IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWILU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 9 OF 2005

BETWEEN

KIMOTE MUSAU………………...
……………………………………………………………………..APPELLANT

AND

MAKUMI MULUVA MUTHWE THAU……....……………......
…………………………………….1ST RESPONDENT

REPUBLIC…………………………………….............………………………………………..2ND RESPONDENT

THE CHAIRMAN, MAKUENI DISTRICT LAND DISPUTES TRIBUNAL……..................
………..3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (Wendoh, J.) dated 27th October 2004 in H.C. Misc. Appl. No 112 of 2002)

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JUDGMENT OF THE COURT

1. The genesis of this appeal is the application of Kimote Musau (hereinafter referred to as the appellant) and Nyumbu Muindi who were the exparte applicants in the High Court Misc Application No. 112 of 2002. They filed an application seeking *inter alia*, an order of certiorari to remove into the court and quash the proceedings and decision of the Makueni District Land Disputes Tribunal in Tribunal Case No. 4 of 2001 that was adopted and read by the Resident Magistrate Court on the 19th February 2002. In the Tribunal proceedings, the appellant and his co-applicant had been sued by Makumi Muluva Mutwethau (the 1st respondent herein). The 1st respondent alleged that there was a dispute between himself and Nyumbu Muindi over a piece of land that he had sold him. In addition, the claimant alleged that the appellant herein had encroached onto his land. In its award, the Tribunal gave the claimant the portion of land which he had bought from Nyumbu Muindi, that is, parcels 446 and 552. In addition, the Tribunal found that the appellant had encroached onto the claimant's property and directed that the boundary on the appellant's portion be amended and the claimant do take over his portion.

2. The appellant and his co-applicant were aggrieved and thereafter filed an application for Judicial

Review seeking an order of certiorari to quash those directions. The grounds upon which that application was based were that the **Land Disputes Tribunal** acted *ultra vires*, its jurisdiction and in contravention of **Section 143 (1)** of the **Registered Land Act** and **section 6** of the **Land Control Act**, and also **section 13 (3)** of the **Land Disputes Tribunal Act** (hereinafter referred to as the Act) which contravention rendered the proceedings and the subsequent award a nullity. In addition, the applicant alleged that there was an error apparent on the face of the record of the Tribunal in that the titles are wrongly described.

3. The Judicial Review application was heard by Wendoh, J. The evidence led before her was that Nyumbu Muindi, who was the first *ex-parte* applicant, was the registered owner of LR Numbers Kathonzweni/Muusini/446 and Kathonzweni/ Muusini/552, while Kimote Musau, the 2nd appellant herein was the registered owner of Title Number Kathonzweni/ Muusini/447. The 1st respondent herein filed proceedings against him in the Makueni District Land Tribunal and the outcome of those proceedings was that the Tribunal ordered the cancellation and amendment of the register in respect of those properties. It was the contention of the *ex parte* applicants that the Tribunal acted *ultra vires* its powers because there was no consent from the Land Control Board; that the purported sale agreement that was relied upon by the parties was not in writing as required by **section 3** of the Law of Contract Act, and was also in breach of **section 143**

   (1) of the **Registered Land Act** since theirs was a first registration which could not be cancelled.

4. In opposition, the 1st respondent filed grounds of opposition, in which he alleged that the court did not have jurisdiction, and that the orders sought could only be granted where there was a breach of the rules of natural justice, which was not apparent. The learned judge disposed of the application before her by finding and holding;

   > ***"the jurisdiction of the Land Disputes Tribunal is derived from section 3(1) of the Land Disputes Tribunal Act, No. 18 of 1990. … The Claim before the tribunal arose from a contract of sale of land as revealed from the sworn statement of the claimant. In their award the tribunal awarded to the claimant the land which he purchased land parcel no Kathonzweni/Muusini/ 446 and Kathonzweni/Muusini/ 552. It is apparent that the tribunal was dealing with the issue of ownership of land arising out of a contract of sale which was beyond the jurisdiction and they therefore acted*** *ultra vires* ***their powers. However as regards plot no***
   >
   > ***447 the tribunal dealt with issue of boundaries which was within its docket. If the applicant was dissatisfied with that decision regarding boundaries, he should have appealed."*** *(sic)*

5. The appellant was aggrieved and preferred an appeal to this Court. In his Memorandum of Appeal, the appellant laid out five grounds of appeal which were argued on his behalf by Mr Muithya. Learned counsel submitted that the ruling regarding parcel number Kathonzweni/Muusini/447 was wrong because it was an issue on the ownership of the property, and not boundaries as the trial judge had indicated. On the first ground, the appellant averred that the court erred in failing to quash the decision of the Tribunal as the Tribunal acted beyond its jurisdiction in ordering rectification of the register for the property subject of this appeal. In the appellant's view, the decision of the Tribunal is untenable as first, a first registration cannot be cancelled, and additionally, counsel argued that the matters before the Tribunal were *res judicata* as they had been conclusively determined by the Nziu District Magistrates Court, in District Magistrates Court Case No 48 of 1978 and as such, the Makueni Land Disputes Tribunal had no jurisdiction to hear the case under section 13 of the Land Disputes Tribunal Act and section 7 of the Civil Procedure Act. Counsel further submitted that the appellant should not have been condemned to share costs since he was a co-applicant, and since there was no dispute between him and his co-applicant, he ought not have been condemned to pay costs.

