Court stated;-

“Indeed, this court has had occasion to remind litigants that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities” it is plain to us that Article 159 (2) (d) is applicable case-by-case basis...”

[9] Mrs Nzei, learned counsel for the 3rd respondent also opposed this appeal. Similarly, she relied on her written submissions and made some oral highlights agreeing principally with submissions by counsel for the 1st and 2nd respondents that failure by the appellant to join the Senior Resident Magistrates’ Court in the proceedings was not a mere procedural technicality but went to the root of judicial review orders. According to counsel, although the Judge found and rightly so, that the tribunal had no jurisdiction to delve into a dispute over purchase of land, however the magistrate had entered judgment before the judicial review process was undertaken; the appellant was seeking to quash the decision of the tribunal which had already become an order of court which could not be quashed. Counsel therefore urged us to dismiss the appeal.

[10] The aforementioned is a brief outline of the matters contained in the respective submissions by counsel, the impugned ruling, list of authorities cited and the record of appeal. In considering the issues that arose, it is important to revisit the guiding principles that guide the High Court in its exercise of judicial review powers. It is trite in judicial review; the High Court is not concerned with the merits of the decision by a public or statutory body but rather undertakes a consideration of the procedures that were undertaken to arrive at the decision that is under challenge to ensure, the decision took into accounts rules of natural justice and due process. This much was stated by this Court in the case of;- **Ransa Company Ltd vs. Manca Francesco & 2 others** [2015] eKLR -

“As we all appreciate, a court sitting on Judicial Review exercises a sui genesis (sic) jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.”

The said jurisdiction was further expounded by Lord Green M.R. in the often cited case of **Associated Provincial Picture House vs. Wednesbury Corporation** [1914] 1 KB 222 as follows:

“Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision.”

See also **Kenya National Examinations Council vs. Republic Exparte Kemunto Regina Ouru** [2010] eKLR.

[11] Having so stated, the issues we have discerned for our determination remain two fold, that;- whether the learned Judge having found the Land Disputes Tribunal had no jurisdiction to determine the dispute and an order of *certiorari* should issue to quash the award, erred by proceeding to dismiss the same case on the grounds that the Senior Principal Magistrates’ Court was not enjoined in the proceedings. Can a suit be dismissed due to non-joinder; in other words was non-joinder of the magistrates’ court fatal.

[12] We shall begin with the issue of jurisdiction being the basis of the court’s authority to adjudicate on matters litigated before it. The limits of this authority are imposed by statute, or constitution and the extent of the authority may be extended or restricted. If unrestricted the jurisdiction is said to be unlimited as in many instances the High Court has unlimited jurisdiction in civil and criminal matters. On the other hand, the Land Disputes Tribunal’s jurisdiction as rightly pointed out by the learned trial Judge was limited specifically as provided for under **section 3(1)**, to determine land disputes regarding;-

The division of or the determination of boundaries of land A claim to occupy or work land. Or

Trespass to land

It was common ground amongst all the parties in this appeal that the tribunal in this case in issuing an award directing the cancellation of the appellant’s title was an order that was made without jurisdiction. It was therefore an *ultra vires* order that exceeded the authority of the tribunal and the Judge found it was a suitable matter to quash through an order of *certiorari*. However, it was not quashed because the magistrates’ court was not made a party to the proceedings.

[13] Still on the issue of jurisdiction, many authorities have defined it as the foundation and basis that every court or tribunal must establish before embarking on a matter. Where a court or tribunal takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before a court can issue a valid judgment or order. See the case of **The Owners of Motor Vessel ‘Lillian ‘S’ ’ vs Caltex Oil (Kenya) Ltd** [1989] KLR 1. It was emphasized that establishing jurisdiction is a condition precedent to the whole case as set out and mandated by statute or the Constitution. Nyarangi J. (as he then was) had this to say;-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

[14] The Court of Appeal also emphasised the importance of a court or tribunal establishing its jurisdiction prior to considering the matter before it in **Joseph Njuguna Mwaura and 2 others vs**

