



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 236 of 2012

**IN THE MATTER OF APPLICATION FOR ORDER OF CERTIORARI AND
PROHIBITION BY JOHN KITONGA MUTISYA AND LAWRENCE MATINGI
IN THE MATTER OF LAND PARCEL NO. KAKUZI GITUAMBA BLOCK 11/272**

AND

**IN THE MATTER OF KAKUZI DIVISION LAND DISPUTES TRIBUNAL CASE NO.
TKA/26/011/7 AND AWARD MADE ON 7TH SEPTEMBER 2011**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT THIKA D.O CASE NO. 63 OF
2011**

**AND IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990
REGISTERED LAND ACT CAP 300, LAW OF SUCCESSION ACT CAP 160 AND
THE LAW OF CONTRACT CAP 23 LAWS OF KENYA**

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

VERSUS

THE CHAIRMAN KAKUZI LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE THIKA LAW COURTS.....SECOND RESPONDENT

PETER GACHERU WAKABA.....INTERESTED PARTY

**EX PARTE APPLICANTS
JOHN KITONGA MUTISYA
LAWRENCE MATINGI**

JUDGEMENT

1. In their Notice of Motion dated 20th December, 2012 the ex parte applicants herein, **John Kitonga Mutisya** and **Lawrence Matingi**, seek the following orders:

a. An order of prohibition to prohibit the Chief Magistrate's court at Thika and Kakuzi Division land Disputes Tribunal and or their agents from enforcing or executing the Decree issued on 2nd November 2011 and dated 31st October 2011 in D.O case No. 63 of 2011, Thika Law Courts as well as the award dated 7th September 2011 made by Kakuzi Division Land Disputes Tribunal in L.D.T Case No. TKA/LDT/26/011/7.

b. That costs of this application be provided for.

2. The application is supported by Statutory Statement filed on 26th January 2012 and Verifying Affidavit sworn by **John Kitonga Mutisya** sworn on 25th January, 2012. The applicant's case is that the deponent's deceased father **Mutisya Mweki** is the registered owner of Land Parcel No. Kakuzi/Gituamba Block 11/272. According to him, the interested party herein **Peter Gacheru Wakaba** referred a dispute to Kakuzi Division Land disputes Tribunal claiming a portion measuring 1 acre out of plot No. 238. The said plot Number 238 was later registered and a Title Deed issued in the names of the deponent's deceased father as the absolute owner and is now parcel No. Kakuzi/Gituamba Block 11/272. The interested party, however, claims to have bought the said 1 acre at a consideration of Kshs 10,000/= on the 19th September 1988 and this is the issue that was deliberated upon by the tribunal and a verdict given whereupon the deponent was directed to include the interested party in succeeding his deceased father.

3. It is the applicant's case that the said award of the Tribunal was read and adopted by the Chief Magistrate's Court Thika as a Judgement of the court and a decree issued on 2nd November, 2011 and based on legal advice received from the deponent's advocates the proceedings of the Kakuzi Division Land Disputes Tribunal (hereinafter referred to as the Tribunal) and the subsequent adoption of the same as judgment of the Court by the Chief Magistrate's Court, Thika are null and void as the tribunal has got no jurisdiction to deal with a matter affecting title to land and ownership. It is further contended that the tribunal lacked jurisdiction to hear and determine issues of contract and or sale of land. Similarly, it is the applicants' case that interested party did not have *locus standi* to institute proceedings on behalf of the estate of my deceased father as he did not have the necessary letters of Administration and neither had they been issued to anyone and that the judgement of the Chief Magistrate's Court arising out of an illegal award cannot stand as it is founded upon an illegality is an outright abuse of the process of the court and due process of law.

4. According to the deponent, the decision of the Tribunal that he includes the interested party in succeeding his deceased father is outside the tribunal's enabling Act and therefore null and void and he is likely to suffer irreparably if the said illegal judgement is executed as this will deprive the other beneficiaries and himself user of the said portion of land.

5. In opposition to the application, the 1st and 2nd Respondents filed the following grounds of opposition:

a. That the judicial review remedy of prohibition is not available to the applicants as the 1st and 2nd respondents have already determined the dispute.

b. That the Chief Magistrate's Court at Thika acted within its jurisdiction and its decision is therein after valid.

c. That Kakuzi division land tribunal is nonexistent and thus it is impossible to issue and order of prohibition against a nonexistent body.

d. That judicial review is only concerned with the decision making process and procedure but not

on the merits of the decision.

- e. That the application is defective and an abuse of court processes as the applicant has failed to pursue available remedies.**
 - f. That it is fair and just that the application is dismissed and the 1st and 2nd respondents pray so.**
6. The Interested Party similarly filed the following grounds of opposition:
- a. That the application is frivolous, a nonstarter and an abuse of the court process in so far as it seeks only the remedy of prohibition without seeking to quash a valid and binding judgment and decree of the lower court via the remedy of certiorari.**
 - b. That the Chief Magistrates court acted within its jurisdiction and the law mandatorily required it to confirm the award of the land disputes tribunal as its judgement.**
 - c. That orders issued by the lower court cannot be in vain and must be executed as they have not been challenged to be quashed and/or set aside.**
 - d. That the ex parte applicant only sought and was granted leave to seek the remedy of prohibition but not certiorari as should have been the case.**

7. In their submissions the ex parte applicants, while reiterating the contents of the Motion, the Statement and the Verifying Affidavit, submit that in this case the Tribunal was not called upon to adjudicate on issues enumerated as per its mandate under section 3 of the Land Disputes Tribunal Act No. 18 of 1990 but rather on ownership of a registered parcel of land. Accordingly, the Tribunal was not seized with jurisdiction to entertain matters pertaining to acquisition of a registered parcel of land. It is submitted that the Tribunal deliberated over a parcel of land which was the subject of sale between the Applicant's deceased father and the interested party and in the applicants' view, land transactions out rightly oust the jurisdiction of the tribunal hence the consequential orders flowing therefrom are void and ought to be quashed. It is further submitted that in the absence of the grant of letters of administration, the interested party lacked the locus standi to lodge a complaint against the Estate of a deceased person in violation of the provisions of the Law of Succession Act Cap 160 as well as the Civil Procedure Rules hence the proceedings are a nullity. It is further submitted that the resultant award and the decree are in contravention of section 45(1) of the Law of Succession Act. In making an award that the applicants should include the interested party in succeeding the applicants' father, it is submitted that the tribunal had no jurisdiction to arbitrate on matters of inheritance and that its actions amounted to interference with the estate. In the applicants' view no authority has been cited for the proposition that an order of prohibition must of necessity be preceded by an order of certiorari and relying on *Administrative Law*, 8th Edn. by Sir William Wade and Christopher Forsyth, it is submitted that where only prohibition is applied for to prevent the enforcement of an ultra vires decision, the effect is the same as if certiorari had been granted to quash it for the court necessarily declares its invalidity before prohibiting its enforcement.

8. It is further submitted that whereas the Land Disputes Act No. 18 of 1990 was repealed by enactment of Land and Environment Act on 30th August 2011, the dispute before the Tribunal was lodged by the interested party on 7th September 2011 after the Land Tribunals had ceased existing thus making its decision *ultra vires*.

9. On behalf of the interested party, it is submitted that leave was only granted to apply for an order of prohibition since the prayer for certiorari was statute barred hence the remedy sought is only one for certiorari.

10. In the Interested Party's view, the prayer for prohibition cannot stand in isolation where certiorari is not being sought because in the absence of the pursuit of the remedy sought the manner of arriving at the court order in question and effectively the court order remain unchallenged. The court order in question

herein being the one confirming the award of the tribunal as judgement of the court is therefore fully in force and binding on the parties and it would therefore be an exercise in futility for this Honourable Court to prohibit the execution of a legal forceful and binding decree of court such as one the subject of these proceedings. In the Interested party's view, the Court must of necessity reject such a recourse in order to protect its dignity and ensure that there is lawful compliance with its decree and order.

11. Secondly, it is submitted that the Chief Magistrate's Court at Thika acted as the law in mandatory terms obligated it to do and once an award of the tribunal was filed before it and the same was not challenged by way of an appeal the Magistrate's Court was mandatorily required to confirm the award as its decree which it did. Therefore it is submitted that the ex parte applicant's case against the interested party lacks merit and ought to be dismissed with costs to the Interested Party.

12. I have considered the foregoing. The matter before the Court requires an examination of the scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition. In **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR** the Court of Appeal held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

13. In the present application, the decision of the Tribunal has already been adopted as a judgement and decree of the court. To prohibit the two decisions without quashing any of the said decisions would in effect leave the said decision intact. If the intention for seeking the order of prohibition is to block the

implementation of the said decision, the effect of the said decision would be to render the decisions which are not being challenged useless. In **Republic vs. Chairman Meru North District Land Disputes Tribunal and Others Ex Parte M'ailutha [2007] 1 EA 343**, it was held that since prohibition is issued to prevent a future event, an order for prohibition is not available where the Magistrate's Court has already acted on the Tribunal's decision.

14. In similar vein, the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** held that as a matter of common-sense the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done. The same Court in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was of the view that where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.

15. The application for leave to apply for an order of *certiorari* having been abandoned, it is my considered view that the application was severely crippled and was thereby rendered ineffectual.

16. Before I conclude this judgement it was argued that since the Tribunal is no longer in existence, its decision cannot be quashed. A similar issue arose in **David Mugo T/A Manyatta Auctioneers vs. Republic Civil Appeal No. 265 of 1997**, the Court of Appeal in that matter held that where the body has ceased to exist but its decision is still enforceable, *certiorari* must issue to quash or nullify it. See also **Republic vs. The Funyula Land Dispute Tribunal Ex Parte Prof. Washington O.Pamba Busia HCMA No. 78 of 2003 [2005] eKLR**.

17. It follows that the Notice of Motion dated 20th December 2012 lacks merit and the same is dismissed with costs to the Interested Party.

Dated at Nairobi this 17th April 2013
G V ODUNGA
JUDGE

Delivered in the presence of Miss Cheruiyot for the Respondent