



**REPUBLIC OF KENYA**

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

**MISC. CIVIL CAUSE NO. 1173 OF 2002**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF  
CERTIORARI**

**AND**

**IN THE MATTER OF THE KAJIADO LAND DISPUTES TRIBUNAL NO. TC 0140 OF 2001**

**AND**

**IN THE MATTER OF THE RIFT VALLEY PROVINCIAL LAND DISPUTES APPEALS  
TRIBUNAL CASE NO. 1 OF 2002**

**MASENKE OLE MPARO VS KEREI KANYIKO PARSKON**

**AND**

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

**AND**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP. 22 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP. 21 OF THE LAWS OF KENYA  
AND THE CIVIL PROCEDURE RULES**

**AND**

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

**BETWEEN**

**REPUBLIC OF KENYA .....APPLICANT**

**AND**

**RIFT VALLEY PROVINCIAL LAND DISPUTES TRIBUNAL.....RESPONDENT**

**EX-PARTE: KEREI KANYIKO PARSOKO**

**AND**

**MASENKE OLE MPARO.....INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. By an Amended Motion on Notice dated 6<sup>th</sup> day of May, 2003, the ex parte applicants herein, **Kerei Kanyiko Parsokon**, seeks the following orders:

1. **An order of certiorari to remove into the High Court and quash the decision and order of the Rift Valley Provincial Land Disputes Appeals Tribunal given on the 30<sup>th</sup> April, 2002.**
2. **Costs of this application be provided for.**

**Applicant's Case**

2. According to the applicant, in or about 1969, he moved to and settled on L.R. No. Kajiado/Kaputiei South/38 which was later erroneously registered in the name of **Mr. Masenke Ole Mparo**, in interested Party herein while **Mr. Masenke** settled on parcel L.R. No. Kajiado/Kaputiei South/37 which was later erroneously registered in his name, with each of them believing that they had settled on their rightful parcel. In or about 1969, both of them were each erroneously registered as individual owners of parcel Nos. L.R. Kajiado/Kaputiei South/37 and Kajiado/Kaputiei South/38 respectively on the mistaken belief that these are the parcels each of them occupied. During the same period or thereabouts, they both applied for loans from the Agricultural Finance Corporation using their respective titles but residing on each other's parcels.

3. In or about 1975, they both discovered and confirmed that the parcels of land that they had been occupying were each erroneously registered in each other's land names. Despite the aforesaid discovery, each of them opted to and have been living on one another's parcel of land since then.

4. According to the applicant in the course of residing on L.R. No. Kajiado/Kaputiei South/38 for over 32 years, he has constructed permanent buildings and structures, constructed waters dams, reclaimed a seasonal river, undertaken farming and established businesses and has buried several relatives on the same. During the same period the interested party herein has also continued knowingly and voluntarily to occupy parcels No. Kajiado/Kaputiei South/37 and has constructed permanent houses and structures thereon, has buried several relatives and other persons thereon, and has misused and devalued the said parcel by undertaking extensive quarrying and extraction of *murrum* from the said parcel leaving huge craters thereon, cutting down trees, burning charcoal and general deforestation and leasing the same to his neighbours which has led to overgrazing and deforestation.

5. In or about 2001, despite voluntary, knowing and peaceful occupation and use of L.R. No. Kajiado/Kaputiei South/38 and L.R. No. Kajiado/Kaputiei South/37 by the applicant and the interested party respectively for the period and extent stated hereinabove, the interested party embarked on making demands and threats for the applicant to shift to parcel No. Kajiado/Kaputiei South/37 and that he be allowed to shift to parcel No. Kajiado/Kaputiei South/38. After a series of unsuccessful meetings, often chaired by the area Chief, the Applicant referred the matter to the Kajiado Land Disputes Tribunal for adjudication, being case No. **TC 0140 of 2001**.