Republic, Nairobi Criminal Appeal No. 5 of 2008 when it stated that;

“It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function”

[15] Although the tribunal was completely oblivious of the above requirement, as the same was not raised before it, nonetheless before embarking to determine the matter, they ought to have asked themselves three questions, whether the claim was in regard to;-

The division of or the determination of boundaries of land A claim to occupy or work land. Or

Trespass to land

Since the claim touched on issues of transfer of land after a sale transaction, which was not within the jurisdiction given to the tribunal by statute, they ought to have downed their tools and referred the parties to court. Having found the tribunal had no jurisdiction and the award made without jurisdiction was a nullity, was the Judge justified in proceeding further. We think there was nothing to take further as the award made without jurisdiction would not have any legal effect even if adopted by the magistrate’s court. Mere adoption of an order that was a nullity would not cure the illegality.

[16] The learned Judge nonetheless went on to dismiss the matter on the grounds of non-joinder of the Senior Resident Magistrates’ Court as a party to the proceedings. We are certainly not down playing the importance of joining parties to proceedings who will in one way or another be affected by the decision made by the court as a right to a hearing is one of those fundamental rights that are secured in the Constitution. See **Article 50 (1)** of the Constitution provides as follows:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body.”

The pertinent argument here was, it was imperative to join the magistrate’s court in the proceedings and we agree as we did in a recent decision by this same bench in the case of **Registrar of Trade Unions vs Nick Njuguna & 4 others** Civil Appeal No 251 of 2014, that a party who is affected prejudicially by the decision of the court is a necessary party to the case. The aforesaid case involved the interpretation of **Article 24 (5)** of the Constitution as read with **sections 3 (b)** of the Labour Relations Act 2007 and 47 (3) of the National Police Act regarding the fundamental rights to associate and in particular, the right to form a trade union for police officers. The Attorney General was not a party to the proceedings before the trial court and we had the following to say in regard to non-joinder thereto:

“This is not just a matter of misjoinder or non- joinder of parties. The proceedings by which Sections 3(b) of the Labour Relations Act, 2007 and 47(3) of the National Police Service Act, No 11 A of 2011 were declared unconstitutional were matters of great public interest. The orders affected the National Government, the Police Service and the National Assembly. It was imperative the said parties be joined in the proceedings where the court was called upon to give an interpretation of Article 24 (5) of the Constitution in relation to the impugned sections of the law. As it is we think it is not necessary for us to interrogate whether the interpretation given by the learned Judge was sound granted that the views of the affected parties were not considered. It was necessary for the Court to order the application be served upon the necessary parties and consider the opinion, views or submissions by the said parties on their view of the aforesaid provisions of the law. Under Article 156 (6) of the Constitution, the office of the Attorney General is charged with the responsibility of promoting, protecting and upholding the rule of law and to defend public interest. The Inspector General of Police is in charge of the Police Service, and the National Assembly enacted the impugned sections of

statutes and was being directed to implement the order by amending the law as per the orders.”

[17] It is trite that if a party has a direct and substantial interest in a matter in which he/she may be affected prejudicially by the judgement of a court or tribunal in the proceedings, that is a necessary party. The question we have asked ourselves regarding the joinder of the magistrates’ court is how an *ultra vires* order made without jurisdiction by the tribunal would affect the magistrate’s court that merely adopted the order as an order of the court. Had the learned Judge considered this aspect, that in any case the award that he found was made without jurisdiction was a nullity, we have no doubt he would have arrived at the same conclusion as we have, that the only legal solution was to down his tools and not proceed any further as the award was of no legal effect.

[18] In the upshot, we find merit in this appeal, which we hereby allow with the result that the orders made on 29th November, 2011, and delivered on 30th November, 2011 and all consequential orders are hereby set aside and the appellant’s notice of motion is allowed. Due to the nature of these proceedings that involve individuals who were seeking interpretation of the mandate of the Land Disputes Tribunal, we make no order as to costs. Each party shall bear their own costs.

Dated and delivered at Nairobi this 29th Day of September, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR