



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**IN THE JUDICIAL REVIEW CASE NO. 1 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF CERTIORARI  
& PROHIBITION**

**AND**

**IN THE MATTER OF THE LANDS DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**AND**

**IN THE MATTER OF KERUGOYA CENTRAL LAND DISPUTES TRIBUNAL CASE NO. 29  
OF 2010**

**AND**

**IN THE MATTER OF KERUGOYA CHIEF MAGISTRATE'S LDT CASE NO. 31 OF 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT/RESPONDENT**

**VERSUS**

**KERUGOYA CENTRAL LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA.....2<sup>ND</sup> RESPONDENT**

**RICHARD MUGO GICHANGI.....3<sup>RD</sup> RESPONDENT**

**EXPARTE**

**ANTONY WACHIRA NDUMBI.....1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**PETER WANJOHI GICHANGI.....2<sup>ND</sup> INTENDED INTERESTED PARTY**

**JUDGMENT**

Leave having been granted by Ong'udi J. on 13<sup>th</sup> December 2011, the applicant herein **ANTONY**

**WACHIRA NDUMBI** filed this Notice of Motion on 9<sup>th</sup> January 2012 seeking the following orders against the respondents:-

1. *An order of certiorari to remove into this Court and quash the award of the Kirinyaga Central Division Land Disputes Tribunal and the subsequent order of Kerugoya Senior Resident Magistrate's Court adopting the award as a judgment of the Court on 2<sup>nd</sup> November 2010 in Kerugoya Senior Resident Magistrate's Land Disputes Tribunal Case No. 31 of 2010.*
2. *An order of prohibition directed to the Senior Resident Magistrate's Court Kerugoya and all officers thereof prohibiting them from enforcing or assisting in the enforcement of the said award and subsequent orders.*
3. *That the Land District Surveyor and Registrar do sub-divide the said land as per the shares in the search certificate annexed herein.*

The said application was grounded on facts set out in the statutory statement of facts and the verifying affidavit of the applicant **ANTONY WACHIRA NDUMBI**.

The application is premised on four issues being:-

1. *That the applicant and the 3<sup>rd</sup> respondent are the joint registered owners of land parcel No. MUTIRA/KAGUYU/819 (the suit property).*
2. *That the Kirinyaga Central District Land Disputes Tribunal (the tribunal) deliberated over a dispute involving the said suit property and ordered its sub-division between the applicant and the 3<sup>rd</sup> respondent as follows:-*
  - a. *Applicant – 0.60 Ha*
  - b. *3<sup>rd</sup> Respondent – 1.38 Ha.*
3. *That the said award was adopted by the Senior Principal Magistrate's Court Kerugoya in Land Disputes case No. 31 of 2010.*
4. *That the Tribunal had no jurisdiction to alter the shares under the Registered Land Act.*

The application was opposed.

On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, **MAKORI OKELLO** a Litigation Counsel at the Attorney General's office filed a replying affidavit in which he deponed, inter alia, that the application is misconceived, bad in law and an abuse of the Court process and has not met the legal threshold for Judicial Review remedies of certiorari and prohibition and therefore the orders sought are legally untenable.

On his part, the 3<sup>rd</sup> respondent **RICHARD MUGO GICHANGI** filed a replying affidavit in which he raised the following issues:-

1. *That leave to file this Notice of Motion was granted on 13<sup>th</sup> December 2011 and the Notice of Motion was to be filed within 21 days from that day yet it was filed on 9<sup>th</sup> January 2012 which is beyond the 21 days hence the Notice of Motion is incompetent and bad in law and should be struck off with costs.*
2. *That the Notice of Motion was not filed at least 8 clear days from the date of hearing.*
3. *That it is the applicant himself who filed proceedings before the Tribunal seeking a sub-division of the suit property.*

**PETER WANJOHI GICHANGI** was enjoined in these proceedings as an interested party. He represents the family of the late **GICHANGI GITHIRU** and his contention is that the suit property belongs to that family and devolved to their mother upon succession and that the applicant is not a member of their family.

