



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC. CIVIL APPLICATION NO. JR/ELC 88 OF 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE LAND DISPUTE TRIBUNAL**

**(LIMURU DIVISION).....1<sup>ST</sup> RESPONDENT**

**THE SENIOR PRINCIPAL MAGISTRATE’S**

**COURT (LIMURU).....2<sup>ND</sup> RESPONDENT**

**JOSEPH NJUGUNA MACHARIA.....INTERESTED PARTY**

***EX-PARTE:* ALICE NYAKIO NJENGA**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 18<sup>th</sup> October, 2011, the *ex parte* applicant herein, **Alice Nyakio Njenga**, seek the following orders:
1. **That this honorable court be pleased to remove unto this court and quash the award of the LAND DISPUTES TRIBUNAL (LIMURU DIVISION) made on the 28<sup>th</sup> July 2011 in LAND DISPUTES TRIBUNAL CASE NO. LIM/LND/9/6/2011 and quash an order of the Senior Principal Magistrate’s Court (Limuru) made on the 13<sup>th</sup> September 2011 in Land Case No. 11 of 2011 adopting the said award as the judgment of the said court.**
2. **That the leave granted herein on the 13<sup>th</sup> October 2011 do operate as stay of all proceedings and matters hereinbefore complained of until this application is heard and determined or further orders of this court.**
3. **That costs of this application be borne by the Interested Party**

**Applicant’s Case**

2. The application was supported by an affidavit sworn by the applicant on 8<sup>th</sup> October, 2011.
3. According to the deponent, the award of the Tribunal dated 28<sup>th</sup> July, 2011 was filed in the Senior Principal Magistrate’s Court (Limuru) on the 29<sup>th</sup> July 2011 as Land Case No. 11 of 2011. The said Award was read to the Applicant and the Interested Party on the 13<sup>th</sup> September 2011 in

- which award, the Tribunal declared the Interested Party the owner of part of L.R. No. LIMURU/KAMIRITHU/T.257 (hereinafter referred to as the suit land) and ordered the Applicant to stop constructions and to remove building materials from the said part.
4. According to the applicant, that part of the suit land that was the subject matter of the proceedings before the Tribunal belongs to **Wairimu Waiganjo** (deceased), her mother-in-law but nobody had been appointed as the administrator of her estate. She further deposed that the other co-proprietors to the suit land were not joined as parties to the proceedings before the Tribunal and that out of the five (5) Co-proprietors only two were alive and neither they nor the administrators of the estates of the three deceased co-proprietors were made parties to the proceedings before the tribunal.
  5. According to the applicant she together with her late husband (**Cosmas Waweru Waiganjo**) and their family have lived on the suit land throughout her married life and that the Interested Party had no interest in the said plot and was an intruder.
  6. The applicant's case was that the Land Disputes Tribunal exceeded its powers and/or had no jurisdiction to decide on the ownership of the suit land and that the Tribunal's Award is null and void as it concerned the property forming the estate of deceased person (**Wairimu Waiganjo**) which had no legal representative in the proceedings before the tribunal.
  7. It was the applicant's case that unless the court grants the orders sought herein she and the estate of the late **Wairimu Waiganjo** (to which she was a beneficiary) stood to lose part of the suit to the Interested Party who is not entitled thereto.

### **Respondents' Case**

8. On behalf of the interested party a replying affidavit was filed sworn by him on 16<sup>th</sup> November, 2011.
9. According to him, the entire Judicial Review proceedings herein have been premised on the wrong appreciation by the Applicant of the nature of the proceedings of the Land Dispute Tribunal, Limuru in case No. Lim/LND/9/6/4/2011, between the *ex parte* Applicant herein and himself. He deposed that he acquired the suit property for valuable consideration from **Cosmas Waweru Waiganjo** way back on 18<sup>th</sup> August 1989 and that the said **Cosmas Waweru Waiganjo** has since died.
10. According to him, the portion he bought is just a small portion of the sit land and there are many other persons who bought other portions on the same property from **Cosmas Waweru Waiganjo** and they have no dispute with the *ex parte* Applicant. He further deposed that though the transfer had not been done by the time **Cosmas Waweru Waiganjo** died, he entered occupation in 1989 and even without title, had the right of absolute ownership by reason of adverse possession.
11. He confirmed that it was him who took the *ex parte* Applicant before the Land Dispute Tribunal, Limuru, for trespass on his property which dispute fell within the jurisdiction of the Tribunal under Section 3 of the **Land dispute Tribunal Act** (No. 180 of 1990). He deposed that the *ex parte* Applicant had no claim of right over the suit property either by herself or through the deceased **Cosmas Waweru Waiganjo** since she was not the Administrator of the estate of **Cosmas Waweru Waiganjo** and had no right to claim on behalf of the estate.
12. According to him, the *Ex parte* Applicant only started encroaching upon the suit property after the death of **Cosmas Waweru Waiganjo** and hence it was in order for the Land Dispute Tribunal to order her to stop encroaching the property and the Magistrate Court, Limuru should be allowed to adopt the award as a decree of the court to enable him enforce it against the *Ex parte* Applicant.
13. In his view, the remedy available to the *Ex parte* Applicant was an appeal before the Provincial Land Appeals Tribunal which she had not filed despite expiry of the right of appeal.

### **Applicant's Rejoinder**

14. In a rejoinder the applicant filed a further affidavit sworn on 23<sup>rd</sup> February, 2012 in which she averred that the ownership of part of the suit land was in dispute and that is why the Interested Party referred the dispute to the Land Disputes Tribunal; that the Land Disputes Tribunal had no jurisdiction to hear and determine a dispute involving the estate of a deceased person when the estate did not have an Administrator to represent it; that the proceedings before the Land Disputes Tribunal were in contravention of Section 13(3) of the **Land Disputes Tribunal Act** (No. 18 of

1990) as the Interested Party was attempting to recover land from the *Ex-parte* Applicant Twenty Two (22) years after his cause of action accrued; that her late husband **Cosmas Waweru Waiganjo** did not sell any part of the suit land and that no valid Sale Agreement existed for the alleged sale.

### **Applicant's Submissions**

15. It was submitted on behalf of the applicant that before the Tribunal the interested party was trying to recover the land he allegedly purchased in 1980 yet the proceedings before the Tribunal were filed in 2011, 22 years later. Under section 13(3) of the repealed **Land Disputes Tribunal Act**, it was submitted the Tribunal had no jurisdiction to entertain certain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions and that under section 7 of the **Limitation of Actions Act** Cap 22 action for recovery of land must be brought within 12 years and not 22 years.
16. It was therefore submitted that the Tribunal did not have jurisdiction to hear and determine the dispute before it hence exceeded its powers.
17. Further at the time of the said proceedings the suit land was registered in the name of a deceased person, **Wairimu Waiganjo** and the applicant was not the administratrix of her estate as there was no such administratrix. It was therefore submitted that the Tribunal's award was made against a wrong person who could not effect it and that the Tribunal had no powers to deal with Probate and Administration matters hence the application ought to be allowed with costs

### **Interested Party's Case**

18. According to the interested party, the subject matter of the dispute was a very small portion of the suit land which the interested party bought from the registered owner of the bigger portion **Cosmas Waweru Waiganjo** on 18<sup>th</sup> August, 1989 and entered into possession thereafter. The registered owner however passed away before subdivision and transfer could be completed.
19. It was submitted that from 1989 to 2011 when the ex parte applicant started interfering with his possession he had been in possession for a period of 22 years and had acquired ownership by way of adverse possession since time started running on 18<sup>th</sup> February, 1990 six months after the date of the agreement in default of the consent of the Land Control Board under section 6 of the **Land Control Act**.
20. It was submitted that the dispute before the Tribunal was founded on trespass. The applicant, it was submitted was not the registered owner of the property, was not claiming a purchaser's interest or beneficial interest nor was she the administrator of the estate of the deceased but was a mere trespasser.
21. It was therefore submitted that the dispute was properly filed before the Tribunal and it was in order for the Tribunal to order the applicant to stop encroaching on the suit property.

### **Determination**

22. 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.***

23. 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.

24. In this case it is contended that the 1<sup>st</sup> respondent did not have the jurisdiction to grant the award which it did. If that contention is found to be correct then I would associate myself with the decision of **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**, to the effect that if an award is made without jurisdiction, it is a nullity and anything out of a nullity is a nullity due to the maxim *ex nihilo nihil fit* – out of nothing comes nothing hence 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 as it has powers to strike out nullities. This is due to the fact that where a decision is a nullity, 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. You cannot put something on nothing and expect it to stay there, as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169**.
25. In its decision, the Tribunal expressed itself inter alia as follows:

**“Portion number three (3) of LIMURU/KAMIRITHU/T 257 is wholly owned by Joseph Njuguna Macharia”**

26. Clearly, this was a determination that the suit property was the property of the interested party and not simply that the interested party had the right to occupy the same and that the applicant had trespassed thereon. In fact a reading of the decision leads to the conclusion that the order for removal by the applicant of the construction was consequential upon the finding that the suit property belonged to the interested party. This power the Tribunal clearly lacked and this decision was clearly ultra vires its powers hence the same was a nullity.
27. From the submissions filed on behalf of the interested party, it would seem that the interested party hinged his case on prescriptive rights since he clearly appreciated that without the consent of the Land Control Board having been sought and obtained within the period stipulated under the relevant law, the agreement for sale may well have become illegal and unenforceable. Whereas the interested party may be entitled to the suit land if such a claim is proved, in **Republic vs. Kapsabet Land Disputes Tribunal & Keter Kipchoge Miso Ex Parte 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.”**

13. 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.***

28. In my view, in determining whether or not the Tribunal was seized of the jurisdiction, the Court ought to look not at the wordings employed by the Tribunal but the effect of the determination. That, in my view, was the effect of the determination in **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002**, in which the Court of Appeal held that where the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre, the Courts have been in clear in their minds that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of section 3(1) of the Act. Conversely, in order to determine whether or not a dispute is in respect of a boundary, trespass or title to land it is

- not the words used but the substance of the dispute that is to be considered.
29. In this case the interested party set out to litigate his interests before a body which had no powers to hear and determine the issues which were to be placed before it and that rendered the proceedings still-born and incapable of resuscitation.
30. It therefore follows that the decision made by the Tribunal cannot be allowed to stand. An order of certiorari is hereby issued bringing into this Court the award of the Land Disputes Tribunal (Limuru Division) made on the 28<sup>th</sup> July 2011 in Land Disputes Tribunal Case No. LIM/LND/9/6/2011 together with the order of the Senior Principal Magistrate's Court (Limuru) made on the 13<sup>th</sup> September 2011 in Land Case No. 11 of 2011 adopting the said award as the judgment of the said court for the purposes of being quashed and the same is hereby quashed.
31. As the Tribunal is no longer in existence, each party will bear own costs.

**Dated at Nairobi this 30<sup>th</sup> day of October, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties**

**Cc Patricia**