



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS APPLICATION NO. 214 OF 2011

REPUBLICAPPLICANT

VERSUS

THE KAJIADO NORTH DISTRICT

NGONG LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT

MAGISTRATE'S COURT.....2ND RESPONDENT

EXPARTE

**CAROLINE WAMBUI NGUNJIRI, CATHERINE NJERI NGUNJIRI & HARIT A. SHETH
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTONY
NAHASHON NGUNJIRI AS THE APPLICANTS**

JUDGEMENT

1. By a Notice of Motion dated 20th August 2013, the *ex parte* applicant herein, **Caroline Wambui Ngunjiri, Catherine Njeri Ngunjiri & Harit A. Sheth Suing as The Personal Representative of The Estate of Antony Nahashon Ngunjiri**, seek the following orders:
1. **THAT an order of prohibition do issue against the 2nd Respondent of prohibition to restrain the 2nd Respondent from hearing/adoption entering judgement and/or issuing a decree in accordance to the decision of the Kajiado North District Land Disputes Tribunal in regard to Tribunal Case Numbers 283/9 of 2010 and /or 216/9/10 whatsoever in Kajiado Resident Magistrate's LDT No.53 of 2011 Jane Mwhaki Nduti Versus Antony Nahashon Ngunjiri having been read on the same date the order for leave was given.**
2. **THAT an order of prohibition do issue against the 1st Respondent prohibiting it from entertaining and/or further hearing and/or further cases filed or instituted by Jane Mwhaki Nduti against the applicant including TC 216/9/2011, involving L.R. No. Kajiado/Kisaju/1668.**
3. **THAT an order of Certiorari do issue to remove into this High court and quash the decision of the 1st Respondent made and dated on 19th may 2011 requiring the Applicant, Antony**

Nahshon Ngunjiri to Transfer Land Reference Number Kajiado/Kisaju/1168 which were heard and adopted by the 2nd Respondent on the 13^h September 2011 in LDT No.53 of 2011 Jane Mwihaki Nduti Versus Antony Nahashon Ngunjiri

4. THAT costs of this application be provided for.

Applicant's Case

2. The application was supported by an affidavit sworn by **Anthony Nahashon Ngunjiri**, on 8th September, 2011.
3. According to the deponent, the claimant in the Kajiado North District Land Dispute Tribunal **Jane Mwihaki Nduti** filed her claim in the tribunal on 9th September 2010 in respect of the dispute involved the sale of land Title deed No.JKD/KISAJU/1668 as per the agreement for sale dated 20th November 2008. In his view, the issue between the claimant and him in his capacity as the objector in the Land Dispute Tribunal Case number TC/216/9 of 2010 was Title.
4. However, vide a Notice of attendance to the objector dated 9th October 2010 the applicant was informed by the tribunal the hearing of the dispute was scheduled for 7th October 2010 at 10.00 a.m. or soon thereafter and on that date he attended the tribunal offices at Ngong and Kisaju area but there was no sitting of the tribunal on that day. The deponent subsequently vide a letter dated 25th October 2010 informed the chairman District Land Dispute Tribunal of his address for avoidance of miscommunication of the hearing date and any correspondences involving the Land dispute case **No.TC/216/9 of 2010**. On 28th October the applicant's representative/clerk was informed at the tribunal that hearing of the dispute was scheduled for 11th November 2010 on which date the hearing was further adjourned to 25th November 2010 and further to 9th December 2010.
5. On 9th December 2010 vide his letter dated and filed in the tribunal on the same date the applicant wrote to the chairman of the District Land Dispute Tribunal in Ngong challenging the jurisdiction of the Dispute Tribunal with regard to the dispute between him and the claimant which dispute involved title which does not fall within a dispute as envisage in Section 3(1) of the **Land Disputes Tribunal Act** (Chapter 18) of 1990 (hereinafter referred to as the Act) which gives the Dispute Tribunal authority to adjudicate. Together with the letter of 9th December 2010 the applicant also field his list of authorities challenging the jurisdiction of the tribunal on the same date.
6. He, however did not thereafter receive any further information, communication, correspondences, Notice to attend, Hearing Notice at all from the District Land Dispute Tribunal till 2nd August 2011 when by sheer luck her daughter **Catherine Njeri Ngunjiri** happened to be at the senior Resident Magistrate's court at Kajiado and happened to come across case number LDT No.53 of 2011 **Jane Mwihaki Nduti Versus Antony Nahashon Ngunjiri** listed on the cause list. The said Catherine Njeri Ngunjiri promptly informed the applicant about the same and the applicant requested her to get a counsel to hold his brief for he was never served and the matter was stood over to 13/09/2011 and the court ordered and directed that he be served.
7. According to the applicant to date he has never been served with any documents although it is apparent that the respondent was represented by counsel.
8. Upon perusal of the court file **LDT No.53 of 2011** – Kajiado it emerged that Ngong Land Disputes Tribunal had indeed created another case **No.283/9/2010** proceeded with the hearing in his absence of and without Notice to him and allegedly arrived at a decision and purportedly made a ruling dated 19th May 2011 in which proceedings the applicant was purported to have been present, participated and gave evidence.
9. The applicant then on 5th August 2011 applied for copies of the Ruling/decision, pleadings and proceedings from the executive office at the Kajiado Resident Magistrate's court but the Resident magistrate vide his letter dated 10th August 2011 declined to supply him with copies. After that the applicant made arrangements and managed to informally get copies of the same. From the said proceedings, the applicant noted that the ruling was filed in Kajiado Senior Resident magistrate's court on 23rd June 2011 under a totally different case number Tribunal case number **TC/216/9/ of 2010 Jane Mwihaki Nduti Versus Antony Nahashon Ngunjiri** whereas the tribunal case

- involving him was Number **TC/216/9 of 2010**.
10. To the applicant, instead of the tribunal considering, deliberating and making a ruling on his objection the tribunal had fraudulently changed the case number of the dispute from TC 216/9/2010 to TC 283/9/2010 and proceeded to hear it without any communication and/or notice to him whatsoever. He deposed that the fate of Tribunal Case number TC/216/9 of 2010 was unknown to him. It was contended that the decision of the tribunal purported at paragraph 1 to have been arrived at after “.....having heard and considered the presentation of **ALL** the parties and their witnesses”whereas this position was not true as he had never appeared before the tribunal since he lodged his objection to its jurisdiction to hear and determine, the dispute together with his list of authorities on the 9th December 2010.
 11. The applicant deposed that the purported claim at paragraph 2 of the decision was indeed not the issue between him and the claimant as the only issue between them was regarding title to the property, but it’s alleged to issue of use of the land Kjd/Kisaju/1668 in the award and specific performance is order. It was therefore his view that the ruling or resolution of the Tribunal at paragraph 4 is not relevant and consistent with the dispute/issue between him and the claimant in Land Dispute Tribunal **No.TC/216/9 of 2010** or the fraudulently created **TC/283/9 of 2010** alleged claim of “case of the land” whereas specific performance has been ordered.
 12. According to him, the tribunal purported to have heard his presentation together with his witness whereas despite having served them with his address for service of the tribunal case, the tribunal never at any one time served him with a Notice to attend in **TC/283/9 of 2011**. However, from the evidence obtained from the Tribunal tendered herein the statement of the claimant is dated signed and endorsed with the identity card number on the 31st March 2011 whereas the purported statement by him is neither dated, nor signed at all. However, there is no evidence in the proceedings that he attended the Land Dispute tribunal and was heard on the 31st March 2011 at all. To the contrary, on the 31st March 2011 he was before Mr. Justice L. Njagi for hearing in HCCC 528 of 2005 **Kairu Enterprises and 2 Others Versus Housing Finance Company Kenya (HFCK)**.
 13. Vide a letter dated 5th August 2011 and filed on 10th August 2011 I wrote to the Senior Resident Magistrate’s Court at Kajiado through the executive Office informing him of aforesaid irregularities and requesting for the pleadings and proceedings in regard to case **No. LDT 53 of 2011** emanating from Tribunal Case **No. TC 283/09/10 and/or TC 216/9/2010 Jane Mwihaki Nduti Versus Antony Nahashon Ngunjiri**. The Senior Resident Magistrate’s Court vide his letter dated 10th August 2011 declined to supply him with copies of pleadings and proceedings on the ground that the decision of the tribunal had not been read and adopted by the Honourable Court and that it’s only after the same been read that may be supplied.
 14. The applicant averred that case **no. LDT 53 of 2011 – Kajiado Jane Mwihaki Nduti Versus him** was scheduled for hearing for purposes of adoption and/or entering Judgment by the court in accordance with the decision of the Land dispute Tribunal on Tuesday the **13th September 2011 but in his view**, the decision of the Ngong North District Land Dispute Tribunal if it was made in **TC/216/9 of 2010** was made *ultra vires* its jurisdiction conferred upon it under the Land Disputes Tribunal Act chapter 18 of 1990 and as now relates to **TC/283/9 of 2011** is not only *ultra vires* the Act is fraudulent. It was contended that the fraudulent decision of the tribunal in **TC No.283/9/2010** was made in breach of the principles of natural justice whereby he as the objector in the tribunal case was not heard, nor served with notices to attend even on the 31st March 2011 despite having served the tribunal with my address for service and with my objection to its jurisdiction yet the decision at paragraph 1 purports that all the parties , and their witness were heard which to him, is fraud on any litigant, and an insult to the court.

