



IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

(CORAM: GITHINJI, KARANJA & KIAGE, J.J.A)

CIVIL APPEAL NO. 11 OF 2015

BETWEEN

SAMUEL KAARIA APPELLANT

AND

CHAIRMAN, MWIMBI LAND DISPUTES

TRIBUNAL1ST RESPONDENT

EVANS NJIRU MANYARA2ND RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Meru

(Njoroge, J.) dated 15th October, 2014

In

H.C. Judicial Review App. No. 22 of 2012)

JUDGMENT OF THE COURT

Samuel Kaaria (hereinafter ‘the appellant’) comes before this Court aggrieved by the ruling of the High Court in Judicial Review Application No 22 of 2012 wherein the High Court declined to grant him the prerogative order of prohibition. The appellant was desirous of prohibiting the implementation of an award rendered by the **Mwimbi Land Disputes Tribunal in Land Disputes Tribunal Case No 8 of 2007** which was read and adopted by the Principal Magistrate’s Court at Chuka on 11th March, 2009 vide **Land Disputes Tribunal Award No 36 of 2008**. The facts before the Land Disputes Tribunal were that Evans Njiru Manyara; the Plaintiff thereat, and the 2nd respondent herein (‘the 2nd respondent’) was desirous of having the appellant return the whole of that land known as **Mwimbi / Chogoria / 177** (‘the suit land’) measuring three acres, which the latter party allegedly held in trust for him. For clarity, the appellant and the 2nd respondent are brothers. According to the 2nd respondent, their father had allegedly informed him that the suit land had been given to the appellant to hold in trust as the eldest brother. Their father had equally inherited the land from their grandfather.

On his part the appellant testified that he had been given the suit land by their father and mother on 9th December, 1967 and that the relevant Land Certificate was issued on 7th January, 1972. The appellant was baffled as to why the 2nd respondent was demanding the suit land from him yet he was under instructions to share the land among four sons excluding himself. Moreover, he contended that the suit land had been given to him by their mother in her capacity as their father's successor following his demise. According to the appellant, the 2nd respondent ought to have addressed his grievances to their mother as she was the one who held the title to the suit land. By and large the testimonies of witnesses who appeared before the Land Disputes Tribunal ('the tribunal') in favour of the appellant or the 2nd respondent, showed *inter alia*:- that the title to the suit land was in the name of the appellant; that the appellant and 2nd respondent's father ('Manyara') gave the suit land to the appellant; that the 2nd respondent cultivates the suit land; that the appellant had intimated that he would give the 2nd respondent a piece of land, only for his brother to decline the offer, stating that he wanted the suit land in its entirety. It also came to light that Manyara had informed the 2nd respondent to remain with 'Gitonga' on the suit land.

At the close of the proceedings before the tribunal it was found that the appellant had indeed been entrusted with the suit land by Manyara; that aside from the suit land the appellant had a big piece of land which he had bought; that the second piece of land was bought by Manyara and the appellant; and that when the appellant and 2nd respondent's mother was sharing the suit land among members of the family, the 2nd respondent was given one acre therefrom, but declined to take it. Ultimately, the tribunal held that the suit land belonged to the appellant, but since he had another piece of land at Kinoro and the 2nd respondent had a lot of development on the suit land, he should be given two acres thereon, leaving the appellant with an acre. Displeased by the verdict of the tribunal, the appellant lodged an application for Judicial Review seeking an order of prohibition to prohibit the award of the tribunal from being implemented as a judgment of the court. The application was predicated upon the ground that the tribunal had acted *ultra vires* in purporting to order for transfer of land registered under the **Registered Land Act** (now repealed) when it had no jurisdiction to do so.

The Judicial Review application was heard by Njoroge, J. who dispensed with the Notice of Motion dated 2nd August, 2012 by way of written submissions as elected by the parties. Upon consideration of the respective submissions, the facts and the law, the learned Judge dismissed the said motion with costs to the 1st and 2nd respondents herein vide a ruling delivered at Meru on 15th October, 2014. Aggrieved by the decision of the High Court, the appellant has lodged this appeal and set out four grounds of appeal in his memorandum of appeal to the effect that:-

The learned Judge erred in law by failing to find that the 1st respondent acted ultra vires when it ordered for the transfer of L.R. No Mwimbi / Chogoria / 177 to the 2nd respondent.

The learned Judge erred in law in misconstruing and misinterpreting the provisions of Section 3 (1) of the defunct Land Disputes Tribunal Act, which fact led him to a wrong decision.

The learned Judge erred in law in failing to find that an illegal adoption of the 2nd respondent by the Principal Magistrate Chuka as courts judgment is null and void ab initio.

The learned Judge erred in law in relying on irrelevant materials to arrive to the wrong decision.

Mr. Kiara, learned counsel argued the above grounds as a whole during the hearing by submitting that the tribunal was bereft of the requisite jurisdiction on the material date by purporting to sub-divide and transfer land registered under the **Registered Land Act** (now repealed). Counsel contended that the trial court had failed to appreciate that the judicial review order of prohibition is concerned with the process as opposed to the merits. He submitted that whereas the learned Judge found and held that the award of the tribunal had been implemented; that the order of prohibition could not issue; the reverse was in fact the true position.

Counsel submitted that the suit land is still in the name of the appellant; that there was an order of stay in force against the title at the lands office; and that the same was yet to be removed. In conclusion learned counsel submitted that the dispute between the parties herein ought to have been submitted to court and not the tribunal which lacked the necessary powers.

