



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR ELC CASE NO 24 OF 2010**

REPUBLIC.....APPLICANT

V

CHAIRMAN,KANDARA LAND DISPUTES TRIBUNAL .....1<sup>ST</sup> RESPONDENT

CHIEF MAGISTRATE'S COURT THIKA.....2<sup>ND</sup> RESPONDENT

MARGARET WAMBUI WAINAINA .....1<sup>ST</sup> INTERESTED PARTY

JANE WANJIKU .....2<sup>ND</sup> INTERESTED PARTY

JANE WANJIKU NYOIKE.....3<sup>RD</sup> INTERESTED PARTY

**EX-PARTE**

**JOEL GICHARU WAINAINA**

**JOTHAM KIRINGA GICHERU**

**DAMSON WAINAINA GICHERU**

**JUDGEMENT**

Through sale agreements dated 31<sup>st</sup> December, 2004 Joel Gicharu Wainaina (the 1<sup>st</sup> ex-parte applicant) herein sold one acre of land to Margaret Wambui Wainaina (the 1<sup>st</sup> interested party) and another acre of land to Jane Wanjiru Ngugi (the 2<sup>nd</sup> interested party). The pieces of land sold to the interested parties were to be excised from the 1<sup>st</sup> ex-parte applicant's land parcel number Loc.5/GITURA/293 measuring 3.1 acres. Each interested party paid Kshs.70,000/= to the 1<sup>st</sup> ex-parte applicant and the balance of Kshs.130,000/= from each of the interested parties was to be paid on or before 1<sup>st</sup> January, 2006. For reasons which are not clear, the agreements were not concluded amicably. The interested parties later filed Case No. 16 of 2009 before the Kandara Land Disputes Tribunal (the 1<sup>st</sup> Respondent) asking for the enforcement of the sale agreements. The defendants in that case were Joel Gicharu Wainaina, Jotham Kiringa Gicharu and Danson Wainaina Gicharu who are the respective 1<sup>st</sup> to 3<sup>rd</sup> ex-parte applicants in these proceedings.

After hearing the dispute the 1<sup>st</sup> respondent found in favour of the interested parties herein and directed that each of the interested parties would get an acre of land from land parcel number Loc. 5/GITURA/1155 which was registered in the name of the 1<sup>st</sup> ex-parte applicant. The interested parties were directed to pay the balance of kshs.240,000/= to the 1<sup>st</sup> ex-parte applicant. The interested parties proceeded to file case No. 50 of 2009 at Thika Chief Magistrate's Court and moved the court to adopt the decision of the 1<sup>st</sup> respondent as its own decision. The court issued orders accordingly. The Chief Magistrates Court at Thika is therefore the 2<sup>nd</sup> respondent in these proceedings.

The ex-parte applicants moved to this court on 16<sup>th</sup> April, 2010 and obtained leave to commence judicial review proceedings. Through the notice of motion dated 5<sup>th</sup> May, 2010 they therefore pray for orders that:-

**1.THAT this Honourable Court be pleased to issue an order of certiorari to remove into this court the award of the Land Disputes Tribunal, Kandara Case No. 16 of 2009 and the proceedings of Thika Chief Magistrate's Case No. D.O. 50 of 2009 for purposes of being quashed.**

**2.THAT this Honourable Court be pleased to issue an order of prohibition against the Chief Magistrate's Court Thika prohibiting it from further effecting the decree dated 24/11/2009 emanating from the award hereinabove being sought to be quashed in D.O. Case No. 50 of 2009 regarding the dispute touching on land parcel No. LOC 5/GITURA/1155**

**3.THAT the costs of this application be provided for**

The ex-parte applicants' case is clearly brought out by the grounds in support of the said notice of motion in the following words:-

**1.The Land Disputes Tribunal at Kandara in its LDT Case No. 16 of 2009 had no jurisdiction to hear and determine a dispute touching on ownership and title to land registered under Cap. 300 Laws of Kenya**

**2.The tribunal had no jurisdiction to enforce a contract arising from a sale of land agreement**

**3.The tribunal had no jurisdiction to order the ex-parte applicants to subdivide land parcel No. LOC. 5/GITURA/1155 and transfer 2.0 acres to the interested parties as the same will offend sections 27 & 28 of the Registered land Act Cap 300 Laws of Kenya**

**4.The Land Disputes Tribunal acted ultra vires to its mandate and jurisdiction under S. 3(1) of the Land Disputes Tribunal Act No. 18 of 1990**

The 1<sup>st</sup> interested party opposed the application through grounds of opposition dated 29<sup>th</sup> November, 2011. The said grounds of opposition are as follows:-

**1.THAT the 1<sup>st</sup> Applicant died on 2<sup>nd</sup> February, 2010 before the filing of the instant application yet he is referred to as the 1<sup>st</sup> applicant.**

**2.THAT the applicants have not brought the present application as the legal representatives of the 1<sup>st</sup> applicant since deceased hence they have no locus standi to bring the suit.**

**3.THAT the application/suit has not been brought in good faith as the 2<sup>nd</sup> and 3<sup>rd</sup> applicants did not disclose that the 1<sup>st</sup> applicant had died before filing of the suit.**

**4.THAT further the applicants have no capacity to bring forth the suit on behalf of the 1<sup>st</sup> applicant who is deceased and the present suit/application had abated.**

