



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS CIVIL APPLICATION JR/ELC NO. 31 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF  
CERTIORARI AND PROHIBITION BY PETER THIONG'O NJUNGUNA**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990 AND LAND  
PARCES NOS GITHUNGURI/GATHANGARI/2033 AND GITHUNGURI/GATHANGA/2242**

**AND**

**IN THE MATTER OF THE DECISION OF GITHUNGURI AND DISPUTES TRIBUNAL CASE  
NO. 16/20/10/2009**

**BETWEEN**

**PETER THIONG'O NJUGUNA.....APPLICANT**

**VERSUS**

**SENIOR RESIDENT MAGISTRATE'S COURT GITHUNGURI.....1<sup>ST</sup> RESPONDENT**

**GITHUNGURI LAND DISPUTES TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**JOSEPH NJUGUNA THIONG'O.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 19<sup>th</sup> November, 2010, the *ex parte* applicant herein, **Peter Thiong'o Njuguna**, seeks the following orders:

1. An order of certiorari do issue to remove into this court and quash the proceedings and decision/awards of the Githunguri Land Disputes Tribunal (2<sup>nd</sup> respondent) made on 17<sup>th</sup> December 2009 in land case number 16/20/10/2009 and which award was adopted as a judgment of the Resident Magistrate Court Githunguri (1<sup>st</sup> respondent) on 2<sup>nd</sup> September 2010.
2. An order of prohibition do issue to prohibit the Respondents jointly and severally from

acting pursuant to or in furtherance of the said decision/award and/or judgment of the court under section 7 (2) of the Land Disputes Tribunal Act or in any other manner whatsoever.

3. Costs of this application be provided for.

Applicant's Case

4. The application was supported by an affidavit sworn by the applicant on 21<sup>st</sup> May, 2010.
5. According to the applicant, he was born in 1973 to the 3<sup>rd</sup> Respondent herein and his late mother **Margaret Wanjiru** but in the year 1977, his mother passed away and his father abandoned him and his sisters and it was their grandfather who took care of them until they became adults.
6. According to the applicant his said late grandfather, **Victorio Thiongo Mugoro**, knew and understood the suffering he underwent at the hands of the 3<sup>rd</sup> Respondent and because of that in the year 1991 the grandfather subdivided his parcel of land Reference Number **Githunguri/Gathangari/2032** into equal parcels wherein he transferred one parcel namely **Githunguri/Gathangari/2242** to himself and the other parcel being L.R No. **Githunguri/Gathangari/2241** he transferred to the 3<sup>rd</sup> respondent, a process the 3<sup>rd</sup> respondent did not object to.
7. When the said grandfather died in 1996, he left behind an oral will wherein he bequeathed his Land Reference **Githunguri/Gathangari/2033** to his 3 grandsons named after him being one of them. In 2003, succession proceedings were instituted as cause number 18 of 2003 wherein the 3<sup>rd</sup> respondent consented that the deponent be one of the Administrators of the estate of the said grandfather, **Victorio Thiongo Mugoro** and on 8<sup>th</sup> May 2003 the said applicants were issued with Grant letters of Administration in respect of the estate thereof which grant was confirmed on 20<sup>th</sup> November 2003. In the confirmed Grant Letters of Administration the 3<sup>rd</sup> respondent's share of land is clearly indicated and the respondent did not object the mode of distribution and to date the Grant has never been challenged/revoked or annulled.
8. However, the 3<sup>rd</sup> respondent there afterwards developed an afterthought and instead of either challenging the succession cause or challenging the applicant's title in respect of the applicant's title number **Githunguri/Gathangari/2242** filed a land Dispute Tribunal case at Githunguri wherein the Tribunal without Jurisdiction over the matter ruled on 17<sup>th</sup> December 2009, that land reference number **Githunguri/Gathangari/2033** and **Githunguri/Gathangari/2242** titles be revoked. The said decision was on 17<sup>th</sup> December 2009 forwarded to the Resident Magistrate Court Githunguri for adoption.
9. According to the applicant, the Tribunal acted without jurisdiction in that land title number **Githunguri/Gathangari/2033** is a subject of succession cause number 18 of 2003 and therefore the right court to arbitrate on the matter is the succession court and likewise the tribunal also acted in excess of its jurisdiction in regard to the title number **Githunguri/Gathangari/2242** as there is a title to the land and as such the right court to arbitrate on the matter is the High Court.
10. The applicant was therefore apprehensive that unless the orders sought herein are issued he stood to suffer irreparable loss and damages without the due process of law being followed.

Respondent's Case

11. In response to the application, the 3<sup>rd</sup> Respondent, **Joseph Njuguna Thiong'o**, filed an affidavit in which he deposed that he was the father of **Peter Thiongo Njuguna, Anna Njeri Njuguna, Eunice Wacheke Njuguna, Pauline Muthoni**. According to him, since the death of his wife in 1977, he took care of his said children. He deposed that in 1991 he went abroad and in his absence his father **Victoria Thiongo Mugoro** became ill and decided to equally subdivide his parcel of land no. Githunguri Gathangari 1213 to his 3 sons and himself as here under:

1. **Joseph Njuguna Thiongo** - 2032
2. **James Ndura Thiongo** - 2034
3. **George Ngugi Thiongo** - 2035
4. **Victoria Thiogo Mugoro** - 2033

12. He further deposed that his first wife the late **Margaret Wanjiru Njuguna** died in 1977 and left the four children under his care being **Anna Njeri Njuguna**, **Eunice Wachehe Njuguna**, **Pauline Muthoni Njuguna** and **Peter Thingo Njuguna** and in 1990 he married his 2<sup>nd</sup> wife **Margaret Wambui Njuguna** with whom they had 3 children **Simon Mbugua Njuguna**, **Anna Njeri Njuguna** and **Rachel Njambi Njuguna**.
13. He deposed that because of his absence he told his father to subdivide his parcel **Githunguri/Gathangari/2032** into two equal parts, one for him and the other for **Peter Thingo Njuguna** to represent his sisters.
14. The deponent urged the Court to share **Githunguri/Gathangari/ 2242** measuring (1.44ha) among the named children who are above 18 years old equally while the **Githunguri/Gathangari/No. 2033** belonging to his father **Victoria Thiongo Mugoro** be shared amongst his 3 sons namely:-

1. **Joseph Njuguna Thiongo** – 2 2/4 acres
2. **James Ndura Thiongo** – 2 ¼ acres
3. **George Ngugi Thiongo** 2 ¼ acres

15. The deponent was of the view that since he was not around, his brothers **James Ndura** and **George Ngugi Thiongo** decided to file a succession case and his parcel was registered in the name of his son **Peter Thiongo Njuguna**. He therefore requested the Court to revert **Githunguri/Gathangari/2033** and **Githunguri/Gathangari/ 2242** to his name so that he could be a trustee to his children.

### **Determination**

16. I have considered the application, the affidavits on record as well as the submissions of the parties.
17. 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.***

18. The question before me is not the subdivision of the estate of the deceased but whether the 2<sup>nd</sup> Respondent had the jurisdiction to make the impugned decision. 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. 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 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.

19. The Court of Appeal in **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002** held that if 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, it is clear 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 **Land Disputes**

**Tribunal Act** as such disputes can only be tried by the High Court or by the Resident Magistrate's Court in cases where such latter court has jurisdiction.

20. In **Republic vs. The Chairman Keiyo Division L. D. T & Another Ex Parte Tabyotin Kabon Ego Eldoret HCMA No. 43 of 2005 Mohammed Ibrahim, J** (as he then was) was of the view which view I associate myself with that:

**“The interested party’s claim herein does not fall under any of the 3 categories mentioned in section 3 of the Land Disputes Tribunal Act No. 18 of 1990. Her claim is of a beneficiary to the Estate of the deceased. She has to prove that first, the land registered in the name of the Applicant was part of the assets of the said Estate and secondly that it was registered in the name of the Applicant in breach of any applicable law whether Succession Act or otherwise...The Tribunal therefore have no jurisdiction or mandate to consider the claim by the applicant and it is not an answer to state that the applicant participated in the proceedings and submitted herself to the jurisdiction of the Tribunal since jurisdiction can only be conferred by law and not by consent or conduct of parties.”**

21. It is therefore clear that if the Tribunal purported to hear and determine a dispute in respect of which what was in dispute was title to land, then its decision would be null and void for lack of jurisdiction and it would not matter whether or not the applicant was a willing participant to those proceedings since the participation of the applicant therein could not confer on the Tribunal what the Tribunal did not have *ab initio* – jurisdiction.

22. In its decision, the Tribunal purported to revoke land parcel **Githunguri/Gathangari** nos. 2033 and 2242 aforesaid and gave directions on the mode of sharing the same. It further went ahead to direct the District Land Registrar to survey and issue new title deeds. Nothing can be clearer than the fact that the Tribunal was in effect dealing with titles to land and its decision in effect amounted to nullification of existing titles and issuance of new ones. That was clearly power which the Tribunal lacked and its decision was clearly ultra vires its powers hence the same was a nullity.

23. 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 for the purposes of being quashed the proceedings and decision/awards of the Githunguri Land Disputes Tribunal made on 17<sup>th</sup> December 2009 in land case number 16/20/10/2009 and which award was adopted as a judgment of the Resident Magistrate Court Githunguri (1<sup>st</sup> respondent) on 2<sup>nd</sup> September 2010 and the same is hereby quashed. I further grant an order prohibiting the Respondents jointly and severally from acting pursuant to or in furtherance of the said decision/award and/or judgment of the court under section 7 (2) of the **Land Disputes Tribunal Act** or in any other manner whatsoever. As the antagonists in the instant dispute are close family members and in order to promote reconciliation there will be no order as to costs more so as the Tribunal itself is no longer in existence.

**Dated at Nairobi this 10<sup>th</sup> day of December, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Butoi for Mr. Kimani for the Applicant**

**Mr. Kiongera for Miss Kariuki for the 3<sup>rd</sup> Respondent**

**Cc Richard**