Mr. Kieti, learned counsel appeared on behalf of the 1st respondent at the hearing in opposition to the appeal. He submitted that an order of prohibition could not issue as the decision sought to be prohibited had already been made. According to him the remedy of prohibition was futuristic in outlook and was not suited to the past. He posited that an order of certiorari may have been available in the circumstances, but was not sought. Our attention was also drawn to the wording of the prayer for the order of prohibition as set out in the Chamber Summons dated 24th July, 2012 to wit:- to prohibit “ ***the award read in court on 11th March, 2009 from being implemented as judgment of the court***”. Counsel argued that in the circumstances the 1st respondent was *functus officio* having discharged its duties as required by law. Finally, learned counsel turned his focus on **Section 3 (1)** of the **Land Disputes Tribunal Act** (now repealed) and submitted that the said proviso limited the tribunal’s jurisdiction to matters of occupation and working of land; with no power to cancel title.

On his part Mr. Mutunga, learned counsel appearing for the 2nd respondent argued that the suit land was yet to be transferred to his client’s name. He argued that the tribunal had jurisdiction to make the orders it made and noted that it had taken 5 years for the appellant to lodge the present appeal rendering it an afterthought. He went on to submit that any party aggrieved by the tribunal’s decision and subsequent award, had 30 days to appeal; that the High Court was right to find that it could not prohibit what had taken place 5 years before. The case of **KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS [1997] eKLR** was cited in support of the said submission. In conclusion, learned counsel submitted that an order of prohibition cannot issue against the Land Dispute Tribunal as it is no longer in existence. He was also of the considered opinion that the failure to enjoin the Land Registrar was fatal.

In reply Mr. Kiara submitted that the order sought was discretionary, and that the appellant had no problem with the 2nd respondent occupying the land he currently occupies but is totally opposed to a title deed being issued to the 2nd respondent.

He wound up his submission by conceding that the appellant was in court on 11th March, 2009 when the award of the tribunal was adopted as a judgment of the court.

We preside over this appeal as a first appellate court. Our mandate involves to re-considering the evidence, evaluating of the same and drawing our own conclusions therefrom; always bearing in mind that we did not get to see or hear the witnesses; and giving due allowance in that respect. See **KENYA PORTS AUTHORITY VS KUSTON (KENYA) LIMITED (2009) 2 E.A. 212**.

The decision of the High Court was premised on the jurisdiction of the Land Disputes Tribunal as set out in **Section 3(1)** of the **Land Disputes Tribunal Act**(now repealed); and the fact that the decision sought to be prohibited was *fait accompli*. **Section 3 (1)** of the **Land Disputes Tribunal Act** (now repealed) states as follows:-

“3 (1) Subject to this act, all 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”.**

A court of law or a tribunal for that matter has to be seized of the requisite jurisdiction before it can exercise its functions. So central is jurisdiction that any court without jurisdiction has no choice but to

down its tools as was enunciated in the celebrated case of ***THE OWNERS OF MOTOR VESSEL LILIAN "S" V CALTEX OIL KENYA LTD [1989] KLR*** by Nyarangi, J.A. Thus the question becomes whether the tribunal had the jurisdiction to make the orders it did. To answer the foregoing question one has to place the remedies granted by the tribunal against its mandate as set out at **Section 3 (1)** of the **Land Disputes Tribunal Act** herein above.

It is manifestly clear that for the appellant and the 2nd respondent to get the one acre and two acres of the suit land respectively as decreed by the tribunal, there would be need to undertake a sub-division of the suit land and all the processes attendant thereto which brought the matter squarely within the jurisdiction of the tribunal as the learned judge quite properly found. We cannot help but notice the apathy which the appellant showed towards the right of appeal provided at **Section 8 (1)** and **(9)** of the **Land Disputes Tribunal Act** (now repealed) for someone who was genuinely aggrieved.

Section 8 (1) of the **Land Disputes Tribunal Act** (now repealed) provides as follows:-

“ 8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the tribunal may, within thirty days (emphasis ours) of the decision, appeal to the appeals committee constituted for the province in which the land which is the subject matter of the dispute is situated”.

Further leeway for an appeal from a decision of the appeals committee to the High Court is provided for at Section 8 (9) of the Land Disputes Tribunal Act (now repealed), but limited to points of law to wit:-

“(9) Either party to the appeal may appeal from the decision of the appeals committee to the High Court on a point of law within sixty days (emphasis ours) from the date of the decision complained of”.

Thus, we are inclined to agree with the 2nd respondent’s submission that the appellant’s application before the High Court and the present appeal are an afterthought in view of the clear timelines set out at **Section 8 (1)** and **(9)** hereinabove.

Finally, courts and this Court for that matter do not issue orders in vain. The learned trial Judge rightly observed that: -

“The decision of the LDT was adopted as an order of the court by the Principal Magistrate’s Court in Chuka in LDT 36 of 2008 on 11.3.2009. The application was filed in court in July, 2013 more than three years later. I find that over 5 years later, there is nothing to be prohibited. I also agree that the Ex-parte applicant has not quashed the LDT decision. Indeed, the Ex-parte applicant, who had actively participated in the LDT proceedings, should have exhausted the appeal mechanisms as provided by the apposite provisions of the Land Dispute Tribunals Act”.
We could not agree more.

The upshot is that we uphold the ruling of the High Court as this appeal is devoid of merit. We hereby dismiss it with costs to the respondents both in this Court and the High Court.

Dated and delivered at Meru this 21st day of December, 2016.

E. M. GITHINJI

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR