



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 195 OF 2009

SUSAN NYAMBURA WAHOME – (DECEASED) Substituted by

TIMOTHY KAGONDU MURIUKI.....1ST APPELLANT

FRANCIS KIMONDO MURIUKI.....2ND APPELLANT

JANE WARIGIA MURIUKI.....3RD APPELLANT

WINFRED WAIRIMU MURIUKI.....4TH APPELLANT

DAVID WANJOHI MURIUKI.....5TH APPELLANT

VERSUS

REPUBLIC.....1ST RESPONDENT

CENTRAL PROVINCE, LAND DISPUTES

APPEALS' COMMITTEE.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, NYERI.....3RD RESPONDENT

DICKSON MURICHO MURIUKI.....4TH RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya at Nyeri, (Kasango, J.) dated 26th February, 2009

in

H.C. Misc. Appl. No. 288 of 2009

JUDGMENT OF THE COURT

1. The history of this matter is a sad demonstration of how far family relationships have deteriorated and continue to, as they pursue settlement of family disputes through contentious proceedings, instead of opting for other non contentious processes that promote family unity and harmony. The original proceedings were between **Susan Nyambura Wahome** (*mother*) and her son **Dickson Muricho Muriuki** (*4th respondent*). Susan died on 10th April, 2004 and was substituted by her son **Timothy Kagundu Muriuki** (*1st appellant*). All the appellants are brothers and sisters of the 4th respondent. The dispute is over a parcel of land known as **Ruguru/Gachika/83** (*suit property*).

2. From what we can decipher from the record, it would appear to us the suit property was bequeathed to the 4th respondent by his maternal grandfather, that is the father of his mother. Susan Nyambura was married, but she left her husband either through divorce or long time separation and went back to live with her father (original owner of the suit property). Susan's father intended to bequeath upon her the suit property and expressed his desire. Susan opted to have the suit property registered in the name of the 4th respondent who was named after her father. She did this ostensibly for fear that her own brothers would object to the suit property being registered in her name. Nonetheless, there was a protracted dispute over the suit land when the 4th respondent sought to be registered as the proprietor of the suit property.

3. The dispute was between the 4th respondent as against Susan's brothers. Susan stood by the side of the 4th respondent throughout the dispute that originated before the Karatina Third Class District Magistrate, an appeal went to Nyeri Senior Resident Magistrate's Court, and finally before the High Court Nyeri. The 4th respondent's claim over the suit property was upheld and he finally got registered as the proprietor of the suit property. After he was registered, the dispute over the suit property shifted between the 4th respondent, his mother, brothers and sisters.

4. The dispute was filed by Susan Nyambura before the Land Disputes Tribunal. After hearing all the parties and their witnesses, the Panel of Elders made the following observations and award on 20th August, 2004.

“Observations

1. ***That the disputed land Ruguru/Gachika/83, was given to Susan Nyambura Wahome by her father.***

2. ***In order to evade cases from other brothers, she said her son who is named after her father be registered in the title deed as a remembrance and also be the custodian of the family land.***

3. ***When the father was giving Susan Nyambura land, he questioned the future honesty of her son be registered in that land as regards to sub division of the land to his brothers.***

4. ***Although she had said his son be registered in the title deed, she is still the head of the family.***

5. ***Initially, Dickson Miricho Muriuki had agreed to share the land with his mother. He later changed his mind.***

6. ***According to observations of the tribunal, the family had been living and brought up in that land before and after the death of their grandfather in 1973.”***

5. Being aggrieved by that award, the respondent appealed to the Provincial Land Disputes Tribunal. It is not clear when the appeal was filed but the award was made on 14th June, 2007 and this is what the tribunal decided:

“AWARD

After going through all the documents available and the appellant agreeing that the family of Susan Nyambura Wahome who is the appellant's mother (sic) have no other land to settle having lived in the same premises from early 1973. This tribunal rule goes with the ruling of the Nyeri District Tribunal, but elaborates further that the suit land be divided equally by the residing parties who are brothers and sisters as follows having relied on (sic) 3(i) A: the land held in common (common land)

<i>Susan Nyambura</i>	-	<i>3.5 acres</i>
<i>Timothy Kagonda Muriuki</i>	-	<i>3.5 acres</i>
<i>Francis Kimondo Muriuki</i>	-	<i>3.5 acres</i>
<i>Jane Warigia Muriuki</i>	-	<i>3.5 acres</i>
<i>Winfred Wairimu Muriuki</i>	-	<i>3.5 acres</i>
<i>David Muricho Muriuki</i>	-	<i>3.5 acres</i>

Relevant parties to sign Land Control Board Consent. Land Registrar to sign where any party disobeys 60 days of appeal given after the date of signing these proceedings (sic) of ruling.”

