



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**JUDICIAL REVIEW CASE NO. 126 OF 2011**  
**IN THE MATTER OF AN APPLICATION BY NAOMI MUTHONI MUNIU**  
**TO APPLY FOR JUDICIAL REVIEW IN THE NATURE OF ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**  
**AND**  
**IN THE MATTER OF THE PRINCIPAL MAGISTRATES' COURT (KIKUYU) LAND CASE NO. 40 OF 2009**  
**BETWEEN**  
**NAOMI MUTHONI MUNIU.....APPLICANT**  
**VS.**  
**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**THE CHIEF MAGISTRATES COURT (KIKUYU).....2<sup>ND</sup> RESPONDENT**  
**AND**  
**NANCY WANJIRU WACHIRA**  
**LOISE NJERI KAMAU.....INTERESTED PARTIES**  
**SIMON NGANGA KAMAU**

**JUDGEMENT**

1. In their Notice of Motion dated 21<sup>st</sup> June, 2013 the *ex parte* applicant herein, **Naomi Muthoni Muniu**, seeks the following orders:
1. **THAT certiorari be and is hereby issued quashing the order made by C A Otieno, RM on 28<sup>th</sup> January, 2011 adopting the award of the Land Disputes Tribunal in Claim No. Kabete/1/2010 as Judgment of the Court.**
  2. **THAT declare C A Otieno RM was in breach of his duty under the Limitation of Actions Act, Chapter 22 of the Laws of Kenya for failing to appreciate that the Applicant had lived peaceable on the said portion for over 37 years.**
  3. **THAT declare the Order by C A Otieno RM made on 28<sup>th</sup> January, 2011 as invalid, void and of no effect.**
  4. **THAT Mandamus be and is hereby issued to compel the Kiambu Land Registrar to excise a portion of land contained in Sigona 362/363/364 (hereafter “ The Said Portion”) where the Applicant has raided for a period of over 37 years (hereafter “The Said Portion”) and register the same in the name of the Applicant.**
  5. **THAT Mandamus be and is hereby issued to compel the Deputy Registrar of this Honourable Court to sign any and all requisite documents and/or papers on behalf of the interested parties herein to facilitate the transfer of the said portion.**

**6. THAT the Applicant be awarded damages, costs and interest from the matters arising herein.**

2. The application is supported by an amended Statutory Statement filed on 9<sup>th</sup> June, 2011 2010 and Verifying Affidavit sworn by the applicant herein on 20<sup>th</sup> May 2011, a supporting affidavit sworn by the applicant the same day and another supporting affidavit filed with the Notice of Motion sworn by the applicant on 21<sup>st</sup> June 2013.

13. I wish to state at this stage that there is no place for a supporting affidavit in an application for leave to apply for judicial review and the only affidavit provided for is the affidavit verifying the facts which ought to be detailed and contain all the facts relied upon by the Applicant. This position was clarified in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321** where Nyamu, J (as he then was) was of the view which view I associate myself with that:

**“There is no legal requirement that the statement and verifying affidavit or any other supporting affidavits and documents relied on by the applicant be filed together with the Notice of Motion and indeed there is no requirement that the motion be filed simultaneously with any other document. Order 53, rule 4 requires that the Motion be served together with the documents filed at the application or (leave stage) stage and the grounds to be relied on in support of the motion are those set out in the statement filed at leave stage and the facts are as set out in the affidavit verifying the statement. This means that no other documents need be filed with the Motion and the Motion is supported by the statement and the affidavits accompanying the application for leave. However under Order 53, rule 4(2) the applicant can file other or further affidavits, apart from those accompanying the application for leave, in reply to any affidavits filed by the other parties (where they introduce a new matter arising out of the affidavits) and the applicant can do so after sending out a notice to the parties and the procedure for this is clearly outlined in the rules. Where the other parties have not filed any affidavits the applicant would under Order 53 have no legal basis for filing another or further affidavits. To this extent the applicant’s case is complete at leave stage and practicing advocates are cautioned that the Civil Division Procedure of filing many affidavits to counter the opponent’s case is a hangover, which is not acceptable under the Judicial Review jurisdiction.”**

14. The Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000**, on the other hand held:

**“We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:**

**‘The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.’**

At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:

**‘The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.’ ”**

15. However, in the interest of justice I will deem all the said affidavits as constituting the verifying affidavit though that is a matter which the Court is entitled to take into account when dealing with costs.

16. Apart from that the Applicant in the Motion is indicated as the ex parte applicant rather than the Republic. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779**.

17. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

**“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.**

18. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

**“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**

**“REPUBLIC.....APPLICANT**

**V**

**THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.**

**EX PARTE**

**JOTHAM MULATI WELAMONDI”**

19. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

**“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.**

20. It is therefore my view that whereas the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.

21. According to the Applicant, being a lay person she was unaware that she was required to institute these proceedings within 6 months hence the Court should enlarge the time for doing so.

