



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISCELLANEOUS APPLICATION NO.7 OF 2011 (J.R.)

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

AND

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

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES

IN THE MATTER OF LAND REFERENCE NO. NAROK/CIS-MARA/ILMOTIOK/21

IN THE MATTER OF THE PROVINCIAL LAND DISPUTES COMMITTEE

**IN THE MATTER OF NAROK SENIOR PRINCIPAL MAGISTRATE'S COURT MISC. LAND
CASE NO. 3 OF 2010**

AND

IN THE MATTER OF THE LAW REFORM ACT (CAP 26) SECTION 8 AND 9

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**THE CHAIRMAN, PROVINCIAL LAND DISPUTES COMMITTEE.....1ST
RESPONDENT**

**THE SENIOR PRINCIPAL MAGISTRATE, NAROK.....2ND
RESPONDENT**

EVALINE TUIYA3RD RESPONDENT

EX-PARTE

LEDAMA LELEI.....SUBJECT

JUDGEMENT

1. The applicant, **LEDAMA LELEI** filed a Notice of Motion dated **2nd February, 2011** under **Order 53 Rules 1(2) and 3(1)** of the **Civil Procedure Rules, 2010** seeking that this Honourable court be pleased to issue an Order of Certiorari to quash the 2nd respondent's order dated **21st December, 2010** pursuant to the 1st respondent's award dated **14th September, 2010**, adopted as judgment and a decree issued by the Narok Senior Principal Magistrate in **Misc. Land Case No 3 of 2010**, and costs.
2. The application was filed pursuant to leave granted on **16th February, 2011**. It is supported by the Statutory Statement dated **19th January, 2011** and a verifying affidavit sworn by **Ledama Lelei** of the same date.
3. The applicant, in his verifying affidavit depones that he is the son of the registered owner of **Land Reference No. Narok/Cis-Mara/Ilmotiok/21**, (*hereinafter referred to as the suit land*) who was cohabiting with the 3rd respondent. The 3rd respondent was not formally divorced from one **Samwel Busienei** and could therefore not be a widow of the applicant's father.
4. The 3rd respondent filed a claim at the District Land Dispute Tribunal and was awarded 5.5 acres of the suit land on **11th June, 2009** a fact the applicant avers was against procedure, which award was adopted as judgment of the court by Narok Senior Principal Magistrate in **Misc. Land Case No. 3 of 2010** on **10th February, 2010**.
5. The applicant dissatisfied with this resolution, appealed to the Rift Valley Provincial Land Disputes Committee, whose findings included that the award of the District Land Dispute Tribunal be upheld and that the applicant be restrained from interfering with the parcel of land, or with the 3rd respondent and her children. This decision was reached on **6th December, 2010** and incorporated in **Misc. Land Case No 3 of 2010** on **21st December, 2010**.
6. The applicant being dissatisfied filed this application for Judicial review for the reasons that:
 - i. **The Tribunal award is ultra vires, incompetent and fatally defective as the Tribunal had no jurisdiction to adjudicate disputes relating to registered land**
 - ii. **The 3rd Respondent lacks locus standi to institute and maintain the claim as the succession proceedings have not been concluded**
 - iii. **The 3rd Respondent may proceed to execute the judgment unless the orders are granted.**
7. The application was opposed by the 3rd respondent, **Evaline Tuiya**, who filed her replying affidavit on **26th May, 2011** and written submissions on **10th February, 2014**.
8. The 3rd respondent in her replying affidavit deponed that she is the administratrix of the estate of **Kirutit Arap Tuiya's** (*hereinafter referred to as the deceased*) having obtained letters of Administration vide **Kericho High Court Succession Cause No. 268 of 1999**; she had lived with the deceased at their matrimonial home on the parcel of land that is the subject of the suit and they had two children.
9. She further deponed that the applicant had attempted to eject her and her children from the suit land on allegations that she was not a legal wife, leading her to petition the District Land Dispute Tribunal which decided in her favour.
10. During the pendency of the suit, the 3rd respondent filed a notice of motion dated **5th October, 2011** seeking temporary orders to restrain the Applicant from interfering with the 3rd respondent's use of **Cis-Mara/Ilmotiok/21**. She was not granted the orders sought. Her application was

marked as abandoned on **28th January, 2014** to pave way for hearing of the substantive motion. The court directed that the motion dated **23rd February, 2011** be disposed off by way of written submissions. The 3rd respondent filed her submissions on **10th February, 2014**, while the applicant filed his submissions on **25th February, 2014**.

11. The applicant's counsel reiterated what was stated in the verifying affidavit. He submitted that the decision of the Tribunal was ultra vires, as it went outside its mandate clearly defined in **Section 3 of the Land Disputes Tribunal Act No. 18 of 1990**, by deciding a matter under customary law, despite the land in question being registered under the **Registered Land Act Cap 300**, (now repealed). He relied on the case of ***The Chairman Chemaner Land Disputes Tribunal & 2 Others ex parte Zakayo M Ngelechei & Another (Kericho H.C. Misc. Appl. No 41 of 2010)***.
12. He further submitted that the land in question having being registered under the **Registered Land Act, Cap 300**, (now repealed), claims under it cannot be defeated other than in accordance with the law. He cited the case of ***Gichobi Kithue v Kibuko Githae and 3 others (2005) eKLR*** to support this argument.
13. In her submissions counsel for the 3rd respondent's also reiterated what was stated in her replying affidavit. On the issue of the previous proceedings before the District Land dispute Tribunal and Provincial Land disputes Committee whose decisions were adopted by the Narok Senior Principal Magistrate's Court in Land Case No. 3 of 2010, she submitted that as administratrix of the deceased's estate the 3rd respondent should be given free rein to administer the estate and that the applicant should be prosecuted for inter meddling with the estate. She relied on the case of ***In the Matter of the Estate of David Murage Muchina (Deceased) (Nairobi High Court Succession Cause No. 2077 of 2002)***. She further submitted that the 3rd respondent had locus standi as administratrix of the deceased's estate, citing the case of ***Troustik Union International & Another v Jane Mbeyu & Another (Civil Appeal No. 145 of 1991) (Court of Appeal at Nairobi)*** to illustrate her point.
14. From the pleadings and submissions by the respective counsels for the parties, I find four issues call for determination;
 - i. *Were the decisions of the Provincial Land Disputes Committee and the District Land Dispute Tribunal unlawful?*
 - ii. *Does the 3rd Respondent have locus standi to institute and maintain the claim?*
 - iii. *Is the applicant entitled to orders of judicial review as prayed?*
 - iv. *What is the order as to costs?*
15. I shall proceed to adjudicate on the question of *locus standi*. The principles of *locus standi* or standing determine whether a litigant is entitled to institute a particular dispute before the court. The purpose of ascertaining the legal standing of a litigant is among other reasons to ensure that the case is presented in the best way possible, by a person with real interest and to ensure that people do not meddle in affairs of others. In this particular instance, the 3rd respondent was issued with Letters of Administration in Succession Cause No. 268 of 1999 to administer the estate of **Kirutit Arap Tuiya**. In that capacity she had the right to institute a claim or file suit. I therefore find that the 3rd respondent had Locus.
16. On the issue as to whether the District Tribunal and the Appeal's Committee's decisions were unlawful, the question arising is the nature of the claim before the tribunal. Was it a claim for occupation and work on land as submitted by counsel for the 3rd Respondent or was it a claim touching on customary law and title as submitted by counsel for the applicant? If it is found that

the claim was touching on title and customary law then another question arises on whether the Tribunal had power to hear and determine such a claim. If the decision was made in excess of the Tribunal's power, it matters not that the decision was the right decision in the circumstances. If the decision was *ultra vires*, unlawful, unreasonable and/or against the rules of natural justice, this court will have no option but to quash the decision. See **Kenya National Examination Council vs Republic Exparte Geoffrey Gathenji Njoroge and others.**

17. The remedy of judicial review is concerned not with the private rights or merits of the decision being challenged but with the decision making process. Its purposes is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **Republic vs Secretary of State for Education and Science (Exparte) Avon County Council (1991) I ALL ER 282 at 285.** The point is more succinctly made in the English case of **Chief Constable of North Wales Police Vs Evan (1982) I W.L.R 1155,** by Lord Hailsham of St Marlebone.

Thus:

“the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court”

18. Therefore, a decision of an inferior court or public authority may be quashed (by an order of certiorari made on application of Judicial review) where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where these rules are applicable, or where there is an error of law on the face of the record or the decision is unreasonable in the Wednesbury sense.

19. Under Section 3 of the **Land Disputes Tribunal Act, (repealed)** the Tribunal's jurisdiction is restricted to hearing and determining cases involving-

(a) the division of, or determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) a claim on trespass to land.

20. Disputes relating to claims under customary law and title or the possession of land registered under the **Registered Land Act, Chapter 300 Laws of Kenya (now repealed)** were the preserve of the High Court or the Resident Magistrate's courts depending on the monetary value of the suit property. See **Section 5 of the Magistrates Court Act Cap 10.**

Section 159 of the Registered Land Act Cap 300 states;

"Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of Section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act."

21. There is no doubt that the claim by the 3rd respondent was that she was entitled to Land from the estate of the deceased having been married to him under customary Law. The issue before the

District Tribunal, the Appeals Committee and subsequently before the Narok Senior Principal Magistrate's Court related to ownership of the suit land and distribution of property under customary law. The tribunals found that the 3rd respondent was married to the deceased and was therefore entitled to 5.5 acres and 1 acre she paid for in parcel Cis-Mara/Ilmotiok/21. By clothing itself with the jurisdiction to determine these issues, the Tribunals no doubt went beyond their mandate. Any action done without jurisdiction is in law a nullity, that is to say, is of no legal force. As such it could not and was not validated by its adoption by the lower court.

22. Having found the orders of the District Tribunal and of the Appeals Committee to have been a nullity in law, permitting them to continue forming the record of the Tribunals or the lower court is, in my view, a violation of the subject's rights.

23. It is on these grounds that this court issues an order of certiorari quashing the order by the Senior Principal Magistrate Narok dated **21st December, 2010** together with the proceedings pursuant to the award by the Provincial Land Disputes Committee dated **14th September, 2010**

24. Costs for the suit are awarded to the Applicant.

Dated, Signed and Delivered at Kericho on this 25th June 2014

L N WAITHAKA

JUDGE

In the presence of:

- Mr. Orina for Exparte/Applicant
- N/A for Interested Parties
- N/A for Respondents