



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 19 OF 2009**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW BY WAY  
OF CERTIORARI**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP. 300, LIMITATION OF ACTIONS  
ACT AND THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**AND**

**IN THE MATTER OF THE NORTH KINANGOP DIVISION LAND DISPUTES TRIBUNAL  
CASE NO. 28 OF 2008 AND NYAHURURU PMCC LAND DISPUTES CASE NO. 40 OF 2008**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NORTH KINANGOP**

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

**PRINCIPAL MAGISTRATE'S COURT-NYAHURURU.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOSEPH NGARUIYA MWAURA.....INTERESTED PARTY**

**AND**

**RAHAB NJUGUINI KINYUA.....EX-PARTE APPLICANT**

**RULING**

1. The Notice of Motion dated 6/04/2009 was filed in court pursuant to the leave granted on 18/03/2009. The application has been brought under **Sections 8 and 9** of the **Law Reform Act Cap 26 Laws of Kenya** and **Order 53 Rule 1(3)** of the **Civil Procedure Rules**. The *Ex-parte*

Applicant seeks the following orders:

- a) **That the honourable court be pleased to issue an order of Certiorari to bring to this court for purposes of being quashed the proceedings and ruling of the North Kinangop Division Land Disputes Tribunal dated 13<sup>th</sup> October, 2008 issued in Case No. 28 of 2008; and**
- b) **that the costs of the application for leave and the substantive motion be awarded to the applicant.**

#### **THE EX-PARTE APPLICANT'S CASE**

2. The *Ex-parte* Applicant is the administrator of the estate of the Late John Simon Kinyua Rukunyi pursuant to the Grant of Letters of Administration issued to her by the Senior Principal Magistrate's Court at Naivasha on 26/11/2001 and confirmed on 14/03/2002. The deceased was the registered owner of the parcel of land known as L.R. NO. NYANDARUA/KITIRI/200. He purchased this land on 1/04/1973 from the Settlement Fund Trustees and immediately took possession and was subsequently issued with a title deed on 11/07/1995. (See "RNK 4"). Upon his death, the *Ex-parte* Applicant instituted the proceedings in Naivasha SPMC NO.2 of 2001 for the distribution of the deceased's estate. The property was subdivided into parcels of land known as L.R. NO. NYANDARUA/KITIRI/3652, 3653, 3654, 3655, 3656 and 3657 and transferred to the beneficiaries of the deceased who were then issued with their titles.
3. Sometimes in the year 2008, Joseph Ngaruiya Mwaura (the Interested Party) instituted proceedings in the North Kinangop Division Land Disputes Tribunal (the Tribunal) alleging that the property belonged to his deceased brother one Harrison Kuria Mwaura.
4. By its decision made on 13/10/2008, the Tribunal allowed the Interested Party's claim. Its holding was that:

**(a) the Settlement Fund Trustees first allocated the suit property to the Interested Party's brother and then 15 years later and without canceling the first allocation, allocated it to the *ex-parte*'s husband.**

**(b) That the property which constitutes 30 acres should be divide divided equally between the two parties. However since the *Ex-parte* Applicant's husband had substantially developed a portion of it, the property should be divided in the ratio of 3:2 so that the *Ex-parte* Applicant would receive 18 acres while the interested party would receive 12 acres.**

**(c) the Tribunal also altered the shares that had been allocated to the *Ex-parte* Applicant's deceased husband's beneficiaries.**

**(d) the District Surveyor was ordered to subdivide the property in terms of the orders of the Tribunal and the District Land Registrar was ordered to cancel the existing titles and issue new ones after subdivision.**

**(d) the executive officer of the Nyahururu Magistrate's Court was ordered to sign the necessary documents to facilitate the land transaction.**

5. The *Ex-parte* Applicant has challenged this decision on four grounds:

(a) That the Tribunal had no jurisdiction to determine a claim of ownership or title to land registered under the Registered Land Act;

(b) that the Interested Party's claim was time barred

(c) that the Interested Party had no legal capacity to institute the claim on behalf of the estate of Harrison Kuria Mwaura

(d) that the Tribunal acted contrary to the rules of natural justice by determining the matter without hearing the registered proprietors of L.R NOS. NYANDARUA/KITIRI 3652, 3653, 3654, 3655, 3656 and 3657.

