



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. CIVIL APPLICATION NO. 823 OF 2007**  
**(NYERI HIGH COURT MISC. APPL. NO. 191B OF 2003)**  
**IN THE MATTER OF AN APPLICATION FOR PROHIBITION & CERTIORARI ORDERS**  
  
**AND**  
  
**IN THE MATTER OF LAW OF SUCCESSION ACT (CAP 160)**  
  
**AND**  
  
**IN THE MATTER OF LAND DISPUTES TRIBUNALS ACT**  
  
**BETWEEN**  
  
**BETH WANGARI NJOROGE**  
  
**THROUGH**  
  
**REPUBLIC .....APPLICANT**  
  
**VERSUS**  
  
**NJERI MWANGI NJOROGE.....1<sup>ST</sup> RESPONDENT**  
  
**THE CHAIRMAN,**  
  
**GATANGA LAND DISPUTE TRIBUNAL.....2<sup>ND</sup> RESPONDENT**  
  
**THE CHIEF MAGISTRATE, THIKA .....3<sup>RD</sup> RESPONDENT**  
  
**JUDGEMENT**

**Introduction**

1. In their Notice of Motion dated 7<sup>th</sup> November, 2003, the ex parte applicants herein, **Beth Wangari Njoroge**, seeks the following orders:
  - a) **THAT** this Honourable Court be pleased to issue an Order of Certiorari removing the Award of the Gatanga Land Disputes Tribunal dated 26.06.03 filed in the Thika Chief Magistrate's Court in D. O. Case No.36 of 2003 into this Honourable Court for the

purpose of quashing the same.

b) **THAT an Order of Prohibition preventing the Chief Magistrate's Court at Thika from adopting the said Award of the Gatanga Land Disputes Tribunal as its Judgement.**

c) **Such further Orders as this Honourable Court may deem fit to grant.**

d) **Costs be provided for.**

### Applicant's Case

2. The application was supported by Statutory Statement in which the facts constituting the cause of action were enumerated as follows:
  1. **The Applicant is the registered owner of Land Parcel LOC.16/MBUGITI/409, the Suit Land herein, measuring 17 ½ Acres.**
  2. **The Land originally belonged to the Applicant' Father Njoroge Gikima (Deceased).**
  3. **The Applicant was registered proprietor of the said Land pursuant to the Registrar's Certificate dated 26.6.79 in Succession Cause No. 81 of 1979 in the Matter of the Estate of Njoroge Gikima (Deceased) in which the Parties by Consent agreed that the Land be transferred to the Applicant.**
  4. **That the 1<sup>st</sup> Respondent neither Appealed nor applied for revocation.**
  5. **That in or about January, 2003, the 1<sup>st</sup> Respondent filed Case No. of 2003 in the Gatanga Land Disputes Tribunal claiming that the Applicant transfers to her 10 Acres out of the Suit Land.**
  6. **THAT the Case was heard by the Tribunal and the Award of the Tribunal was that the Applicant transfers 10 Acres out the Suit Land to the 1<sup>st</sup> Respondent.**
  7. **That the said Court is about to adopt the Award as its Judgment.**
  8. **That the said Award was filed in the Thika Chief Magistrate's Court in D. O. Case No. 36 of 2003 and the same was read to the Parties by the Court on 12.08.03.**
  9. **That the Applicant was aggrieved by the said Award and hence this Proceedings for Certiorari and Prohibition Orders.**
3. The application was supported by a verifying affidavit and Verifying Affidavit sworn by the applicant on 26<sup>th</sup> October, 2003 in which the applicant apart from confirming that the "averments" in the Statement of Facts herein were true and correct, said nothing else of substance.
4. It was submitted that the Gatanga Land Disputes Tribunal lacked the necessary jurisdiction to hear and determine a question of ownership of title hence acted ultra vires the statutory provisions of the *Land Disputes Act*.
5. It was further submitted that the said Tribunal offended the provisions of the Law of Succession Act by purporting to revoke a grant when it had no such powers. According to the applicant, the proceedings before the Tribunal were *res judicata* in light of the issues canvassed and determined in Succession Cause No. 81 of 1979.

### 1<sup>st</sup> Respondent's Case

6. In response to the application, **Njeri Mwangi Njoroge**, who is erroneously named as the 1<sup>st</sup> Respondent herein rather than an interested party, swore a replying affidavit on 18<sup>th</sup> October, 2006.
7. According to her, she was the Claimant in the Gatanga Land Dispute Tribunal Case No. 1 of 2003 and the Plaintiff in the subsequent confirmation suit in the Chief Magistrate Courts Thika, D. O. Case No. 36 of 2003, which suits are the subject of this Application.
8. In the said affidavit the deponent denied that there was a confirmation of grant in the Succession Cause No. 81 of 1979 in Kandara (the Succession Cause) which had the effect as alleged in the statement of this Application. She therefore averred that the case she filled at the land Disputes

- Tribunal is not *res judicata*.
9. While denying the averments in the Statement of the Application that she had no interest in the land Parcel LOC.16/MBUGITHI/409 (hereinafter the suit land), she deposed that she the widow of Mwangi, a son of **Njoroge Gikima**, deceased (who was the original owner of the suit land) begotten of his first wife **Wanjiru**, also deceased. Before the death of her husband she begot him ten issues.
  10. The 1<sup>st</sup> respondent deposed that while alive, her late father in law intimidated according to Kikuyu customary law, that upon his death, each of his wives namely: **Wanjiru** (the 1<sup>st</sup> wife), **Muthoni** (the 2<sup>nd</sup>) and **Wangari** (the 3<sup>rd</sup>) be entitled to ten (10) acres of his thirty six (36) acres. It was her averment that even though her mother in law predeceased her father in law, her children were still entitled to the share of his property hence her late husband being the son of **Njoroge Gikima's** first wife was entitled to succeed her. She therefore averred that even though her husband is deceased his ten children and herself are entitled to inherit on his behalf as his dependants. She was however, a stranger to the proceedings of the Succession Cause No. 81 of 1979 Kandara produced in court by the Applicant.
  11. In her view, the purported consent judgment was obtained fraudulently and/or irregularly which prompted her to resort to the Land Disputes Tribunal at which the Applicant did not mention the Succession Cause as being the source of her ownership but stated that she was entitled to the suit land by virtue of having bought it from the said **M. Giichi**, the deponent's brother in law, and the rest totaling seven (7) acres having been gifted to her by her father to make the total of about seventeen acres of the suit land. She therefore asserted that the Applicant's evidence at the Land Disputes Tribunal, by far conflicts with the proceedings of the alleged Succession Cause.
  12. In her view, the Succession Cause, if ever held, is riddled with irregularities and inconsistencies which would make it a nullity and contended that if the registration of the suit land was obtained irregularly and/or fraudulently acquired, it can be rectified.
  13. The deponent therefore prayed that this Honourable Court exercises its immense fairness and justice to dismiss this Application with costs so that the proceedings of the courts below may be concluded.
  14. The 1<sup>st</sup> respondent's submissions reiterated the contents of the affidavit and challenged the validity of the applicant's title as well as the regularity of the succession proceedings and averred that the same were a nullity.

### **Determination**

15. I have considered the foregoing. The issue for determination by the Court in this application is whether the Tribunal had the jurisdiction to entertain the dispute that was before it. The said Tribunal's jurisdiction was circumscribed in section 3 of the repealed ***Land Disputes Tribunals Act*** under which it was provided that:

***(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.***

16. It therefore follows that the Tribunal had jurisdiction to determine disputes revolving around division of, or the determination of boundaries to land, a claim to occupy or work land and trespass to land. In its decision the Tribunal directed that the "*Land Loc.16/Mbugiti/409 be subdivided into two and 10 acres of it be transferred to Njeri Mwangi Njoroge the claimant*".
17. The Court of Appeal in **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002** held that if the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels opening a register

- in respect of each sub-division and thereafter the transfer of the sub-division of half acre, it is clear that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of section 3(1) of the **Land Disputes Tribunal Act** as such disputes can only be tried by the High Court or by the Resident Magistrate's Court in cases where such latter court has jurisdiction.
18. In this case the effect of the order for transfer of the portion of the suit land to the 1<sup>st</sup> respondent was the alteration of the proprietorship of the said land with the effect that the title to the said land would be affected. Based on the decision cited hereinabove the Tribunal had no power to make a determination with respect to title to land.
  19. If the Tribunal had no jurisdiction to entertain the dispute that was placed before it, it is of no assistance to the 1<sup>st</sup> respondent to contend that there was an appellate option available to the applicant since an appellate option deals with the merits of the decision. In this case the effect of a decision rendered without jurisdiction is to render the same null and void and of no legal effect. See **Macfoy vs. United Africa Co Ltd [1961] 3 All ER 1169 at 1172.**
  20. Whereas the 1<sup>st</sup> Respondent if properly advised may still canvass her case successfully before the right forum, the option of seeking the assistance of the Gatanga District Land Tribunal was ill-advised and misconceived. It was a short cut which was bound to land the 1<sup>st</sup> Respondent into a ditch rather than take her to the destination she had intended to go to.
  21. It follows that the orders that were granted by the Tribunal were not only ultra vires the powers conferred upon the said Tribunal but were also tainted with illegality. In the result the Notice of Motion dated 7<sup>th</sup> November, 2003 succeeds and an order of certiorari is hereby issued removing into this Court the Award of the Gatanga Land Disputes Tribunal dated 26<sup>th</sup> June, 2003 filed in the Thika Chief Magistrate's Court in D. O. Case No.36 of 2003 into this Honourable Court for the purpose of quashing which decision is hereby quashed.
  22. I also issue an Order of Prohibition prohibiting the Chief Magistrate's Court at Thika from adopting the said Award of the Gatanga Land Disputes Tribunal as its Judgement,
  23. In light of the fact that **Njeri Mwangi Njoroge** ought not to have been named as a respondent as well as the fact that all the facts ought to have been contained in the verifying affidavit rather than the Statement coupled with the non-existence of the Tribunal each party will bear own costs.
  24. In light of the fact that the issues raised by the **Njeri Mwangi Njoroge** touch on fraud and illegality, I grant a stay of the implementation of the decision herein for a period of 45 days to enable her seek appropriate legal redress should she deem fit to do so.

**Dated at Nairobi this 20<sup>th</sup> Day of February, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr. Mwaniki for the 1<sup>st</sup> Respondent***

***Cc Simiyu***