**5.THAT the 2<sup>nd</sup> applicant did file a succession cause for the Estate of JOEL GICHARU WAINAINA the 1<sup>st</sup> applicant being succession cause Number 281 of 2009 Thika Law Court a year before the 1<sup>st</sup> applicant had died as evidenced in the certificate of death number 238833.**

The 1<sup>st</sup> interested party also filed a replying affidavit which she swore on 29<sup>th</sup> November, 2011. Through the said affidavit she averred that the 2<sup>nd</sup> ex-parte applicant who had been appointed as an administrator of the estate of the 1<sup>st</sup> ex-parte applicant had since transferred the suit property namely Loc. 5/GITURA/1155 to a third party namely Beatrice Wangari Nyaguthi. The 1<sup>st</sup> interested party's position was affirmed by Jane Wanjiku Ngugi (the 2<sup>nd</sup> interested party) and Jane Wanjiku Nyoike (the 3<sup>rd</sup> interested party). It is important to note at this stage that the 3<sup>rd</sup> interested party joined these proceedings through a consent order entered on 23<sup>rd</sup> July, 2012.

In my view, the first issue for the determination of this court is whether the 1<sup>st</sup> respondent had jurisdiction to hear the dispute between the applicants and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. The second issue is whether the applicants are deserving of the orders sought.

On the first issue, it is agreed by all that the issue that was before the 1<sup>st</sup> respondent revolved around the sale of land to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties by the deceased 1<sup>st</sup> applicant (hereinafter simply referred to as the deceased). The 1<sup>st</sup> respondent determined that the deceased had indeed sold land to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties and directed the deceased to transfer land to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.

The question is whether the 1<sup>st</sup> respondent exceeded its jurisdiction by making that decision. The applicants argue that the 1<sup>st</sup> respondent had no jurisdiction to handle the dispute. The Attorney General for the respondents agreed with this submission. This came out clearly on 27<sup>th</sup> November, 2012 when Ms Maina for the Attorney General stated the position taken by the Attorney General. The interested parties did not address this issue.

The jurisdiction of the 1<sup>st</sup> respondent was donated by Section 3(1) of the repealed Land Disputes Tribunal Act as follows:-

**“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.”**

The 1<sup>st</sup> respondent could only do that which it was mandated by the law to do. A look at the above quoted Section clearly shows that the jurisdiction of the 1<sup>st</sup> respondent was very limited. In my view the 1<sup>st</sup> respondent had no jurisdiction to hear disputes relating to breach of contract arising from sale of land. This position was clearly captured by G.B.M. Kariuki (as he then was) when he stated in the case of **JAMES ALUKOYE WERE v LURAMBI DIVISIONAL LAND DISPUTES TRIBUNAL & ANOTHER [2006] eKLR** that:-

**“The suit land is and appears to have been registered in the name of the exparte applicant as its proprietor. The powers vested in the Divisional Lands Disputes Tribunal such as the Lurambi Division Lands Disputes Tribunal under section 3(1) of Act 18 of 1990 do not include the power to decide rights of parties under a contract for sale of land (or any other contract) nor do they include the jurisdiction to grant specific performance of such contract or to decide issues affecting title to**

**land. The Lurambi Lands Disputes Tribunal in attempting to deal with the title to the said land and to determine the rights of the parties and also to decree specific performance went far beyond its powers and acted ultra vires such powers. Its decision was clearly a nullity.”**

It is therefore quite clear that the 1<sup>st</sup> respondent went overboard when it decided to hear this matter. I think the interested parties opted to keep quiet about the issue of jurisdiction because they knew that the 1<sup>st</sup> respondent could not be defended on this issue.

The second issue is whether the applicants are deserving of the orders sought. Judicial review orders are discretionary remedies. They are issued to meet the ends of justice. Even where a party has established that he/she deserves the orders, the court may nevertheless decline to issue the orders. In doing so, the court must act judiciously and give reasons why it has declined to issue the orders. In the case before me, it is clear that the 2<sup>nd</sup> and 3<sup>rd</sup> applicants filed this matter using the name of a deceased person (the 1<sup>st</sup> applicant). They never disclosed to this court that the 1<sup>st</sup> applicant was already deceased at the time they filed this cause. That amounts to a misrepresentation of facts and a court of justice cannot be seen to assist a party who misleads the court. Secondly, the interested parties have informed the court, and which information is not disputed by the ex-parte applicants, that the 2<sup>nd</sup> ex-parte applicant filed a succession cause pertaining to the estate of the deceased and has since transferred the suit property to a third party who is not even before this court. This is an act of bad faith on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> ex-parte applicants. How could they transfer a property which they themselves have made a subject of these proceedings? In my view their actions amounts to a clear abuse of the court process. They used this court to stall the court case before the 2<sup>nd</sup> respondent and then went ahead to transfer the property. That is quite wrong. The summary of it all is that the applicants are not deserving of the orders sought. Their application is dismissed. From the look of things, the proceedings before the 2<sup>nd</sup> respondent may no longer be of any use to the interested parties. They may now have to go back to the drawing board and re-strategize on how to get justice. The actions of the 2<sup>nd</sup> and 3<sup>rd</sup> ex-parte applicants should, however, not go unpunished. They will meet the costs of the respondents and interested parties in these proceedings.

Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of April , 2013

**W. K. KORIR,  
JUDGE**