6. On 25<sup>th</sup> October 2001, after hearing both parties and their witnesses, the Tribunal held that having resided on the respective parcels of land for over 30 years, none can now be evicted under the law and that therefore the applicant should remain on parcel No. Kajiado/Kaputiei South/38 on which he had lived and developed while the interested party should also remain on parcel No. Kajiado/Kaputiei South/37.

7. Being dissatisfied with the said decision, the interested party appealed to the Rift Valley Provincial Land Disputes Appeals Tribunal, the Respondent herein and after hearing both parties and their witnesses, the Tribunal in its findings held *inter alia* that;

- i. The Applicant and the interested party were each allocated parcels of land being L.R. Nos. Kajiado/Kaputiei South/37 and 38 respectively.
- ii. At first they both unknowingly occupied each other's parcel but both of them secured loans with "AFC" using their correct titles but not knowing that they were residing on the wrong parcels.
- iii. In the course of their loan transactions, they both learnt that they were not living on their respective parcels but nevertheless opted to remain that way and have, lived in harmony ever since.

8. The Tribunal however proceeded to issue a "verdict" ordering them to vacate to their respective titles as identified by their respective title deeds and accordingly set aside the decision of the Kajiado Land Disputes Tribunal's ruling NO. TC 0140/2001 dated 25<sup>th</sup> October 2001. In the Applicant's view, the said "verdict" is not supported by the Tribunal's findings and is actually contrary to the findings and further contravenes the laid down provisions of the law. The said Tribunal's findings and "verdict" proceeded to analyse ownership rights over the parcels of land in issue and subsequently issued orders which are beyond their mandate and power, are contrary to law and have far reaching effects and impact negatively on the lives of the parties to the proceedings. Further, the Appeals Tribunal's "verdict" purports to issue orders ordering the Applicant to vacate parcel No. Kajiado/Kaputiei South/38 on which he had lived and developed for over 30 years. To the applicant:

- a. The Tribunal exceeded the Jurisdiction granted by Section 3(1) of the Land Disputes Tribunal Act by purporting to determine the issue of ownership of the disputed parcels of land being L.R. No. Kajiado/Kaputiei South/37 and Kajiado/Kaputiei South/38.
- b. The claims by Mr. Masenke over ownership of L.R. No. Kajiado/Kaputiei South/37 are Statute – Barred by the Limitation of Actions Act, the applicant having settled on the said parcel back in 1970 and have continued to occupy and use the same to date with the knowledge and consent of the interested party.
- c. The Tribunal in purporting to issue eviction orders against the applicant, acted *Ultra vires* and contrary to laid down provisions of the law and without regard to his claim by way of adverse possession and or prescription.
- d. The Tribunal's "verdict" is in total contravention of the Tribunal's findings or the evidence adduced and is of no legal basis at all.
- e. The Tribunal's "verdict" is irrational, unlawful and an absolute mockery of justice.
- f. The Tribunal in purporting to set aside the Kajiado Land Dispute Tribunal's ruling acted *ultra vires* and contrary to law.

9. It was therefore the applicant's case that this is a suitable case for the exercise of this Honourable Court of its inherent and supervisory jurisdiction by issuing an order of certiorari quashing the order of the Respondent.

### **Respondent's Case**

10. In Response to the application the Respondent filed the following grounds of opposition:

1. **The application contravenes the provisions of order LIII Rules 1(2); 3(i), 4 and rule 7(i) of the Civil Procedure Rules and the same should be dismissed with costs.**
2. **The application is bare, incurable defective, and therefore bad in law.**
3. **The orders sought for in this application by the Applicant cannot be granted by this honourable court as there is nothing on record for this honourable court to quash.**

### **Interested Party's Case**

11. According to the interested party, he had never agreed and/or consented for the applicant to remain and/or settle on his parcel of Land Title No. Kajiado/Kaputiei South/38 but the respondent has been deaf

to all entreaties to vacate his land and/ or settle in his rightful land Title No. Kajiado/Kaputei South /37. By reason of the aforesaid entreaties the applicant has not and/or has never had uninterrupted occupation of the said Kajiado/Kaputei South/38 and therefore his claim to the said land is not barred by statute neither does the issue of adverse possession and/ or prescription arise.