6. After the above award was made, it was followed by a flurry of activities, the appellants sought to have the award by the Provincial Land Tribunal adopted as the decree of court before the Chief Magistrate's court at Nyeri. An order was issued on 12th July, 2007 where it was so adopted. While on the part of the 4th respondent, he filed a Judicial Review matter before the High Court in Nairobi being **Miscellaneous Civil Application Number 676 of 2007**, on 2nd July, 2007. An exparte application by the respondent sought for leave to apply for orders of *certiorari* directed to the Central Province Land Disputes Appeals' Committee, to quash its award of 14th June, 2007 ordering the sub division of **LR. No. Ruguru/Gachika/83**, into seven equal portions and transfer of six portions thereof to the 2nd to 7th appellants.

7. The 4th respondent was granted leave and such leave was to operate as a stay of execution of the **Provincial Appeals' Committee Award in Nyeri Number 6 of 2004**, made on 14th June, 2007. The 4th respondent filed a substantive Notice of Motion on 20th July, 2007. On 4th March, 2008, the parties agreed the matter be transferred by consent from High Court, Nairobi to the High Court, Nyeri for hearing and determination. However, that notice of motion ran into problems when counsel for the 4th respondent sought to make some amendments which were objected to by the appellants. Makhandia J., (as he then was), heard the parties, and dismissed the notice of motion seeking to amend the Notice of Motion and observed as follows:

“The initial leave granted did not involve the Chief Magistrate, Nyeri, then. Leave was thus not granted in respect of the Judicial Review proceedings against the Chief Magistrate's Court, Nyeri. The Chief Magistrate's Court is being dragged into the proceedings now by virtue of the decision it made on 12th July, 2007 adopting the award as a judgment of the Court. The applicant wishes to have that decision quashed by order of certiorari. Certiorari proceedings can only be initiated and or commenced successfully within six months of the making of decision sought to be quashed and or impugned. Accordingly, time to analyze the order of the court complained of has long since expired.....”

8. The order made on 20th November, 2008, essentially dealt a fatal blow on the 4th respondent's application for judicial review in the aforesaid suit. The 4th respondent nonetheless filed another **Miscellaneous Suit Number 288 of 2008**, on 26th November, 2008, in which he sought, this time round for an order of prohibition directed against the Chief Magistrate's Court at Nyeri and restraining the said Court from proceeding with execution or enforcement of the decree given on 12th July, 2007, in **Nyeri Chief Magistrate's Court Award Number 12 of 2004**. This matter fell for hearing before Kasango, J. and in her ruling delivered on 26th February, 2009, the learned Judge rendered herself in part of the ruling thus:-

“The decision of the District Land Tribunal was ultra vires (sic) to the Land Disputes Tribunal Act. Section 3(1), limits the tribunal's jurisdiction to matters relating 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 determined by a Tribunal established under

Section 4.”

As it can be clearly seen, the tribunal in ordering that the suit property be divided amongst the interested (sic) parties together with the applicant made orders that related to the title of land. Their decision is therefore, ultra vires to the Act and is a nullity. Further, I do find that the tribunal (sic) award which was eventually adopted as judgment by the Chief Magistrate was res judicata. The interested parties in bringing the action before the tribunal invited the tribunal to rehear the matter relating to the suit property and the applicants' claim over the same. That being so, the award of the tribunal was also a nullity on that ground. The fact that judgment has been entered in terms of the award cannot preclude this court from granting an order of prohibition to stop execution of the judgment whose very source was a nullity.....the judgment of this Court is as follows:

1. That an order of prohibition is hereby issued directed against the Chief Magistrate's Court, Nyeri, restraining the said Court or any other Court under its control from proceedings with execution or enforcement of the decree given on 12th July, 2007, in Nyeri CMCC Award Case No. 12 of 2004.

2. That costs of the Notice of Motion dated 26th November, 2008, and the application for leave dated 25th November, 2008, are awarded to the ex-parte applicant as against the interested parties.”

9. Being aggrieved, by that ruling, the appellants filed this appeal raising 5 grounds of appeal to wit:-

1. That the learned Judge erred in law in making judgment against the weight of submissions and the authorities cited by the counsel for the appellants.

2. That the learned Judge erred in law by holding that an order of prohibition could issue to a decision already made.

3. That the learned Judge erred in law by failing to find that the prayers for prohibition had already been overtaken by events and the tribunal award had already been adopted as the judgment of the court.