Respondents’ Case

15. On behalf of the Respondents the following grounds of opposition were filed:

1. **That the applicant’s application herein is unmerited and an abuse of the due process of the court.**
2. **That the 1st Respondent acted within its jurisdiction.**

3. That the order of prohibition cannot be issued as the same has been overtaken by events.
4. That the application be dismissed with costs to the respondents.

Applicant's Submissions

16. In the submissions filed on behalf of the applicant it was contended that the 1st Respondent's decision was made ultra vires the *Land Disputes Tribunal's Act* in that the Tribunal dealt with the issue of ownership of the suit land which was not within its powers. In support of this submission the applicant relied on **Republic vs. Chairman Land Disputes Tribunal Lurambi Division & Another [2006] eKLR** and **The Owners of Motor Vessel "Lillian S" vs. Caltex Kenya Ltd [1989] KLR**.
17. It was contended that although the orders of prohibition against the Respondents had been overtaken by events the order of certiorari could still be granted. The applicant relied on **David Mugo vs. Republic Civil Appeal No. 265 of 1997, R vs. Judicial Commission of Inquiry into the Goldenberg Affairs and 3 Others ex parte Mwalulu and 8 Others Nrb Misc. Appl. No. 1274 of 2004 [2004] KLR**, **Republic vs. Chairman Kapsabet Land Disputes Tribunal [2006] eKLR** and **Republic vs. The Commissioner of Lands ex parte Lake Flowers Limited HCMISC. Application No. 1235 of 1998**.

Respondent's Submissions

18. On the part of the Respondents it was submitted that prohibition cannot quash a decision which has already been made and as the application seeks to prohibit the magistrate from adopting the tribunal's award, the same has been overtaken by events since the said award was adopted on 13th September, 2013.
19. It was further submitted that the same order cannot issue as the tribunal no longer exists by virtue of the *Land Act* No. 3 of 2011.
20. It was therefore submitted that the application is unmerited and an abuse of the process of the Court and ought to be dismissed.

Determination

21. I have considered the foregoing.
22. Where a decision of the Tribunal has been adopted by the Court the law is that the former is subsumed into the latter and the former ceases to exist with the result that the only decision that can be quashed is the Magistrate's adoptive decision. **Khamoni, J in R vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex parte Kariuki [2005] 2 KLR 10** held:

"The Court judgement having been entered by a Court, in law, not only was it improper but was also irregular for this notice of motion to have been filed praying for an order of *certiorari* to quash the decision of the Land disputes Tribunal since under section 7(2) of the Land Disputes Tribunals Act the Court enters judgement in accordance with the decision of the tribunal and upon judgement being entered a decree issues and is enforceable in the manner provided for under the Civil Procedure Act. Once such a decision is adopted by a Court, it becomes a judgement of the court thereby ceasing to exist as a decision, which can be separately quashed as contemplated in this notice of motion. What has to be dealt with now is a judgement of a court and not a decision of a tribunal just as a party would have appealed against the decision of the Provincial Land Disputes Appeals Committee and not against the decision of the Land Disputes Tribunal had the appellant's appeal in the Provincial Land Disputes Appeals Committee been heard and determined without the existence of an intervening court judgement adopting the tribunal's decision."