22. According to her she has been permanently residing on a portion of land known as Sigona 362/363/364 (hereinafter referred to as the suit land) for a period of over 37 years. The said land belonged to her uncle, **Clement Kamau Njoroge** who had allowed the applicant’s mother and the applicant’s siblings to reside thereon. According to her the said land does not have a title deed hence she is entitled to be registered as the owner of the portion occupied by her based on the doctrine of adverse possession.

23. She deposed that although her mother is buried on the said portion, the interested party now intends to evict her therefrom yet that is the only place she calls home.

24. The deponent deposed that together with her sisters, they lodged a dispute before the Kikuyu District Land Tribunal (hereinafter referred to as the Tribunal) against the interested parties in respect of Land Parcel Nos. Sigona/362/363/364 in which they provided evidence of their occupation thereof from 1972 to 2009 when the interested parties illegally and unprocedurally destroyed their homes on the portions of the said land. However the Tribunal disregarded the said evidence and directed them to remove the restriction the applicant had placed on the said land which award was adopted as a judgement by the Principal Magistrate’s Court at Kikuyu in Land Case No. 40 of 2009.

25. According to the applicant the Magistrate committed an error by failing to consider the factors which ought to have been considered which would have led to a different conclusion rather than the adoption of the award hence the orders sought.

26. According to the amended Statement filed on 8<sup>th</sup> May, 2013, the application was grounded on the fact that the learned Magistrate’s order contains an error of law; that the learned Magistrate’s adopted the award of the Land Disputes Tribunal in claim No. Kabete/1/2010 without adequate reasons; that in adopting the award of the Land Disputes Tribunal in Claim No. Kabete/1/2010 the learned Magistrate committed an error of fact; that the learned Magistrate failed to consider matters which he (sic) should not have considered; and that the learned Magistrate acted unreasonably.

### **Respondent’s Case**

27. In response to the application the Respondent filed the following grounds of opposition:

- 1. THAT the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted within the premises of the law.**
- 2. THAT the matter is not within the Purview of Judicial Review Court.**
- 3. THAT the Applicant has no remedy in law, it is an abuse of court process and hence this lacks merit.**

### **Interested Parties’ Case**

28. In opposition to the application the interested parties' filed the following preliminary objections:

1. That the orders prayed by the ex parte applicant are time barred.
2. That the applicant has concealed necessary material facts.
3. That the applicant's application is frivolous, vexatious and an abuse of the court process.

#### **Determination**

29. I have considered the application, the affidavits, the grounds raised in opposition as well as the submissions filed.

30. Although the parties herein concentrated on the principles applicable to the doctrine of adverse possession, the issue before this Court is not whether or not the applicant proved before the Tribunal that her claim for adverse possession was merited. That is not an issue for this Court but would be an issue for the Environment and Land Court. For this Court the issue for determination is whether the Magistrate had jurisdiction to adopt the Tribunal's award.

32. 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.

32. 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.”**

33. It is therefore my view that even if the Magistrate had been of the view that the Tribunal acted unlawfully, that would not have justified the Court in declining to adopt the award. The Court had no option under the repealed *Land Disputes Tribunal Act* when it came to adoption of the said awards.

34. From the record, it seems that the applicant's claim to the suit land was based on the doctrine of adverse possession. 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 based on adverse possession or prescription. In Republic vs. Kapsabet Land Disputes Tribunal Ex Parte Keter Kipchoge Misoj & 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.”**

35. In fact the Tribunal was expressly barred from entertaining such claims by section 13(3) of the *Land Disputes Act* which expressly provided:

***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.***

36. It is therefore clear that the applicant's claim was a non-starter as it was made before a Tribunal which had no jurisdiction to determine the same. It was bound to fail. 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.

37. I am however unable to agree with the Respondent and the interested party that the application was time barred. The decision of the Magistrate which is being challenged in these proceedings was made on 28<sup>th</sup> January, 2011. These proceedings were commenced on 26<sup>th</sup> May, 2011. That was within 6 months as the law provides. It ought to be remembered that the decision of the Tribunal was incapable of being executed until adopted by the Court. Therefore in my view the 6 months would start running from the date of the adoption of the award.

38. As was held by Khamoni, J in R vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex parte Kariuki [2005] 2 KLR 10:

**“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.”**

39. I accordingly find that the application was not time barred.

40. However in light of the foregoing findings the Notice of Motion dated 21<sup>st</sup> June, 2013 is unmerited. The same consequently fails and is dismissed with costs.

**Dated at Nairobi this 19<sup>th</sup> June, 2014**

**G V ODUNGA**

**JUDGE**

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

***Miss Sigei for interested parties***

***Cc Kevin***