



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW CASE NO. 415 OF 2013**  
**IN THE MATTER OF THE LAND AND ENVIRONMENT COURT ACT, 2011**  
**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 (REPEALED)**  
**IN THE MATTER OF LAND REGISTRATION ACT**  
**IN THE MATTER OF KAJIADO SENIORESIDENT MAGISTRATE COURT LDT 7 OF 2008**  
**IN THE MATTER OF THE KAJIADO LAND DISPUTE**  
**TRIBUNAL**  
  
REPUBLIC.....APPLICANT  
  
VERSUS  
  
ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT  
KAJIADO LAND DISPUTES TRIBUNAL.....2<sup>ND</sup> RESPONDENT  
PRINCIPAL SENIOR RESIDENT MAGISTRATE..... 3<sup>RD</sup> RESPONDENT  
  
AND  
  
MOSES MEELI.....INTERESTED PARTY  
  
EX PARTE: PETER MUNGAI KIMANI  
  
DUNCAN MBICHI  
  
**JUDGEMENT**

**Introduction**

1. The applicants in this cause, **Peter Mungai Kimani** and **Duncan Mbichi** moved the Court by way of a Notice of Motion dated 18<sup>th</sup> December, 2013 seeking an order of certiorari to bring into the High Court for purposes of quashing the proceedings and judgement of Kajiado Senior Resident Magistrate Court in Kajiado Land Dispute Tribunal Case No. 7 of 2008. They also sought for an order that the costs be in the

cause.

### **Applicant's Case**

2. The Motion was supported by Statutory Statement filed together with the Chamber Summons herein and the verifying affidavit sworn by the **Peter Mungai Kimani** on 11<sup>th</sup> November, 2013.
3. According to the Applicants, they are the registered owners of LR No. Kajiado/Lorngusua/109 which they bought from Barclays Bank of Kenya Limited in the exercise of the exercise of the chargee's power of sale at a public auction on 16<sup>th</sup> October, 2003.
4. However last year the interested party encroached upon the said land and denied the applicant access thereto. Earlier on the said interested party had commenced proceedings relating to the same property in Kajiado Land Disputes Tribunal Case No. 138 of 2001 between the former owner of the suit property and the interested party herein which was unsuccessful on the ground that the Tribunal lacked the jurisdiction to handle the same. The said decision was duly adopted at the Kajiado SRM's Court LDT No. 18 of 2002 before the suit property was sold to the applicants.
5. However after the sale of the suit property to the applicants, the interested party commenced proceedings vide LDT Case No. TC 401/107/07 in which the Tribunal requested the objectors to accept a refund of the money given by the Claimant. The said decision was filed at the SRM's Court as LDT No. 7 of 2008 and was read on 29<sup>th</sup> May, 2008.
6. It is contended that the said Magistrate's Court had no powers to adopt two awards relating to the same land in two different suits. It was deposed that on the day of the adoption of the award the applicants' advocates applied for adjournment to enable him bring all these issues to the attention of the Court but the application was disallowed and the award was duly adopted.
7. As a result the decree emanating therefrom is now a demand for the applicants to accept a refund and the applicants contend that the same cannot be amended to direct them to surrender the suit property. To them the Magistrate converted a mere request into an order demanding the surrender of the suit property to the interested party.
8. According to the applicants the decision of the Magistrate is illegal, irregular, unconstitutional and a violation of their rights. Further the matter was not a boundary dispute but a dispute involving title to land.
9. It is important to note that the Respondents on 18<sup>th</sup> June, 2012 conceded the application but urged that they ought not to be penalised in costs.
10. The interest party on the other hand chose not to participate in these proceedings

### **Determinations**

11. The Applicant's case is that the Magistrate's Court ought not to have adopted two awards arising from two suits. In order to determine this issue it is important to understand the role of the Magistrate's Court under the repealed *Land Disputes Tribunal Act*. 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.
12. 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. If 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.”**

13. It is therefore my view that the mere fact that the Tribunal acted unlawfully did not justify the Respondent in declining to adopt the award. Barring all other issues the Magistrate Court had no option but to adopt the award pursuant to the provisions of sections 7 and 8 of the *Land Disputes Act*, assuming the said Act was in existence.

14. However by their decision the Tribunal resolved to request the objectors who are the applicants herein, to accept the refund of the money by the claimant, the interested party herein. It is clear that in that decision there was no express direction for transfer by the applicants of the title to the interested party. I have perused the proceedings before the Magistrate’s Court and I do not see anywhere where the Court ordered the transfer of title. In fact the order extracted from the proceedings is a clear reflection of the decision of the Tribunal. Whether that decision is capable of being executed in the manner in which it was given is another matter altogether.

15. What has however bothered me is the fact that The *Environment and Land Court Act* commenced on 30<sup>th</sup> August, 2011. The award in question was adopted by the Court on 17<sup>th</sup> July, 2013 purportedly pursuant to the provisions of the *Land Disputes Tribunal Act*, No.18 of 1990 which Act the learned Magistrate appreciated had been repealed. The said Act was in fact repealed by section 31 of the *Environment and Land Court Act*, and quite rightly in my view. The repeal of the said piece of legislation had become long overdue and as held by **Ibrahim, J** (as he then was) in **Republic vs. Soy Division Land Disputes Tribunal & Another Ex Parte Apolenary Kenduiywa Tanui Eldoret HCMCA No. 302 of 2003**, that was a statute which had been abused and had failed to achieve the objectives for which it was enacted but had instead become a vehicle for persecution, oppression and frustration. The same Judge had in **Sawe Tanui Chelagat vs. Jeptum Taprandich Siron Eldoret HCCA No. 74 of 2004**, recommended the repeal of the said legislation on the ground that it was wrecking havoc in our judicial system causing untold misery and suffering to thousands of litigants in Kenya.

16. Apparently there was no saving clause in respect of proceedings which were either pending hearing before the Tribunal or adoption before the Courts. In my view, by repeal of the *Land Disputes Tribunal Act*, No.18 of 1990, no Court could purport to exercise any powers thereunder. In adopting the award on 14<sup>th</sup> August, 2013, the learned Magistrate was invoking the provisions of sections 7 and 8 of the said repealed Act. Accordingly, the learned Magistrate could not purport to exercise a jurisdiction which had ceased to exist by operation of law. While the *Land Disputes Tribunal Act*, No.18 of 1990 existed the learned Magistrate had no option but to adopt the award but by the repeal of the said Act that jurisdiction no longer existed. In other words with the repeal of the *Land Disputes Tribunal Act* went the jurisdiction of the Magistrate’s Court to exercise any jurisdiction thereunder and the Respondent ought not to have entertained the application effective from the date of the said repeal since the jurisdiction to adopt the award emanated from the said Act without which no such jurisdiction existed. The Respondent had no blanket power to exercise jurisdiction at large as it were and *in vacuo*. With the repeal of the said Act, therefore the earlier decisions which were based on the repealed legislation were wiped away by the present enactment and cannot be called in aid to gloss a gap in the present enactment. See **Nganga vs. Nganga [1975] EA 161**.

17. The general principle is that except as to the transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed. However, the operation of the principle is

subject to any savings made, expressly or by implication, by the repealing enactment and in most cases is also subject to the general statutory provisions as to the effects of repeal. See **Republic vs. The Chief Magistrate's Court, Nairobi & Others Ex Parte Antonine Auma Okoth Nairobi HCMA No. 994 of 2004**, *Halsbury's Laws of England* 4<sup>th</sup> Ed. Vol. 44(1) Para 1296 & *Principles Of Statutory Interpretation* by Justice Singh at pages 484-485.

18. Whereas this Court is aware of the provisions of section 23(3)(e) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya on the effect of repeal of a law on an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture, under section 7(2) of the ***Land Disputes Tribunal Act***, the Court was only empowered to enter judgement in accordance with the decision of the Tribunal. In this case it is clear that the Tribunal never made any decision and only made a request which in my view could not be the basis of entering a judgement under the aforesaid provision.

19. However, the Applicant having purchased the property pursuant to a chargee's exercise of its power of sale, any dispute arising therefrom would have been a contractual dispute over which the Tribunal had no jurisdiction. This was the position in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003** where it was held:

**“From the evidence tendered the dispute was about whether or not the appellant had fulfilled the terms of the Agreement for Sale, as between himself and the father to the respondent. On the other hand, the appellant insisted that he did pay the full purchase price, whilst on the other hand, the respondent insisted that the appellant only paid one half of the purchase price and therefore offered to refund to the appellant the money, which the appellant had paid to his father. However the appellant would have none of that, because he believes that he had paid the full purchase price. The bottom line appears to be a contractual dispute, over which the Tribunal had no jurisdiction. Therefore, by upholding a decision, which was made without jurisdiction, the Appeals Committee erred in law. In the result, the appeal is allowed, the decision by the Appeals Committee is set aside and the decision by the Divisional Land Disputes is set aside, for want of jurisdiction.”**

20. In my view if the learned Magistrate had no jurisdiction to entertain the matter, whatever proceedings flowed from decision would be null and void since a decision made without jurisdiction 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 thereof 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.

21. A similar position was adopted by 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** in which he 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.

### **Order**

22. 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 for purposes of quashing the proceedings and judgement of Kajiado Senior Resident Magistrate Court in Kajiado Land Dispute Tribunal Case No. 7 of 2008 which decision is hereby quashed but with no order as to costs as the Respondents, rightly in my view conceded the application and the interested party did not participate in these proceedings. It is also not lost to the Court that the Tribunal's decision was a mere request rather than an order.

**Dated at Nairobi this 20<sup>th</sup> day of June 2014**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Kago for Miss Manageni for the Applicant***

***Cc Kevin***