



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. CIVIL APPLICATION NO. 74 OF 2006

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW
(CERTIORARI AND PROHIBITION)**

**IN THE MATTER OF LUGARI LAND DISPUTES TRIBUNAL, LIKUYANI DIVISION,
DISPUTE NO. LKL/6/2005 AND THE AWARD DATED 26/2/2006 AND KAKAMEGA CMCC.
MISC. AWARD NO. 18 OF 2006**

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26

BETWEEN

REPUBLIC

.....**APPLICANT**

AND

**LUGARI DISTRICT LAND DISPUTES TRIBUNAL, LIKUYANI DIVISION
.....RESPONDENT**

VERSUS

PETER KIMEU MUTHINI (Acting as the personal representative of the estate of the late

**AGNES MUNAH MUTHINI as substituted by the court order of the court)....INTERESTED
PARTY**

RULING

On the 10th of February 2006, the Lugari Land Disputes Tribunal consisting of Jothan Kisengo, Chairman, Protas Wabwire, member and Major Rtd. A.S Akweywa, member made the following decision

- 1. The entire process of the transfer of 40 acres of land from Muthini Wambua (deceased) was highly fraudulent, illegal and full of corrupt intentions. Those involved in this illegal dealings included Nyairo & Co. Advocates, the Land Registrar, Kakamega, the Chairman and Secretary of the Land Control Board at that time 1978 and Miriam Nyangara Mirumbi, including the statement of the Settlement Officer, Kitale.**

2. This being the case, Tribunal rules that -

- a. Title Deed Kakamega/Sergoit/145 in the name of Miriam Nyangarah Mirumbi issued on 13th March 1991 be cancelled under Section 143 (1) of the Registered Land Act (Cap. 300) Laws of Kenya.**
- b. Miriam Nyangara Murunbi cease ownership of Plot 145 from the date of this ruling and vacate the same for Muthini Wambua's family to occupy. Houses built by Miriam Nyangara to be demolished.**
- c. Miriam Nyangara be allowed to take her movable properties from the house and carry the material away.**
- d. Miriam Nyangara to meet the costs of her moving away from Plot No. 145.**
- e. New Land Title Deed to be issued in the name of Agnes Munah Muthini (the claimant) by the Land Registrar in Kakamega.**
- f. Miriam Nyangara Mirungi to meet all the court costs including the Tribunal.**

I will observe at this early stage that Miriam Nyangara Mirungi is now deceased.

Following the above decision, the Ex-parte applicant (as personal representative of Miriam Mirungi) applied for leave to file Judicial Review proceedings. In granting leave, he was granted stay orders of execution before filing the substantive Notice of Motion herein. The Notice of Motion herein was filed on 13/7/2006, though it was dated 7/7/2006. The prayers in this Notice of Motion are as follows -

1. That an order of Certiorari does issue to remove into this Honourable court, and to quash the award dated 10th February 2006 in dispute No. LKL/06/2005 made in Lugari District Land Disputes Tribunal – Likuyani Division, together with all subsequent proceedings, adoption orders and decree in Kakamega CMCC Misc. award No. 18 of 2006.
2. That an order of prohibition does issue to prohibit the Chief Magistrate's court at Kakamega or any other court from further dealing with the proceedings in Kakamega CMC Misc. Award No. 18 of 2006 or similar proceedings.
3. That the costs of these proceedings be borne by the Interested Party.

The application was filed with a supporting affidavit, which this court will ignore because no leave was obtained for the filing of that affidavit which was sworn on 7/7/2006. In Judicial Review proceedings brought under Order 53 of the Civil Procedure Rules, the affidavit or affidavits to be relied upon by the ex-parte applicant are those filed with the Chamber Summons for leave, unless leave is granted by the court for the filing of additional affidavits.

Together with the application for leave, the ex-parte applicant filed a Statutory Statement which listed the grounds upon which relief was sought as well as the reliefs sought. Filed also was a verifying affidavit giving the facts upon which the application was brought.