Submissions were filed by both Ms Thungu advocate for the applicant, Mr. Kagio advocate for the 3<sup>rd</sup> respondent and Mr. Murigu advocate for the interested party. The Attorney General did not file any submissions.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsels.

This being a Judicial Review application, the Court is concerned not with the merit or otherwise of the decision but the process by which that decision was arrived at. If, for example, the decision making process violated the rules of natural justice or the decision making body had no jurisdiction to hear the dispute (as in the complaint herein) that will be a ground for quashing the decision of the decision maker. In **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC AND UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 OF 2001**, the Court of Appeal set out the purpose of Judicial Review as follows:-

*“Judicial Review is concerned with the decision making process, not with the merits of the decision itself. The Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters..... The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision”*

See also **REPUBLIC VS KENYA REVENUE AUTHORITY EX-PARTE YAYA TOWERS LTD (2008) e K.L.R.** The broad grounds upon which a Court exercises its Judicial Review jurisdiction were re-stated in the case of **PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL AND OTHERS (2008) 2 E.A 300** which cited with approval the decision in **COUNCIL OF CIVIL UNIONS VS MINISTER FOR THE CIVIL SERVICE (1985) A.C 2** and **AN APPLICATION BY BUKOBA GYMKHANA CLUB (1963) E.A 478 at page 479** as follows:-

*“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....*

*Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality..... Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision”*

The complaint by the applicant herein is that the Tribunal acted in excess of its jurisdiction. That can be a ground for quashing the Tribunal’s decision as is now clear from the **PASTOLI** case (supra). But before I delve into that, Mr. Kagio advocate for the 3<sup>rd</sup> respondent submitted that since this Notice of Motion was filed on 9<sup>th</sup> January 2012 when leave was granted on 13<sup>th</sup> December 2011, that was well in excess of the 21 days period given by **Ong’udi J.** and therefore I should strike off this application. The answer to that is that time does not run between 21<sup>st</sup> December and 13<sup>th</sup> January of the following year. **Order 50 Rule 4 of the Civil Procedure Rules** provides as follows:-

*“Except where otherwise directed by a Judge for reason to be reduced in writing, the period between the twenty first day of December in an year and the thirteenth day of January in the year following, both days included, shall be omitted from any*

***computation of time (whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act”***

The order for leave having been granted by **Ong’udi J.** on 13<sup>th</sup> December 2011, it is obvious that by 9<sup>th</sup> January 2012 when this application was filed, the twenty one (21) days period had not expired.

The other issue raised by the 3<sup>rd</sup> respondent in his replying affidavit is that the Notice of Motion was not served at least eight (8) clear days before the date of hearing and was instead served six (6) days before the hearing. I do not think anything turns on that as there is no suggestion that any prejudice was caused to the respondents and in any case, I would consider that lapse to be a mere technicality curable by **Article 159(2) (d) of the Constitution.**

As stated above, the basis of this application is that the Tribunal had no jurisdiction in making the decision that it did. I have looked at the proceedings before the Tribunal. It is not in dispute that the suit property is registered in the joint names of the applicant and the 3<sup>rd</sup> respondent. From the copy of search certificate annexed to the application, that registration is under the **repealed Registered Land Act.** The issues for determination before the Tribunal as framed by itself were captured as follows:-

**“ISSUES/CLAIMS/DISPUTES**

1. ***Land Control Board consent for sub-division and transfer of joint title.***
2. ***Proper sub-division of parcel MUTIRA/KAGUYU/819 measuring 1.98 Ha into 7 portions to children.***
3. ***Claim of each share to get the portion he has developed.***
4. ***A clan land – Ukiuru Wambori ya Gutu”***

And in its final orders, the Tribunal ordered inter alia, that the suit land be sub-divided into two portions as follows:-

- a. ***RICHARD MUGO GICHANGI (3<sup>rd</sup> Respondent) to have 1.38 Ha and***
- b. ***ANTONY WACHIRA NDUMBI (Applicant herein) to have 0.60 Ha.***

The Tribunal went on further to add that the Executive officer do sign the relevant documents and the Land Registrar dispenses with production of the old title. Those orders were not within the jurisdiction of a Land Disputes Tribunal established under **Chapter 303 A Laws of Kenya (now repealed).** Under **Section 3 (1) of the Land Disputes Tribunal Act,** the limit of jurisdiction of such a Tribunal was provided as follows:-

