



**REPUBLIC OF KENYA**

**High Court at Embu**

**Miscellaneous Civil Application 89 of 2011**

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION AND IN MATTER OF THE LAND DISPUTES TRIBUNAL ACT

AND

IN THE MATTER OF EVURORE DIVISION LAND DISPUTES TRIBUNAL CASES NUMBERS 427, 428, 429, 430, 431, 432, 433, 434, 435 ALL OF 2010

AND

IN THE MATTER OF LAND PARCELS NUMBERS EVURORE/EVURORE/938, 939, 940, 941, 942, 943, 944, 945,& 946

AND

IN THE MATTER OF THE EASTERN PROVINCE ALAND DISPUTES APPEALS TRIBUNAL APPEAL NO.7 OF 2011

BETWEEN

REPUBLIC ..... APPLICANT

VERSUS

THE EASTERN PROVINCIAL LAND

DISPUTES APPEAL TRIBUNAL ..... RESPONDENT

AND

NJERU KABWEBU .....1ST INTERESTED PARTY

NZWE KABWEBU .....2ND INTERESTED PARTY

**EXPARTE**

NYAGA MBITI ..... 1<sup>ST</sup> APPLICANT

NGARI KITHUKE .....2<sup>ND</sup> APPLICANT

NYAGA MUCECERI ..... 3<sup>RD</sup> APPLICANT

KIBURI MUCECERI ..... 4<sup>TH</sup> APPLICANT

## RULING

The Notice of Motion dated 19/12/2011 seeks two prayers namely;

1. That this Honourable Court do issue orders of Certiorari to remove to the High Court and to quash the proceedings and award/decision/ruling of the Eastern Province Land Disputes Appeals Tribunal dated 14th July 2011 in Appeal Number and the subsequent Decree issued by the Principal Magistrate's Court at Siakago on 13th October 2011.
2. That an order of Prohibition do issue to prohibit the District Land Registrar Mbeere District from canceling the Title Deeds to land parcels numbers Evurore/Evurore/938, 939,940, 941, 942, 943, 944, 945, 946, 947 and/or having the same registered as one parcel of land in the names of NZUE KABUBE.

It is supported by the grounds in the statement of facts. The facts presented by the exparte Applicants are that the two Interested Parties, had filed several disputes at the Evurore Land Disputes Tribunal involving land parcels No.EVURORE /EVURORE/ 947. The Land Disputes Tribunal heard it and decided that **“all the said parcels of land were procedurally acquired and that their proprietorship should remain as they currently were”**. The Interested Parties being aggrieved filed an appeal in the Eastern Province Lands Disputes Tribunal being appeal No.7/11. It was heard and it was decided that **“the appeal was allowed and it was ordered that the Land Registrar cancels all purported sub-divisions and the block be registered in the names of Nzue Kabwube”**. The Appellants say that a number of the registered proprietors were long dead when the appeal was heard e.g Land No.EVURORE/EVURORE/944, 945 and 939. Their argument is that the Appeals Tribunal had no jurisdiction to deal with deceased persons land without their legal representatives. Secondly they had no jurisdiction to order for cancellation of title deeds issued under the Registered Land Act (now repealed). They also accused the appeals Tribunal for misconducting itself by applying double standards. That the Appeals Tribunal were doubtful about the Interested Persons acquisition of this land in issue but they went ahead to cancel the title deeds. Nyaga Mbiti swore a verifying affidavit on his behalf and on behalf of the other Applicants (NM1).

The interested parties filed the following grounds of opposition;

1. ***That the Applicants did not explain why they did not appeal within 60 days.***
2. ***That the Applicants did not show any element of illegality by the appeals committee***
3. ***The Applicants participated in the appeal before the committee where the issues complained of were never raised. That the Court's Judicial Review had not been invoked.***

The Respondent was served but did not file any papers. Counsels for the Applicants and the Interested Parties agreed to file written submissions. This matter was mentioned severally but the Applicants and Respondents did not file written submissions. Only Counsel for the Interested Parties filed his.