### **THE INTERESTED PARTY'S CASE**

6. In response to the application, the Interested Party filed a Notice of Preliminary Objection dated 26<sup>th</sup> January 2015. He objected to this suit on two grounds of law: that the application is premature and that the *ex-parte* applicant did not follow the right procedure in filing his claim.

### **SUBMISSIONS**

7. Counsel for the Ex-parte Applicant relied on the written submissions filed on 19/09/2011. He argued that the Tribunal did not have jurisdiction to entertain the claim as it concerned ownership of land. **Section 3(1)** of the **Land Disputes Tribunal Act** is specific on the nature of claims of that the Tribunal may determine. In addition **Section 159** of the **Registered Land Act** (now repealed and hereinafter referred to as the RLA) vests in the High Court and subordinate courts the jurisdiction to determine matters touching on title.
8. He further argued that upon the death of the Ex-parte Applicant's husband, this property was subdivided to his beneficiaries in terms of the **Law of Succession Act**. At the time the Tribunal made its decision, the property had already been transferred and registered to the beneficiaries. These beneficiaries were not heard by the Tribunal before making its decision.
9. Counsel also submitted that the claim was time barred by virtue of **Section 13(1)** as read together with **Section 7** of the **Limitation of Actions Act, Cap. 22**. When the Interested Party filed the suit, his and any interest that the deceased may have had in the land had been extinguished.
10. Counsel for the Interested Party submitted that that these proceedings had been filed prematurely and that the procedure prescribed by law had not been followed. He refuted the contention that the beneficiaries of the Ex-parte Applicant's estate had not been heard, because firstly the Ex-parte Applicant had been sued as an administrator of the estate and secondly, they were aware of the proceedings but chose not to participate in them.

### **ISSUES FOR DETERMINATION**

11. The following are the issues for determination-
  - (a) whether these proceedings have been filed unprocedurally;
  - (b) whether the tribunal had jurisdiction to determine the matter

### **ANALYSIS**

#### **WHETHER THE PROCEEDINGS HEREIN HAVE BEEN FILED**

##### **UNPROCEDURALLY**

12. **The Land Disputes Tribunal Act** provides at **Section 8(1)** that a party who is aggrieved by the a decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted under **Section 9(1)** for the Province in which the land which is the subject matter of the dispute is situated. An appeal from the appeal committee shall be on matters of law and shall be filed in the High Court within 30 days from the date of the decision.
13. The Interested Party's objection was that the Ex-parte Applicant did not follow this procedure. Instead of first appealing to the appeal's committee in terms of the law, the *Ex-parte* Applicant instituted judicial review proceedings in this court. It was his opinion that these proceedings are premature and should therefore be struck out.
14. The availability of other remedies does not bar a party from filing judicial review proceedings. They are special proceedings that are invoked if the court is required to exercise its supervisory

jurisdiction over public bodies that are exercising a judicial or quasi judicial duty. The purpose of judicial review proceedings are to ensure that a body acts within the law, and are therefore only concerned with the decision making process and not, the merits of the decision. Unlike an appeal, the court does not make findings of fact nor can it substitute the findings of the decision-maker solely on the ground that it would have arrived at a different conclusion on the same facts. The principal considerations are illegality, irrationality and impropriety of procedure.

15. In the instant case, the *Ex-parte* Applicant alleged that the Tribunal acted ultra vires by determining a matter that is statute barred and which concerned ownership of land. It is also alleged that it made adverse orders against third parties who were not party to the proceedings against the rules of natural justice.
16. The question of whether this body acted within its powers is one that can be properly determined in these proceedings. This would be pursuant to the court's duty under **Article 165 (6) of the Constitution**. That the *Ex-parte* Applicant did not file a suit in the Appeals' Committee does not invalidate these proceedings. For this reason, I find that the Preliminary Objection has no merit and it is hereby overruled.