***“Subject to this Act, all cases of civil nature involving a dispute to:-***

- a. ***the sub-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”***

As is clear from the issues that the Tribunal set out to determine and its subsequent orders, the proceedings before it related to title to registered land which the Tribunal proceeded to sub-divide and even issued directions to the Land Registrar. By **Section 159 of the Registered Land Act (now repealed)** such powers could only be exercised by the High Court or by the Resident Magistrate’s Court where the subject matter was within its jurisdiction. This has been restated in several cases including **JOTHAM AMUNAVI VS CHAIRMAN SABATIA DIVISION LAND DISPUTES TRIBUNAL AND ANOTHER C.A CIVIL APPEAL NO. 256 OF 2002.** It follows therefore that the Tribunal having exercised powers or a jurisdiction that it did not have under the law, its orders issued by the Senior Resident Magistrate’s Court at Kerugoya in its case No. 31 of 2010 are ultra vires and therefore subject to quashing by this Court. The issues raised by the interested party that the applicant is not part of their family and that the suit property devolved to their mother during succession are matters that ought to have been raised during

the succession proceedings. Mr. Kagio advocate for the 3<sup>rd</sup> respondent has also submitted that it is the applicant herein who filed the dispute at the Tribunal and he cannot now therefore be heard to complain that the Tribunal had no jurisdiction to determine that dispute. The Tribunal being a creature of statute namely the **Land Disputes Tribunal Act (now repealed)** it could not exercise any jurisdiction other than that which is provided under **Section 3 (1) of that Act**. Jurisdiction is a matter of law and as was held in the case of **DESAI VS WARSAMA 1967 E.A 351**, no Court can confer jurisdiction upon itself and further, parties even by mutual consent, cannot confer jurisdiction upon a Court - see **ALLARAKHIA VS AGAKHAN 1969 E.A 613**. It matters not, therefore, that the applicant was the one who moved the Tribunal. It was the responsibility of the Tribunal to lay down its tools and not move a step further because the dispute before it was beyond its jurisdiction and it is well established that any order passed by a Court or Tribunal in excess of its jurisdiction is a nullity. Therefore the Tribunal's award and its subsequent adoption by the Senior Resident Magistrate's Court in Kerugoya Case No. 31 of 2010 were all nullities for want of jurisdiction which this Court must therefore quash by an order of certiorari which is well merited.

The applicant also seeks an order of prohibition directed to the Senior Resident Magistrate's Court at Kerugoya and all officers prohibiting them from enforcing the said award and subsequent orders. It has not been suggested by any of the parties herein that the said award or judgment of the Kerugoya Court have been implemented. In the circumstances, it is proper that such orders or judgment be prohibited having been granted in excess of jurisdiction.

Ultimately therefore I allow the applicant's Notice of Motion filed on 9<sup>th</sup> January 2012 and make the following orders:-

- 1. I call into this Court and quash by an order of certiorari the award of the Kirinyaga Central Division Land Disputes Tribunal dated 28<sup>th</sup> September 2010 and the subsequent order of the Kerugoya Senior Resident Magistrate's Court adopting the said award as a judgment of the Court on 2<sup>nd</sup> November 2010 in Kerugoya Senior Resident Magistrate Court Land Disputes Tribunal Case No. 31 of 2010.***
- 2. An order of prohibition is issued directed to the Senior Resident Magistrate's Court Kerugoya and all officers from enforcing or assisting in the enforcement of the said award, judgment and subsequent orders.***
- 3. With regard to the prayer that the District Surveyor and Registrar do sub-divide the said land as per the shares in the search certificate, I see no need to make such an order as the registered proprietors of the suit property can make an application to the Registrar under Section 94 of the Land Registration Act.***
- 4. Parties to meet their own costs.***

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**

Judgment delivered in open Court this 26<sup>th</sup> February, 2016

Ms Thungu for Applicant present

Mr. Macharia for Mr. Kagio for 3<sup>rd</sup> Respondent present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**