12. According to the interested and the applicant did obtain loans from Agricultural Finance Corporation using the respective Title Deeds as security and this further demonstrates their assertion as to ownership of their respective parcels. In his view, what the Rift Valley Provincial Land Dispute Appeals Tribunal was inquiring into was not the question of ownership of the subject parcels of land but the question of occupation of the said parcels of land which is properly within it's mandate as spelt out by the ***Land Disputes Tribunal Act***. He further averred that the question of ownership of the subject parcels of land is a foregone conclusion and is beyond dispute as evidenced by the Title Deeds which are conclusive on the question of ownership and as such no inquiry on the same was done by the Rift Valley Provincial Lands Disputes Appeals Tribunal hence the findings and/or verdict of the aforesaid Tribunal is therefore just and according to the Law.

### **Determination**

13. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions.

14. From the affidavits herein, it is clear and there is no doubt that the applicant and the interested have for a very long period of time occupied each other's parcels and that at one point in time the two parties realised the mistake but continued with the mistaken possession without seeking and obtaining each other's consent according to the interested party.

15. Section 13(3) of the **Land Disputes Act** (now repealed) provided as follows:

***For avoidance of doubt it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court.***

16. It follows that where the limitation period has run its course the Tribunal had no jurisdiction to entertain the dispute. Adverse possession arises where there is clear possession of another person's land, the possession thereof being without the owner's consent and that possession continuing continuously for a period of 12 years or more.

17. I am mindful of the fact that the matter before me is not a determination of adverse possession. However both the consideration of the applicant's undisputed case and the interested party's position seems to point towards the possibility that the conditions favourable to the application of the doctrine of adverse possession may well have existed between the applicant and the interested party. However the Tribunal's jurisdiction under section 3(1) of the repealed ***Land Disputes Tribunal Act*** did not give the Tribunal the jurisdiction to determine claims where limitation period may well have run its course. In **Republic vs. Kapsabet Land Disputes Tribunal Ex Parte Keter Kipchoge Misoï & Christine Jepkosgei Ngetich Eldoret HCMCA No. 25 of 2002, Mohammed Ibrahim, J** (as he then was) held:

**“The Land Disputes Tribunal under the Land Disputes Act clearly has no jurisdiction to determine claims of prescription or adverse possession as such causes of action can only be heard and determined by the High Court.”**

18. It is therefore clear that if the Land Disputes Tribunal had no jurisdiction, the applicant's claim was a non-starter and as it was made before a Tribunal which had no jurisdiction, all the proceedings that followed thereafter were null and void. The legal position is that if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and

expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172.**

19. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Dealing with the failure by a party to comply with certain procedural requirements in light of allegation of excess of jurisdiction by the Tribunal, Nyamu, J (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** held that despite the irregularities the Court cannot countenance nullities under any guise since the High Court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.

20. It follows that the proceedings right from inception were null and void and none of the parties can take advantage of the orders emanating therefrom.

### **Order**

21. In result, I find that the Amended Motion on Notice dated 6<sup>th</sup> day of May, 2003, is merited and I grant an of certiorari removing into this High Court for the purposes of being quashed the decision and order of the Rift Valley Provincial Land Disputes Appeals Tribunal given on the 30<sup>th</sup> April, 2002 which decision is hereby quashed.

22. As the wrong jurisdiction was triggered by the applicant himself who commenced the proceedings before the Land Disputes Tribunal, he cannot reap costs from his own wrong.

23. Accordingly, the costs of these proceedings are awarded to the interested party and shall be borne by the applicant.

24. It is so ordered.

**Dated at Nairobi this 14<sup>th</sup> day of December, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Manirei for the ex parte applicant**

**Cc Mutisya**