It was deponed in the said verifying affidavit *inter-alia* that the allegations put before the Land Disputes Tribunal were outrageous, false, scandalous, and demonstrated bad faith on the part of the respondent and the Interested party. It was also deponed that the Tribunal lacked jurisdiction to grant the orders it made.

The interested party filed a replying affidavit through a personal representative, Peter Kimeu Muthini dated 14th February 2012. At that time, she was also deceased. It was deponed *inter-alia* that the Tribunal had the jurisdiction to grant the orders it granted. Also, that this court could not quash a decision which was not annexed to the application.

The ex-parte applicant, with leave of the court, filed a further affidavit sworn on 22nd February 2012 in response to the affidavit of the interested party. The said affidavit reiterated that the application was competent and that it had been filed properly under Order 53 of the Civil Procedure Rules. That the Tribunal's decision was *ultra vires*, as it breached the rules of natural justice.

Parties counsel, M/S Nyairo & Co. for the Ex-parte applicant and Wambua Kigamwa & Co. for the interested party filed written submissions. The respondent neither filed a reply to the application nor did they file written submissions.

On the hearing date, Mr. Mwaura who appeared in court for the ex-parte applicant and Mr. Ondieki for the interested party relied on the written submissions. I have perused the submissions filed and considered the authorities cited.

Though the interested party says that the decision of the Tribunal to be quashed was not annexed, I have seen the same in documents filed. Therefore, in my view, that objection has no substance.

It has been argued that the ex-parte applicant was not given a fair hearing by the Land Disputes Tribunal. The record of the Tribunal proceedings shows that the objector, Miriam Nyangara Mirungi (the ex-parte applicant) was summoned a number of times to attend the proceedings, even through counsel M/S Nyairo & Co. advocates, but did not bother to appear. It is therefore not correct to say that the ex-parte applicant was not afforded a hearing by the Tribunal. A party who deliberately fails to appear either in court or before a tribunal for the hearing of a matter, cannot claim afterwards that he or she was not given a fair hearing.

The jurisdiction of the Land Disputes Tribunal is governed by the provisions of Section 3 of the Land Disputes Tribunals Act (now repealed). The relevant part of section 3 provides as follows -

“S.3 (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.”

In my view therefore, the powers of the Tribunal are limited to division and determination of boundaries, occupation and working on land as well as trespass to land.

The decision challenged herein goes beyond these powers. The decision addresses issues of transfer of land, validity of title and ownership to land, and eviction, and demolition. On that account, the decision was null and void and has to be quashed through certiorari.

Though counsel for the ex-parte applicant has argued that the Tribunal did not have powers to deal with land registered under the Registered Land Act, (Cap. 300), that position is not correct. In my view, the Tribunal's powers are not restricted to land which is not registered, so long as the Tribunal restricts itself to the items listed under **Section 3 (1)** of the Land Disputes Tribunal's Act. On this I rely on the provisions of Section 159 of the Registered Land Act (Cap. 300) which provides as follows -

“S.159 – Civil suits and other 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 Tribunal Act , in accordance with that Act.”

In my view therefore, even where land is registered under the Registered Land Act, the Land Disputes Tribunal's had powers to deal with the same, provided they restricted themselves to the parameters of their powers set out under Section 3 (1) of the Land Disputes Tribunal's Act. Anything outside those Tribunals powers had to be dealt with by the courts of law, as provided by the above section.

I am aware of High Court decisions holding a different view. However, I am not bound by those decisions.

Coming back to our present case, I am of the view that the Tribunal went beyond its powers and made orders which were not within its powers to make. The orders were therefore *ultra vires*. They were null and void. They are liable for quashing by this court through certiorari. The prayer for prohibition will also be granted, as the circumstances of this case show that the Tribunal even ordered demolition of structures which had already been constructed on the land by the ex-parte applicant.

In conclusion, I find merits in the application. The application is allowed. I grant the certiorari and prohibition orders sought. The interested party will pay the ex-parte applicant's costs of these proceedings.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E