Mr. Njage in his submissions has raised the following issues;

1. ***Misdescription of the Respondent***
2. ***The Applicants had a replying affidavit and did not explain why they did not exercise it.***
3. ***The Applicants submitted to the jurisdiction of the Appeals Committee an can't challenge it now.***

4. *Applicants raising issues which were never raised during the appeal. e.g dead parties.*

5. *Finally he submitted that the Appeal Committee had jurisdiction just as the Land Disputes Tribunal had jurisdiction. He referred to the cases of;*

i) **REPUBLIC -V- CHAIRMAN LAND DISPUTES TRIBUNAL**

**KIRINYAGA DISTRICT & ANOTHER EXPARTE [2005] KLR 10.**

ii) **TIMOTHEO MAKENGE -V- MANUNGA NGOCHI[1978]KLR 53**

Mr. Njage has dealt a lot on the issue of the Applicants' failure to file an appeal.

As correctly put by Counsel, Judicial Review is not about challenging the merits of the decision but its about the process of arriving at the decision and the legality of the decision. Therefore in Judicial Review jurisdiction is key. The Appellants are not attacking the decision itself. They are challenging the jurisdiction of the Appeals Committee. They are saying the Appeals committee had no jurisdiction to issue the orders it did. These prayers squarely fall within the preview of the Judicial Review. Secondly the exercise of the right to appeal does not amount to a waiver of the right to obtain Judicial Review.

I therefore find that the Applicants have properly invoked this Court's jurisdiction.

Mr. Njage for the Interested Parties submitted that the reference to the Respondent as the Eastern Provincial Appeals Tribunal instead of Eastern Provincial Committee was wrong as there was no such body under the repealed Land Disputes Act. Section 8 of the said Act created a body called "**The Provincial Appeals Committee**". The Applicants referred to this body as "**Provincial Appeal Tribunal**". This is a misdescription. Does it go to the root of the matter?. Nobody was prejudiced by this misdescription. The Applicants in their application refer to the finding of the said Appeals Committee as the decision/award/ ruling. Again its known that the Respondent gave awards. My finding on these two elements is that they are some of the technicalities mentioned in Article 159(1) of the Constitution which the Court should not give due regard to and avert substantive justice. The Court would not place so much weight on them as none of the parties was prejudiced.

The main issue for this Court to decide is whether the Respondent had jurisdiction to make the orders it did.

In **TIMOTHEO MAKENGE case (supra) Law JA** stated;

**"I have emphasized the words 'not of review' which make it clear that the Court's jurisdiction in Certiorari is supervisory and not in the nature of a jurisdiction to review generally (or sit on appeal from) the proceedings which lead to the impugned decision".**

And **Halsbury's Laws of England at page 150** states;

**"Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, or breach of the rules of natural justice or where the determination was procured by fraud collusion, or forgery".**

What this Court has been asked to do is to determine whether the Respondent and by extension the land disputes Tribunal had jurisdiction to deal with the land parcels in issue the way they did. Jurisdiction is given by statute and not by individuals themselves. The District Land Disputes Tribunals acquired their jurisdiction from section 3(1) of the now repealed District Land Disputes Tribunal which provided as follows;

**"Subject to this Act all cases of a civil nature involving a dispute as to;**

- a) *The division of a determination of boundaries to land, including land held in common.*
- b) *A claim to occupy or work land*
- c) *Trespass to land shall be heard and determined by a tribunal established under section 4.*

Its Mr. Njage's submission that section 159 Registered Land Act (now repealed) gave the Land Disputes Tribunals jurisdiction to deal with land. And that the Tribunal was construed to be a Court for purposes of the Civil Law.

The tribunal could be a Court for the purpose of the civil law but had to confine itself to the mandate bestowed on it by section 3(1) of the Land Disputes Act. The amendment in section 12 of the Land Disputes Tribunal Act (now repealed) and the amended section 159 (Repealed Registered Land Act) both indicate that whatever was indicated as capable of being done by the tribunal had to be within the provisions of section 3(1) of the Land Disputes Tribunals Act. Section 159 also clearly provided that;

***“The proceedings relating to the title to land or the possession of land, or to the title to lease or charge registered under the 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 which Act not to require registration, shall be tried by the High Court”.***

The following part qualifies the jurisdiction of the Land Dispute Tribunal. Had the legislative wanted the Land Disputes Tribunal to have equal jurisdiction with the High Court in such matters it would have clearly stated that;

***“SHALL BE TRIED BY THE HIGH COURT AND THE LAND DISPUTES TRIBUNAL”***

The division of or determination of boundary just clearly means that. The Tribunal would determine a boundary and/or division of land. That was in its operation in correcting boundaries. But it had no authority to determine issues of interest or title to land registered under the repealed Registered Land Act. The matter herein did not touch on customary law. Ref:

1. ***WAMWEA -V- CATHOLIC DIOCESE OF MURANGA REGISTERED TRUSTEES [2003] KLR 389***

2. ***REPUBLIC -VS- CHAIRMAN LAND DISPUTES TRIBUNAL, KIRINYAGA DISTRICT & ANOTHER EXPARTE KARIUKI [2005]2 KLR 10.***

An agreement has been advanced that since the Applicants accepted the award of the Evurore Land District Tribunal they should also accept that of the Provincial Appeals Committee. And that they submitted to both jurisdictions and should not be heard to complain. Section 8(1) of the Land Dispute Tribunal Act gave jurisdiction to the Appeals committee to hear appeals from the Land District Tribunal. This jurisdiction could only be invoked by an award that was made by a competent tribunal. My finding is that, neither the Land Dispute Tribunal nor the Appeals Committee had any jurisdiction to determine title of land registered under the now repealed Act nor cancel titles issued under the said repealed Act. The fact that the Applicants submitted themselves to those Tribunals did not cloth the two bodies with jurisdiction. And if a Court never had jurisdiction a party cannot give it that jurisdiction and a party cannot be said to have acquiesced to the jurisdiction which the Court before which the appearance claimed to have constituted appearance was made did not have Ref: ***REPUBLIC -VS- CHAIRMAN LAND DISPUTES TRIBUNAL KIRINYAGA DISTRICT & ANOTHER exparte KARIUKI (supra)***. My finding therefore is that;

1. ***Failure to exercise a Right of Appeal does not in itself amount to waiver of right to file for Judicial Review.***

2. *An Appeal deals with the merits of a decision. Judicial Review deals with the process of driving arriving at the said decision. And where jurisdiction is challenged the Court has to determine the legality of that decision.*
3. *The District Land Disputes Tribunals and the Provincial Land Appeals Committee would deal with land issues within the confines of section 3 of the Land District Tribunals Act ONLY.*
4. *Jurisdiction is conferred by statute and not by parties. Parties cannot therefore confer jurisdiction by their mere appearance before that Court.*
5. *The reference to Provincial Land Appeals Committee as Provincial Appeals Tribunal was a technicality that did not go to the root of the matter.*
6. *The Land District Tribunals and Provincial Land Appeals Committee did not have jurisdiction to deal with issues of ownership of title to land. The Appeals Committee could only exercise its appellate jurisdiction where the District Land Dispute Tribunal had jurisdiction to make the award it made.*
7. *The proceedings and awards of the both District Land Dispute Tribunal and the Provincial Lands Appeals Committee are therefore removed to this Court and quashed. Subsequent orders made by the Magistrate's Court are set aside.*
8. *The parties to articulate their issues before the right forum.*

Costs to the exparte Applicants.  
Right of appeal explained.

**DATED, SIGNED AND DELIVERED IN OPEN AT EMBU THIS 15<sup>TH</sup> DAY OF MAY 2013**

**H.I. ONG'UDI  
J U D G E**

**In the presence of;**

**Mr. Momanyi for Okwaro for Exparte Applicant**

**Mr. Njage for interested parties**

**Parties – present  
Njue – C/c**