6. The respondent, despite being served, was not present at the hearing of this appeal. Nonetheless

we shall embark on determining the appeal as is our duty to do, bearing in mind that as a first appellate court, we are bound by law to evaluate all the evidence tendered in the trial court and make an independent conclusion.

7. Judicial Review matters are constrained to public and not private law. See ***<u>Republic v Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA)</u> [2013] eKLR (Civil Appeal 160 of 2008)*** wherein this Court stated that:

"Judicial review remedies are discretionary and the Court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law."

8. The issue that arises for determination is whether or not the Makueni Land Disputes Tribunal had the jurisdiction to make any determination regarding the appellant's piece of land. It is trite law that an order of certiorari will issue where a decision is made without jurisdiction. See the decision of this Court in ***<u>Kenya National Examination Council V Republic Ex- parte Geoffrey Gathenji Njoroge& 9 others</u> [1997] eKLR (Civil Appeal 266 of 1996)*** where this point was expressed in the words;

"Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter."

Section 3(1) of the **Land Disputes Tribunal Act** limited the jurisdiction of the Land Disputes Tribunal to the extent herein-below set out;

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.

9. In the light of the foregoing, did the Tribunal have jurisdiction to determine a question on the encroachment and the extent of the boundary? From the outset, it is clear, as the learned

judge correctly pointed out, that the Tribunal had no jurisdiction to determine any matters that dealt with the ownership of land. She however found that the matter touching on the appellant was to do with a boundary dispute, and the Tribunal, by virtue of **section 3(1)** of the **Land Disputes Tribunal Act**, had jurisdiction to deal with it. The learned judge was right in that conclusion.

10. It has been contended that the decision of the Tribunal was *ultra vires* **section 143** of the **Registered Land Act**. In our view, **section 143** would not apply as that section dealt with the power of a court to rectify the register in the event a registration, other than a first registration, was undertaken by means of fraud or mistake and therefore nothing turns on that contention. The appellant's second ground of appeal was that the matter before the Tribunal was *res judicata*, as the boundary dispute between him and the claimant had already been conclusively determined in DMCC No. L 48 of 1978. **section 13 (3)** of the **Land Disputes Tribunals Act** provided that:

"(3) For avoidance of doubt it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing

such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court."

11. During the course of the Tribunal proceedings, the appellant had indicated to the panel that he had a court ruling with respect to the dispute regarding his land. In our view, the finding of the Nziu Court seems to have been respected and merely acknowledged by the Tribunal, when it made the recommendation that the boundary which was fixed by the court be the true boundary between the claimant in those proceedings and the appellant herein. We note that this was after the Tribunal had made an observation that the court had directed that the appellant should take an oath to prove ownership, and that after he did, he was awarded the land on the lower side, but that he had subsequently moved off his land and onto the claimant's land. Clearly therefore, the Tribunal was dealing with a question of a boundary between the land of the appellant and that of the claimant. The final order that was made was that:

"the boundary on the parcel no. 447 should be amended and the portion which belongs to Makumi should be transferred to him. However case *(sic)* ***should be taken to have the homestead of the 2nd objector from being affected by the new demarcation."***

To implement this Award of the Tribunal would result in a fresh demarcation of the land, so that a portion of land would have to be excised out and a portion therefrom transferred to the claimant. Indeed the Tribunal did not have power to order the transfer or registration of land, and on this score alone, we find that it made this order *ultra vires* its jurisdiction. A similar approach was taken by this Court in

Jotham Amunavi v The Chairman Sabatia Land Disputes Tribunal & Enos Kenyani Amunavi Civil Appeal no 256 of 2002

(Unreported), where the Court observed that the implementation of the decision of the Tribunal would require a subdivision of the suit land, and thus would fall outside the purview of **section 3(1)** of the **Act**. The Tribunal therefore having taken note of the proceedings of court in DMCC need not have made any direction.

12. We finally turn to the issue of costs. In the High Court, the appellant was condemned to share the costs with the interested party. It is trite law that courts have discretion to award costs, and that costs follow the event; a successful litigant will be awarded costs so as to recoup the costs he has undergone in litigation. In ***Supermarine Handling Services***

Ltd v Kenya Revenue Authority [2010] eKLR (*Civil Appeal 85 of 2006)* this Court stated that:

"Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order… Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule.

13. The appellant did not succeed in his quest to challenge the decision of the Tribunal. In that case, it was reasonable that the learned judge directed that he should pay a portion of the costs. In the present appeal, we find no reason to interfere with the judge's assessment of payment of costs. In the result, this appeal fails in its entirety and it hereby stands dismissed with costs to the respondent. It is so ordered.

The delay in the delivery of this ruling is solely attributable to judge Mwilu who takes personal responsibility for the same and sincerely apologises to the affected parties. The reasons leading to the delay are varied and unintended and the judge deeply regrets the same.

DELIVERED at NAIROBI this 25th day of March, 2015.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR