



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**JUDICIAL REVIEW E.L.C. 18 OF 2014**  
**FORMERLY KERUGOYA JR E.L.C 10 OF 2014**

REPUBLIC.....APPLICANT

**VERSUS**

EMBU DISTRICT LAND DISPUTE.....1<sup>st</sup> RESPONDENT

PRINCIPAL MAGISTRATE SIAKAGO.....2<sup>nd</sup> RESPONDENT

SUSAN WANJIRU NYAGA.....INTERESTED PARTY

GATUMO KABORERIA.....EX-PARTE

ATANAS B. NYAGA GATUMU.....EX-PARTE APPLICANT

**RULING**

**Introduction**

Mr Atanas Nyaga Gatumo on behalf of the estate of Mr Gatumo Kaboreria through his notice of motion dated 1<sup>st</sup> October, 2010 seeks the following orders from this court:

1. That an order of certiorari to remove into the High Court for the purpose of quashing the decision made by the Lands Disputes Tribunal, Gachoka Mbeere South District dated 20<sup>th</sup> September, 2009 and adopted by the court as its judgment on 15<sup>th</sup> July 2010 awarding the interested party land parcel No. Mbeti/Gachoka/80 and ordered the District Land Registrar to direct the Land Control Board to give consent to transfer the said land under the names of Susan Wanjiku Nyaga.
2. The costs of this application be provided for.

Mrs Susan Wanjiku Nyaga, the interested party has opposed this motion and she is supporting the award of the Eastern Province Land Appeals Committee, which awarded her the suit land.

**The Case of Mr Atanas Nyaga Gatumo, the Ex-parte Applicant:**

The ex-parte applicant has supported his application with an affidavit dated 1<sup>st</sup> October, 2010. According to him, the suit land parcel number Mbeti/Gachoka/80 was awarded to the interested party by the Eastern Province Land Appeals Committee which he now challenges on the basis that that tribunal did not have the jurisdiction to award the land to the interested party.

He also states that the award was adopted as a judgement of the court on 8<sup>th</sup> April 2010 in the Principal Magistrate Court at Siakago in its land disputes tribunal number 14 of 2010 with Susan Wanjiku Nyaga being the plaintiff v. Gatumo Kaboreria being the defendant. Following the adoption, a decree was extracted and issued by that court. He filed these proceedings to challenge the judgment and decree issued by the court of the Principal Magistrate at Siakago, which was issued on 30<sup>th</sup> July, 2010. According to counsel for the ex-parte applicant, the Eastern Province Land Tribunal Appeals Committee did not have jurisdiction to make an award in favour of the interested party. Her submission is based on the provisions of **Section 3(1) of the Land Disputes Tribunal Act number 80 of 1990** which states as follows:

- 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.**

It is her further submission that the tribunal did not have jurisdiction to entertain disputes relating to title to land, which was registered in the name of the late Gatumo Kaboreria. Counsel cited the **Court of Appeal judgment in Jotham Amunavi v. the Chairman Sabatia Division Land Disputes Tribunal** and another being **Civil Appeal Number 256 of 2002**, in which the court held that the tribunal did not have jurisdiction to entertain the dispute relating to title to land.

In that case, the land tribunal had ordered for the subdivision of the suit land into two land parcels one of which was ordered to be registered in the name of the second respondent.

Furthermore, the ex-parte applicants submitted that the application for Order 53 Judicial Review was filed within the 6 months limitation period. According to her, she was granted ex-parte leave to file for an order of certiorari on 5<sup>th</sup> October, 2010 and on 15<sup>th</sup> July, 2010, the order sought to be quashed was adopted as a judgement by the magisterial court.

Based on this computation, she contends that the Judicial Review application was filed within the time allowed by **Order 53 of the 2010 Civil Procedure Rules** as read with **Sections 8 and 9 of the Law Reform Act Chapter 26 Laws of Kenya**. In her view, what is sought to be quashed is the decree of the magisterial court and not the award by the tribunal.

She further submitted that the provisions of Section 7(2) of the Land Disputes tribunal Act are mandatory. These provisions require the magisterial court to enter judgement in accordance with the decision of the tribunal. After entry of the award and adoption as a judgment of the court, a decree would follow which is enforceable as a judgement of the court.

Finally, she submitted that it would have been premature to quash the decision of the land disputes tribunal both at the district and the provincial level. In support of her argument, she cited the provisions of Section 7(2) of the Land Disputes Tribunal Act,

### **The Case for the Interested Party (Mrs Susan Wanjiku Nyaga)**

The interested party has opposed this application. She states that the grant of the *ex-parte* leave to challenge or to quash was made after the expiry of the statutory six months limitation period. In other words, leave should not have been granted. She further submits that the High Court lacks jurisdiction to grant an order of certiorari out of time. Additionally, she has submitted that the Land Disputes Tribunal had jurisdiction to entertain the dispute between the parties.

According to her, the Learned Principal Magistrate at Siakago did not play any part in deciding the dispute. In terms of Section 7 of the Land Disputes Tribunal Act number 18 of 1990 (now repealed), the adopting magisterial court had limited mandatory powers to entertain judgment in accordance with the decision of the tribunal.

And therefore the decision which should have been challenged is that of the Provincial Appeals Committee which determined the dispute by awarding the suit land to the interested party and not that of the magisterial court which adopted it as a judgement of the court.

She finally submitted that the tribunal acted within its jurisdiction because the issue in dispute was one of occupation. And for these reasons, she urged the court to confirm the judgement of the magisterial court which adopted the award as its judgment.

### **The Case for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent:**

These two parties did not take part in these proceedings.

### **The Applicable Law:**

In the light of the affidavit evidence, the submissions of both counsel, the law that governs this application is found in Order 53 as read with Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya. These provisions of the statutory law have been judicially approved in ***RE Application of Gideon Waweru Gathunguri (1959(EA))***. According to that case an application for an order of certiorari must be filed within six months from the date of the occurrence of the order or conduct complained of. The case further states that the six months period of limitation is absolute.

Stated differently, after the expiry of six months, the High Court has no discretion to grant an *ex-parte* leave for the issuance of an order of certiorari. This period of limitation does not apply to applications that are filed in respect of the orders of mandamus and prohibition. The provisions of Order 53 are subsidiary rules in relation to sections 8 and 9 of the Law Reform Act, so that if the subsidiary rules are in conflict with the provisions of the statute, the later prevails over the subsidiary rules. Initially, counsel for the applicant had objected to Atanas Nyaga Gatumo appearing as an *ex-parte* applicant on behalf of the estate of his late father Mr Gatumo Kaboreria.

As a result, Atanas Nyaga Gatumo applied for and obtained a limited grant in terms of Section 67 (1) of the Succession Act which allowed him to prosecute suits on behalf of the estate. Following the obtainment of the limited grant of letters of administration *ad litem* counsel for the interested party dropped her objection, because Atanas Nyaga Gatumo replaced his late father as the *ex-parte* applicant.

In addition to the foregoing, the jurisdiction of the Appeals Committee whose award was adopted as a magisterial court judgement was challenged. The issue is whether or not it is that Appeals Committee award which should be challenged by certiorari or the order of the magisterial court which adopted the award as a judgement of that court.

In this regard, it is important to bear in mind that under the provisions of ***Section 7(1) and (2) of the Land Disputes Tribunal Act number 18 of 1990***, the chairman of the tribunal is required to file his decision in the magisterial court. Once he has filed the award, the court is mandatorily required to enter judgement in accordance with the decision of the tribunal. Upon the entry of the judgement, the decree shall issue and shall be enforced as a decree of a civil court. For the sake of clarity, the provisions of ***Section 7(1) and (2)*** provide as follows:

***7(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.***

***(2) The court shall enter judgement in accordance with the decision of the Tribunal and***

***upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.***

It is clear from these provisions that the magisterial court has no discretion in the matter and its role is to enter the judgement in accordance with the tribunal's decision. The reason being that the wording of Section 7 is couched in mandatory terms.

Finally, there is no issue as to whether the tribunal has the jurisdiction to entertain a dispute relating to title to land. According to the Court of Appeal in the case of ***Jotham Amunavi v. the Chairman Sabatia Division Land Disputes Tribunal and Another, being Civil Appeal No. 256 of 2002 (at Kisumu)***, a tribunal does not have jurisdiction to entertain a dispute relating to title to land. The jurisdiction of the tribunal is limited to determine the following issues in terms of ***Section 3(1) of the Land Disputes Tribunal Act:***

***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”.***

#### **Issues for Determination:**

In the light of the foregoing, the affidavit evidence, submissions of both counsel and the law applicable, I find the following as the issues for determination:

1. Whether or not the tribunal had jurisdiction to award the suit land to the interested party.
2. Whether or not the obtainment of the of the grant of leave to apply for an order of certiorari was time barred.
3. Whether or not the proper order that is subject of an order of certiorari is that of the tribunal or that of the magisterial judgement.
4. Who should pay for the costs of this application.

#### **Evaluation of the Evidence, Findings and the Law:**

It is clear from the affidavit evidence that the *ex-parte* applicant was granted leave on 21<sup>st</sup> September, 2010 to apply for an order of certiorari. It is also clear from the evidence that the award of the tribunal was adopted as a judgement of the court on 15<sup>th</sup> July, 2010 and a decree was issued from that court on 15<sup>th</sup> July, 2010.

I find that the application for Judicial Review was filed within the six months limitation period. I therefore reject the submissions of counsel for the interested party that it was filed out of time. Furthermore, the order that is the proper subject for Order 53 judicial review is the magisterial order which adopted the award of the tribunal as its judgment. Once the award was adopted by the magisterial court as its judgment, the award ceased to exist as a separate entity. It is for this reason that I also reject the submission of counsel for the interested party that it is the tribunal's award that should have been subject matter for judicial review.

The issue of jurisdiction was also raised in this court. According to the judgement of the Court of Appeal in ***Jotham Amunavi v. the Chairman Sabatia Division Land Disputes Tribunal and Another, supra***, a Land Disputes tribunal does not have jurisdiction to resolve a dispute relating to title to land. In this case, the award of the suit land and its adoption as a judgement of a civil court was without

jurisdiction. The Appeals Committee and the adopting court acted in excess of their jurisdiction. It therefore follows that the order adopting the award was null and void, because the Land Disputes Tribunal did not have jurisdiction to entertain and determine disputes.

In the circumstances of this application, the application of the *ex-parte* applicant is allowed.

**Verdict and Disposal Order**

In the light of the foregoing, I hereby make the following orders:

1. The order of the magisterial court adopting the award as its judgement is set aside.
2. The award of the tribunal in favour of the interested party is also set aside.
3. Costs are awarded to the *ex-parte* applicant with interest at court rates.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **18<sup>th</sup>** day of **FEBRUARY, 2015**

In the absence of the parties and their counsel

Court clerk Mr Muriithi

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

**J.M. BWONWONGA**

**JUDGE**