### **WHETHER THE TRIBUNAL ACTED OUTSIDE ITS JURISDICTION**

17. There are two grounds that have been raised by the *Ex-parte* Applicant to support her contention that the Tribunal had no jurisdiction. The first is that the issues before the Tribunal were in regard to ownership of land, and therefore outside its jurisdiction. The second is that it purported to determine an issue that was time barred under **Section 7 of the Limitation of Actions Act**.
18. Before determining the issues I wish to point out that there was no replying affidavit filed by any of the parties. In the circumstances, the issues of fact as alleged by the *ex-parte* applicant shall be deemed as being uncontroverted.
19. Jurisdiction is everything and without it any step undertaken by any body or person is void and cannot stand. The Tribunal's jurisdiction under **Section 3 (1) of the Land Disputes Tribunal Act** is limited to determining 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**
20. The Court of Appeal in **Joseph Karobia Gicheru V. Michael Gachoki Gicheru**, [2013] eKLR stated that this jurisdiction should be strictly construed. It held-

**“As this statutory provision was specifically enacted to remove certain matters from the ordinary courts, particularly magistrate’s courts, thereby limiting their civil jurisdiction to the extent of the donation of the same to the tribunals, it follows that the interpretation of the jurisdiction donated to the tribunals, has to proceed from a position of strictness. The tribunals have jurisdiction as granted by the statute and no more.”**

21. In **Mbogo Mwathi V. John Chege Mbogo**, HCCA NO. 531 of 2000 the learned judge observed that the jurisdiction does not extend to issues concerning title to land registered under the RLA because **Section 159 of the repealed Registered Land Act, Cap. 300** under which the title to the land has been registered, vests jurisdiction to determine issues regarding possession of and title to land in the High Court and the Magistrates Courts subject to their jurisdiction. It held:

**“The Tribunal had no power to adjudicate over the issue of title to land since this jurisdiction is vested in the High Court and/or the Resident Magistrate's court, depending on the pecuniary value of the subject matter.”**

22. Similarly in BEATRICE M'MARETE V. REPUBLIC & 2 OTHERS EX-PARTE JOHN GITONGA MBUI, [2004] eKLR the same court stated;

***“In our view, the dispute before the Tribunal did not relate to boundary, claim to occupy or work land, but a claim to ownership. Taking into account the provision of Section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the applicant. In our view, the Tribunal acted in excess of its jurisdiction.”***

23. The position of the law is clear that the Tribunal has no jurisdiction to determine questions regarding ownership and title to land. The dispute before the Tribunal in the instant case, was not one of boundaries or trespass or right to occupy land. The Interested Party's case was that the his deceased brother purchased the parcel of land from the Settlement Trustees Fund. The evidence before the Tribunal also established that the same parcel of land was subsequently allocated to the Ex-parte Applicant's husband by the same body.

24. The Interested Party was in essence seeking cancellation and revocation of the title issued to the Ex-parte Applicant's husband. The net effect of the Tribunal's decision was to rectify the register without considering the provisions of **Section 143** of the **Registered Land Act**.

25. The Tribunal also dealt with matters relating to the property of the deceased. The Law of Succession is very clear that the estate of a deceased vests in an administrator appointed under the Act. Any suit touching on the estate, may only be filed or defended by the administrator. For this reason, the Tribunal cannot be faulted for failing to summon the beneficiaries.

26. Nonetheless, the Tribunal made orders that in effect subdivided the estate of the deceased's estates. The Interested Party had filed the claim on behalf of his deceased brother. The Tribunal found that the deceased had title to land and went ahead to allocate a portion of the land to the Interested Party. Having so found, this portion became part of the deceased's estate and should have been subdivided in accordance with the provisions of the Law of Succession Act which vests this jurisdiction in the High Court. Similarly the Tribunal could not alter the shares that had been given to the beneficiaries of the Ex-parte's husband estate.

27. In addition, it is apparent that the Interested Party's claim before the Tribunal was time barred under **Section 7** of the **Limitation of Actions Act**. This section requires that all actions relating to title to land be filed before the expiry of 12 years. The uncontroverted evidence, was that the Ex-parte Applicant's deceased husband acquired the property in 1973 and thereafter occupied it in the year 1974. The claim was filed in the year 2008 which translates to 34 years after the cause of action accrued.

## **FINDINGS**

28. For the above reasons, I find that the Tribunal determined questions that are outside its mandate in determining questions of title and ownership of land and determining the shares that a beneficiary to a deceased's estate is entitled to. Its entire decision is therefore a nullity and cannot stand.

## **DETERMINATION:11**

29. The application is found to be meritorious and is hereby allowed.

30. Consequently there shall be an order of *certiorari* as prayed to remove into this court and quash the decision of the North Kinangop Division Land Disputes Tribunal Case No.28 of 2008 adopted in PMCC 40 of 2008 (Nyahururu).

31. The Exparte Applicant shall have costs of the application.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 24th day of April, 2015.**

**A. MSHILA**

**JUDGE**