4. *That the learned Judge erred in law by misdirecting herself to instances when an order of prohibition can be available to an applicant.*
5. *That the learned Judge erred in law by issuing an order of prohibition while the decree issued in Nyeri Chief Magistrate's Court Award 12 of 2004, was and still is unchallenged and is in force.*

10. At the hearing of this appeal, Mr. Magee wa Magee, learned counsel for the appellant faulted the ruling of the learned Judge on the grounds that an order of prohibition can only be issued to prevent an occurrence; it is pre-emptive in nature; to prevent that which has not been done: it is futuristic in nature; it looks to the future and not a complaint of a past occurrence. When the Judicial Review proceedings were filed, the award had been adopted as a judgment of the court. According to him, the learned Judge looked into the past and erred by granting an order of prohibition to stop an order that was already issued. An order of prohibition does not operate retroactively.

11. Counsel for the appellant further argued that the 4th respondent had filed another Judicial Review matter being **Miscellaneous Application Number 112 of 2008**, seeking an order of *certiorari* which was dismissed. The 4th respondent did not appeal against that order; therefore, the issue cannot be revisited in a subsequent Judicial Review Proceedings which is tantamount to litigating in installments and an abuse of the court process. Moreover, the order of prohibition could only have been directed to the tribunal which the learned Judge found had acted *ultra vires* and not the Chief Magistrate's Court which had a legal duty given to the court by statute, to adopt the decision from the tribunal. As the order of prohibition was issued after the event, the award and decree of the chief magistrate remained unchallenged was not quashed or set aside. Counsel cited several authorities in this regard, some of which we shall refer to in the course of this judgment.

12. On the part of Mr. Gakuhi Chege, learned counsel for the 4th respondent in opposing the appeal, he submitted that the Provincial Appeals Committee's Award was adopted before the expiry of the period of sixty days that was set for parties dissatisfied with the award to appeal. He maintained the learned Judge properly issued the order of prohibition because the award by the Provincial Committee was adopted by the Chief Magistrate before the expiry of sixty days given to lodge an appeal, therefore, execution had not taken place, thus the law was properly applied. Counsel cited the case of ***Kadamas v Municipality of Kisumu [1985] K L R*** at page 955, where the Court of Appeal held that:

“Acts of anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act Judicially, are subject to Judicial Review, whenever they act in excess of their legal authority where proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters that would result in a final decision (as the case here), being subject to be quashed on certiorari, I think prohibition would lie to restrain it from exceeding its jurisdiction. It is therefore, irrelevant that the act had not been done, only the process of exercising excessive jurisdiction had begun, it could be stated.”

13. In regard to the issue of jurisdiction, counsel submitted that the tribunal lacked jurisdiction to order sub-division of the suit property that is registered under the **Registered Land Act**, the award of the tribunal was a mere nullity. Counsel also submitted the matter before the tribunal was *res-judicata*, the parties had litigated over the same subject matter before the Magistrate's Court and the High Court and by then, the deceased appellant was appearing as a witness and in support of the respondent's case. Finally, Mr. Gakuhi urged us to consider that the same way an order by *certiorari* is issued, it can apply for an order of prohibition to stop the court and the tribunals from proceeding without jurisdiction. The decision under challenge was by a body that lacked jurisdiction. Thus, it cannot be made an order of court. He urged us to dismiss the appeal.

14. This appeal, as we understand it, turns on only one issue, which is whether the learned Judge erred in issuing the orders of prohibition on **26th February, 2009**, to prohibit an award and decree that was

issued on **12th July, 2007**, by the Chief Magistrates Court in Nyeri that is after about one year and six months. It is common ground that the respondents' application for orders of judicial review in the nature of *certiorari* was not successful. That is when the 4th respondent filed another suit this time seeking for an order of prohibition. The law on when a writ of prohibition can issue as appreciated by both counsel is well settled in a long line of authorities by this Court and others which form part of the precedents. In the case of Kenya ***National Examination Council, Exparte, Geoffrey Gathenji Njoroge, C.A. No. 266 of 1996***, this Court discussed at length when the remedy of prohibition can issue.

15. This Court was answering the question; - ***“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceeding. Therein in excess, of its jurisdiction or in contravention of the laws of the Land. It lies, not only for excess of jurisdiction or absence of it but also for departure from the rules of natural justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. See Halsbury's Laws of England, 4th Edition, Vol. 1 at page 37 paragraph 128.”***

16. We have to apply these principles to this case, and what is instructive to acknowledge is that the Land Disputes Tribunal was a creature of statute. The **Land Disputes Tribunal Act No. 18 of 1990** (now repealed) **Section 3(1)** provides the matters that form the jurisdiction of the elders' tribunal are issues of:-

- 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”.***

Our own understanding of the dispute that was taken to the tribunal for determination was the issue of whether the suit property was land held in common, or a claim to occupy land. We say this because, it is uncontested that when Susan, the mother of the appellants and 4th respondent returned to live with her father in the early 1960's, she lived on the suit property with all her children. When her father died, he left her and her children living on this land, thus, they were occupying the land and working on it by the time the 4th respondent was registered as proprietor.