23. It therefore follows that the prayer for prohibition in the manner sought in prayer (1) of the Notice of Motion dated 20th August, 2013 is incapable of being granted. Prohibition, it has been held looks to the future and does not operate to quash a decision which has already been made. See **Nairobi CACA Number 266 of 1996 Kenya National Examination Council vs. Republic Ex**

parte Geoffrey Gathenji Njoroge and 9 Others.

24. Since the Respondent's have not sworn any affidavit to controvert the allegations made on oath by the applicant, it is clear that the factual averments as averred by the applicant remain unchallenged. Therefore based on the record this Court believes the applicant that the dispute before the Tribunal related to title to land.
25. The jurisdiction of the Land Disputes Tribunal 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.

26. In my view if the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since a decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void. This is in line with the celebrated decision in **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 to the effect that** that where an act is a nullity it is trite that it is void and 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. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse.
27. It is therefore clear that the 1st Respondent had no jurisdiction to deal with the dispute which was placed before it.
28. Apart from that the applicant contended that he was never afforded an opportunity of being heard. Denial of the right to be heard is one of the recognized grounds for granting judicial review orders. Accordingly on that score the applicant is entitled to the order quashing the 1st Respondent's decision.
29. It has however been submitted that the decision of the 1st Respondent cannot be quashed as the 1st Respondent no longer exists. As rightly submitted on behalf of the applicant, in **David Mugo vs. The Republic Civil Appeal No. 265 of 1997** the Court of Appeal expressed itself as follows:

“The learned judge held that since the Court Brokers Licensing Board had ceased to exist as a result of repeal of Cap. 20, the appellants’ application for certiorari was merely technical and academic. With respect here the judge fell in error of law. Certiorari was sought to quash the Board’s decision revoking the appellant’s licence. It (certiorari) was not to keep the Board in continuous existence. Where the body or authority against which certiorari is sought has ceased to exist or has become functus officio, but a decision it (body or authority) made is still enforceable certiorari must issue to quash or nullify that decision, if it is bad.”

30. As the 1st Respondent's decision was made without jurisdiction and was a nullity, the 2nd Respondent's decision which was founded on the 1st Respondent's decision must similarly collapse.

Order

31. Accordingly the order which commends itself to me and which I hereby grant is that an order of Certiorari is hereby issued removing into this Court the decision of the 1st Respondent made and dated on 19th May 2011 requiring the Applicant, Antony Nahshon Ngunjiri to Transfer Land

Reference Number Kajiado/Kisaju/1168 which were heard and adopted by the 2nd Respondent on the 13th September 2011 in LDT No.53 of 2011 Jane Mwihaki Nduiti Versus Antony Nahashon Ngunjiri for the purposes of being quashed and the same is hereby quashed.

32. With respect to the order for costs it must be noted that the 2nd Respondent was simply implementing the decision of the 1st Respondent. In **Zedekiah M Mwale vs. Bikeke Farm Directors & Another Kitale HCCA NO. 25 of 1998** the Court held which holding I associate myself with that a magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a Land Disputes Tribunal's award filed in court as section 7(2) only compels the magistrate to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.
33. Similarly, in **Peter Ouma Mitai vs. John Nyarara Kisii HCCA No. 297 of 2005, Musinga, J** (as he then was) following the decision in **Zedekiah M Mwale vs. Bikeke Farm Directors & Another** (supra) expressed himself as follows:

“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate's court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. In any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise.”

34. As the 1st Respondent no longer exists, there will be no order as to costs.

Dated at Nairobi this 21st day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Chimau for Respondent

Ms Ngunjiri for the applicant