



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW 117 OF 2011

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS FOR AN ORDER OF CERTIORARI AND ORDERS OF PROHIBITION BY JOHN
KAMAU NJUGUNA**

AND

**IN THE MATTER OF NYANDARUA-OLKALOU LAND DISPUTE TRIBUNAL CASE NO. 3 OF
2004**

BETWEEN

HEZEKIAH KARANJA NJAGI VS JOHN KAMAU NJUGUNA

IN THE MATTER OF PROVINCIAL APPEALS COMMITTEE CENTRAL

BETWEEN

JOHN KAMAU NJUGUNA VS HEZEKIAH KARANJA NJAGI

AND

**IN THE MATTER OF THE LAW OF SUCCESSION ACT CAP 160 AND IN THE REGISTERED
LAND ACT CAP 300 LAWS OF KENYA**

AND

IN THE MATTER OF AN APPLICATION BETWEEN

JOHN KAMAU NJUGUNA APPLICANT

VERSUS

**NYANDARUA OL-KLALOU LAND DISPUTES TRIBUNAL 1ST
RESPONDENT**

**PROVINCIAL APPEALS COMMITTEE CENTRAL 2ND
RESPONDENT**

**NYAHURURU PRINCIPAL MAGISTRATE'S COURT 3RD
RESPONDENT**

AND

PAUL GICHANGI KARANJA1ST INTERESTED
PARTY

EUNICE WANGARI KARANJA 2ND INTERESTED
PARTY

(SUED ON BEHALF OF THE ESTATE OF) HEZEKIAH KARANJA NJAGI
DECEASED

JUDGMENT

Before Court is the Notice of Motion dated 24/10/2011 where the Ex Parte Applicant JOHN KAMAU NJUGUNA seeks the following orders

“(a) THAT this honourable court be pleased to grant an order of PROHIBITION directed to the 3rd Respondent herein NYAHURURU PRINCIPAL MAGISTRATE’S COURT restraining it from adopting the proceedings and subsequent award of the 1st Respondent herein NYANDARUA – OLKALAU LAND DISPUTE TRIBUNAL.

(b) THAT the costs of the application to be awarded to the applicant subject herein”

The application was filed subsequent to the leave granted by the court on 7th October, 2011 and is supported by the verifying affidavit and further affidavit filed by the Ex Parte applicant on 12th October, 2011 and 8th October, 2011 respectively.

BACKGROUND

The background of this matter is as follows. By way of an agreement dated 12th June, 1986 the late JOSEPH MWANGI NDAGWATHA agreed to give out the Ex parte applicant two (2) acres, out of his land No. Nyandaura/Olkalau/1088 in exchange of 2 acres carved out of the Ex parte applicant’s parcel of land known as Nyandarua/Kiambaga 1440 as well as the sum of Ksh 13,000/= . Following this agreement the Ex parte applicant immediately took up possession of the suit land given to him under the agreement and proceeded to build on it a permanent house.

However the suit property was actually registered in the name of the mother of the seller on LUCIA WACHUKA NDAGWATHA.

Upon the death of ‘Lucia’ the property occupied by the Ex parte applicant was transmitted to the son in law of ‘Joseph Mwangi Ndagwatha’ (the seller) whose name was ‘Hezekiah Karanja Njagi’ (hereinafter referred to as ‘the deceased’). The deceased proceeded to obtain a title deed for the land.

Thereafter the deceased proceeded to file a claim before the Nyandarua OlKalau Land Disputes Tribunal (the 1st Respondent herein) seeking orders to evict the Ex parte applicant. Unfortunately the deceased passed away before prosecuting his case. The case was thus pursued on behalf of the estate of the deceased by the Interested Parties. The 1st Respondent allowed the deceased’s claim and found that the deceased had acquired the title legally thus the suit land belonged to him. The tribunal ordered the ex parte applicant to vacate the land.

Being aggrieved the Ex parte applicant lodged an appeal at the ‘Central Province Appeals Committee’ (the 2nd Respondent herein), which committee rendered its decision/awarded in the following terms

“The tribunal having visited the suit land, the Respondent Hezekiah Karanja Njagi being

deceased person (sic) his title having changed from the said Respondent to her wife through succession, the appellant and the Respondent's wife seeking compensation, this tribunal (sic) has no jurisdiction over all the mentioned matters"

Following this decision the Interested Parties as the administrators of the estate of the deceased, moved to the Principal Magistrate's Court at Nyahururu (the 3rd Respondent) vide Land Dispute No. 18 of 2011 seeking to have the court adopt the decision of the Land Tribunal following the dismissal of the appeal by the Appeals Committee.

The Ex parte applicant asked the court to restrain the court from adopting the decision of the Tribunal since the Tribunal did not have jurisdiction to determine a question concerning ownership and acquisition of Title to the suit land. The Ex parte applicant argued that the Tribunal did not have powers to order that the property be transferred from the deceased to his wife '**Eunice Wangari Karanja**' who had not obtained letters of administration at the time thus she therefore could not validly effect transfer.

The Tribunal therefore erred in allowing the Interested Parties to prosecute the proceedings on behalf of the deceased while they did not have letters of administration. The Ex parte argued that unless restrained by way of a prohibition order the Principal Magistrate's Court would adopt this unlawful award.

The **Hon. Attorney General** entered appearance and filed their Grounds of Opposition dated 7/9/2012 in response to the application. The State argued that the orders of Appeals Committee could only be challenged by way of an appeal to the High Court. The present application therefore ought to be dismissed with costs as it lacked merit, was bad in law and amounted to as abuse of the court process.

The 1st Interested Party objected to the application on the sole ground that the Ex parte Applicant did not lodge a substantive appeal against the decision of the District Land Tribunal.

The 2nd Interested Party entered appearance but did not file any reply to the application.

The application was disposed of by way of written submissions. The Ex parte applicant filed his written submissions dated 17/7/2012. It was submitted on behalf of the Ex parte applicant that the 1st and 2nd Respondents had no capacity to determine issues concerning ownership of property which was the issue before them. Neither did the Respondents have the capacity to determine matters concerning the estate of the deceased given that the case was being litigated by persons who did not hold letters of administration in respect of the deceased's estate.

The 2nd Respondent acknowledged their lack of jurisdiction but nevertheless declined to set aside the verdict of the 1st Respondent. As a result of this default the 3rd Respondent is poised to adopt the illegal award of the 1st Respondent whose real effect would be to allow the Interested Parties to benefit from that illegal award. Counsel for the Ex parte applicant submitted that the dismissal of the appeal by the 2nd Respondent did not amount to an affirmation of the decision of the 1st Respondent.

The Ex parte applicant further submitted that he could not seek an order of Certiorari to quash the decision of the 1st Respondent given that the six (6) month period prescribed by the **Law Reform Act** and the **Civil Procedure Rules** had lapsed. The only recourse available to the Ex parte applicant was to seek an order of prohibition by way of a Judicial Review Application to restrain the 3rd Respondent from adopting that award. Counsel urged this court to allow the application and grant the orders as prayed.

ANALYSIS

The 1st Interested Party and the State argued that the decision of the 1st and 2nd Respondents could only be challenged by way of appeal. As such they argued that the proceedings before this court were defective in substance and the orders sought could not issue. Is this the correct position?

The High Court of Kenya is vested with supervisory jurisdiction over all bodies and persons exercising the Judicial or quasi-judicial function by Article 165(5) of the Constitution of Kenya, 2010. As such any decision made by the Land Dispute Tribunal is amenable to the supervisory jurisdiction of the High Court and is subject to judicial review.

The scope of the remedy of prohibition by way of judicial review was set out by the Court of Appeal in the case of **NATIONAL EXAMINATION COUNCIL Vs REPUBLIC Ex Parte GEOFFREY GATHENJI NJOROGE & 9 OTHERS** where it was held as follows

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.... Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings 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 a 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.....”

An order of prohibition being futuristic in nature will only issue in cases where a decision has not yet been made. The applicant must show that the public body intends to act in a manner that would warrant the intervention of the High Court.

In **NYANDO POWER TECHNIQUES LIMITED Vs NAIROBI CITY COUNTY & ANOTHER [2016]eKLR**, the court held that

“Prohibition on the other hands is a means of preventing an order or decision being made, which if made would be subject of an order of certiorari for prohibition to issue there must be an imminent threat of the Respondent taking an action which constitutes grounds for the grant of judicial review relief. In other words where there is no such threat, an order of prohibition will not issue in vacuo”

The party seeking an order of prohibition must show that the intended action of the public body is tainted with irrationality, procedural impropriety or illegality. This court is not being asked to determine the **legality** of the decisions made by the 1st and 2nd Respondents as it has not been asked to quash those decisions by way of certiorari, which is the appropriate remedy to correct a wrong action which has already been taken. This court is being asked to act against the intended adoption of the decision of the 1st Respondent by the 3rd Respondent.

The 3rd Respondent being the Principal Magistrate, Nyahururu has been asked to adopt as an order of the court, the decision of the 1st Respondent affirming the legality of the title deed, issued to the late **Hezekiah Karanja Njagi** and the decision to issue an order of eviction against the Ex parte applicant. It must be remembered that the decision of the 1st Respondent had been appealed against to the 2nd Respondent, which declined to render a decision on account of lack of jurisdiction.

The issues between the parties concerned ownership and title of property. The Ex parte applicant took up possession and occupation of the suit property following his agreement with the late **Joseph Mwangi Ndagwatha**. The beneficiaries of the estate of the late **Hezekiah Karanja Njagi** were out to assert his proprietary rights over the suit property following the bequest of the same to him by his mother the late **Lucia Wachuka Ndagwatha**. The title thereafter passed to the wife of **Hezekiah Karanja Njagi** by way of succession.

These were matters which were clearly outside the jurisdiction conferred upon the Tribunal by Section 3 of the Land Disputes Tribunal Act, which limited the jurisdiction of the Tribunal to disputes concerning the division of, or the determination of boundaries to land, a claim to occupy or work land or trespass to land.

In its ruling the 2nd Respondent only indicated that it lacked the requisite jurisdiction to determine the matter but did not indicate in its ruling whether it had allowed or disallowed the appeal before it. The interested parties construed this lack of an express statement setting aside the decision of the 1st Respondent to mean that the decision of the 1st Respondent remained valid and available for adoption by the 3rd Respondent.

In exercising its appellate jurisdiction under Section 8 of the Land Disputes Tribunal Act, the 2nd Respondents function is akin to that of a first appellate court. It has an obligation to re-evaluate and analyze the evidence of the Tribunal and thereafter to make its own findings based on facts and the law.

In this case given that the 1st Respondent determined the issues on their merits means that it interpreted the law to mean that it had jurisdiction over the matter. In declining to determine the issues for want of jurisdiction the 2nd Respondent thereby reversed the finding of the Tribunal that it had jurisdiction.

However the finding by the 2nd Respondent that it lacked jurisdiction cannot be construed to mean that the award of the Tribunal could still stand and be deemed as valid and enforceable.

The Tribunal could not assume a jurisdiction that was beyond that of the Appeals Committee. Thus the Interested Parties could not revert to the decision of the Tribunal as if that decision had never been challenged. There must exist some consonance between the Tribunal and the Appeals Committee. Once the appellate court found that it could not determine the issues raised by the parties due to lack of jurisdiction, then it follows that the Tribunal similarly had no jurisdiction to determine those matters. The effect of the decision of the Appeals Committee was to set aside the decision of the Tribunal.

I therefore find that there is no award available for adoption by the 3rd Respondent. The decision of the 2nd Respondent that it lacked jurisdiction effectively invalidated the decision made by the 1st Respondent. As such I find that this is a proper case for the issuance of an order or Prohibition to restrain the 3rd Respondent from adopting the flawed decision of the 1st Respondent.

Accordingly I do allow the Notice of Motion dated 24/10/2011. An order of prohibition is hereby issued restraining the 3rd Respondent from adopting the proceedings and subsequent award of the Nyandarua Olkalau Land Disputes Tribunal issued on 15th September, 2004. The costs are awarded to the Ex parte applicant.

Dated and Delivered in Nakuru this 31st day of May 2017.

Maureen A. Odera

Judge