17. The problem the learned Judge identified was the tribunal overstepped their jurisdiction when they ordered a sub-division of the suit premises and transfer thereto to the appellants. The learned Judge issued an order of prohibition against the Chief Magistrate's court, Nyeri, restraining the said court or any other court under its control from proceedings with execution or enforcement of the decree given on 12th July, 2007, in **Nyeri CMCC Award Case No. 12 of 2004**. Unfortunately, the act that was being prohibited or restrained, had taken place almost 18 months before. In essence, the order of the Chief Magistrate remains because the available remedy that could have set it aside was an order of *certiorari*. The learned Judge's intention is clear, it was to nullify an order that was made in excess of jurisdiction as she posited in part of her ruling as follows:-

“The fact that judgment has been entered in terms of the award cannot preclude this court from granting an order of prohibition to stop execution of the judgment whose very source was a nullity.”

18. In our considered view, this observation is not entirely correct in law because the order of prohibition that was issued did not solve the complex problem that was facing the court and the parties. Firstly, the tribunal was a creature of the law and both parties submitted themselves to its jurisdiction and it is the 4th respondent who appealed before the Provincial Land Disputes Committee. In other words he

could have applied to quash the decision of the Land Disputes Tribunal instead of appealing. The issue we have to address is the fact that the tribunal is said to have exceeded its jurisdiction and went a step further to order sub-division of land. After considering the evidence and establishing that all the parties were occupying the suit land the tribunal ordered the subdivision of the land among the appellants and the 4th respondent. Perhaps if the tribunal merely declared that the appellants were in occupation of the suit land and stated the portions they occupied without making a definitive order of subdivision and transfer and leaving the parties to seek the orders of transfer in the High Court that would have been within the acceptable limits of the Act. The issue that causes us considerable concern is the fact that the remedy sought by the 4th respondent of prohibition cannot help the situation; it was issued after the event.

19. Even if we were to consider this dispute within the principles of the overriding objectives in the administration of justice which can be done because courts have shifted and they no longer worship at the altar of technicalities, we are afraid this is not one of them. This is a matter that touches on a principle of law regarding the effects of remedies in judicial review and also touches on the fundamental rights over rights to property by members of the same family who have occupied land through their mother in all their lifetime and now the suit land is registered in the name of one of them, the 4th respondent. It is the 4th respondent who pursued the wrong remedy after he lost a case for what would have been an appropriate remedy. Was he entitled to litigate in installments and after he lost the case for orders of *certiorari*, file another suit seeking for the orders of prohibition?

20. We think not because of the circumstances of this case; an order of prohibition is futuristic, it is pure-emptive and not retroactive. For an order of prohibition to issue the decision complained of must not be completed, it is a contemplated decision. See the case of ***Republic v University of Nairobi C. A. No. 73 of 2001***, this court observed:

“As a matter of common sense, the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done.”

As matters stand, the decree of the Chief Magistrate, still stands, the learned Judge misapprehended the effect of the remedy of prohibition as far as the circumstances of this case were concerned. An order of court is never made in vain, but sadly in this case, it was. An order of prohibition was issued to stop the adoption of orders that were already adopted.

21. Before we conclude this judgment, an issue was raised regarding the dispute that was referred to the Tribunal was actually *res-judicata*. Although this was an issue that should have been raised in the aforesaid tribunal, nonetheless on our part, we have taken time to go through the proceedings before the Karatina Third Class District Magistrate's Court, the Senior Resident Magistrate and High Court and we are satisfied the appellants were not parties in those cases. The parties were Susan's brothers as against the 4th respondent who sought to inherit the suit land from his grandfather. The appellants led by their mother started a fresh dispute claiming their own rights to occupy the same property as the 4th respondent.

14. In our considered view the matter was not *res-judicata* when the 4th respondent became registered as proprietor, the appellants who were in occupation of the suit land started their own claim. We think we have said enough to demonstrate that this appeal has merit and we have no hesitation to allow it. Accordingly, we allow the appeal, set aside judgment of the learned Judge made on 26th February, 2009 and the respondents' Notice of Motion application dated 26th November, 2008, be and is hereby dismissed. This being a family matter we do not desire to set these litigants any more against each other as we could have ordered the 4th respondent to pay costs, but instead order each party to bear their own costs.

Dated and delivered at Nyeri this 26th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO - ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR