No. 1

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION CAUSE NO. 400 OF 2009

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY NZOKI JOHN MUTUA FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE JUDGMENT/ADOPTION OF AN AWARD BY HON. GITHAIGA; SENIOR RESIDENT MAGISTRATE TAVETA LAW COURT ON 18TH MARCH 2009

AND

IN THE MATTER OF LAND TRIBUNAL DISPUTE NO. 3 OF 2009 TAVETA

PETER MCHARO –VERSUS- JOHN MBITHI

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, LAW REFORM ACT CAP 26, CIVIL PROCEDURE ACT CAP 21 ORDER 53, THE MAGISTRATE'S COURTS ACT CAP 10, THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA.

REPUBLIC
……
APPLICANTS

VERSUS

THE LAND DISPUTE TRIBUNAL TAVETA

SENIOR RESIDENT MAGISTRATE TAVETA
……. RESPONDENTS

AND

PETER MCHARO
……..…..
INTERESTED PARTY

EXPARTE: NZOKI JOHN MUTUA

RULING

1. Upon leave granted by the court, the ex parte applicant commenced proceedings for judicial review orders as follows:

> *"1. THAT a writ of certiorari do issue to remove into the High Court and quash the decision/award and the judgment by the respondents in the land dispute tribunal case no. 3 of 2009.*
>
> *2. THAT this Hon court be pleased to issue a writ of prohibition against the respondents and the interested party herein from interfering, trespassing, sub-dividing and/or dealing in any way with a unregistered parcel of land bordering/adjacent to Tuhire irrigation scheme Challa within Taveta District.*
>
> *3. THAT costs of the application be provided for."*

2. The grounds upon which the application is based were set out on the application as follows:

> *"a. THAT the case by the interested party before the respondents was statutorily time barred by the Limitation of Actions Act Cap 22 laws of Kenya and as such the 1st Respondent has no jurisdiction to entertain, hear and determine the case.*
>
> *b. THAT there was no leave sought and granted for filing the case out of time and/or no proper, acceptable or reasonable grounds at all were advanced for the inordinate delay.*
>
> *c. THAT the interested party had no personal legal interest and/or no prove or at all about the nature of his claim in the subject parcel of land thus the interested party had no locus standi to bring the case.*
>
> *d. THAT the 1st respondent was biased, impartial and/or there was conflict of interest because the 1st respondent was constituted and comprised of four (4) relatives, friends and/or cousins of the interested party.*
>
> *e. THAT the 1st Respondent acted and contrary to the principles of natural justice in that the ex parte applicant was not given opportunity to put questions to the interested party and/or his questions and answers by the ex parte applicant were ignored during the making of the award.*
>
> *f. THAT the award was ambiguous, wanting and without clarity hence not enforceable and has the potential of precipitating shedding of blood.*
>
> *g. THAT there was no proper, regular and lawful award for adoption into a court judgment and it was wrong and unlawful for the 2nd respondent to endorse and adopt as a judgment an illegal proceedings and award."*

3. The factual basis of the ex parte applicant's case is set out in his affidavit in support of the application for leave as follows:

> *"3. THAT in the year 2005 a Mr. Peter Macharo lodged a complaint before the Land Tribunal Taveta against me claiming ownership of a parcel of land owned and possessed by me at Challa location Taveta District.*
>
> *4. THAT in his affidavit Mr. Peter Mcharo herein shall be referred to as the claimant as in the land dispute tribunal no. 3 of 2005.*

5. THAT the subject suit land is unadjudicated land lying and/or bordering the Tuhire Irrigation Scheme.

6. THAT the claimant herein during the hearing before the Tribunal did not explain the acrearage of the land claimed by him.

7. THAT the claimant could not explain the boundaries of the land he claimed and who were his neighbours and as such the tribunal could not ascertain the exact location of the alleged land.

8. THAT the claimant at the hearing did not explain how he got the land except that the claimant stated that he knew his late father David Kimaro had land at Challa before he passed away in 1975.

9. THAT the claimant failed to prove how his alleged late father acquired the land and/or who gave him and as such there was nothing to link alleged late father with the land.

10. THAT the claimant did not prove that he was the son of the alleged late David Kimaro as no document or evidence was produced during the hearing before the tribunal.

11. THAT and in addition to the aforegoing that there was nothing produced before the tribunal by the claimant to prove that he inherited the alleged late father and/or that the claimant's basis for his claim. And as such I am advised by my advocates record M/s Mwinzi & Associates that the claimant had no locus standi to file and/or lodge the claim hence the claim and/or the case was incompetent, incurably defective and bad in law.

12. THAT the claimant in his evidence before the tribunal stated that he had an elder brother and two elder sisters and whereas the claimants elder brother and sisters would have been fit to be a party to the case but were all suspiciously left out in the case and worst of all, none of them was called as a witness in the case.

13. THAT the cause of action arose in 1975 or thereabout immediately upon the death of the alleged late David Kimaro but there was no case or claim was filed until after 30 years later. Hence I am advised by my advocates which advise I verily belief to be true that the case was statutorily time barred by the provisions of the Limitations of Action Act Cap 22 Laws of Kenya unless otherwise leave of the court is sought and granted."

3. The Interested Party responded to the application by a replying affidavit setting out his case at various paragraphs thereof as follows:

"5. THAT I do not accept as true the contents of paragraph 5 of the said affidavit and I further state that when I reported the matter to the Taveta Land Dispute Tribunal, which necessitated the elders to meet, ***I stated that my claim was for the whole parcel of land*** *(and it is only identifiable by way of boundary marks since it has never been surveyed) currently occupied by the applicant). All this evidence was tendered while at the Tribunal as shown by a copy of the Tribunal Proceedings annexed hereto and marked as exhibit "PM-1."*

8. THAT in respect to paragraph 8 of the affidavit, while at the Tribunal it was not in dispute that my father David Kimaru used to ***occupy and own the said suit land.*** *As a matter of fact even witnesses for the applicant such as one David Colombo while testifying before the Tribunal stated that my father used to occupy and own the suit land and further that, certain old men like, Mzee Mbamba, Makiata, Hussein Nyaki were neighbours to my father. This can be seen at page 7 of the Tribunal proceedings.*

10. THAT in respect to paragraph 10 of the said affidavit, ***it is true that I did not produce any document to show that I inherited my late father but it should be noted that when my father***

passed on in 1975, I was only about six years old thus I could not have inherited his wealth then. *But I wish to also add that, during those days people of my father's age (90 years old, born in 1885) hardly used to prepare documents such as wills. Further as evidenced in page 1 of the proceedings at one point in 1988 when I attempted to reclaim the land, I was advised that I was young to do so and that I should wait till I finish school first. I refer to page 1 of the Tribunal proceedings again.*

17. THAT I am advised by my advocates on record that the averment contained in paragraph 15 of the affidavit is misplaced since ***1st respondent had jurisdiction to hear the said case and further even if the 1st respondent lacked the said jurisdiction, the applicant should have raised an objection earlier in the day instead of him raising it after having fully participated in the Tribunal's proceedings.***

25. THAT I am advised by my advocate on record for which information I verily believe to be true that ***the applicant's application for judicial review is actually time barred since the same ought to have been filed within six (6) months of delivery of the 1st respondent's award which was awarded on 19th November, 2008.***

26. THAT I am advised by my advocate on record for which information I verily believe to be true that, ***since the underlying dispute is ownership of land and this has been determined by the 1st and 2nd respondent, judicial review is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on several issues*** *specifically those contained in paragraph 5-17 of the affidavit."*

4. For the respondent no replying affidavit or grounds of opposition were filed but written submissions dated the 17th September 2012 in opposition of the application were filed. The parties filed written submissions on the application without supplementary oral argument, and ruling was reserved.
5. From the pleadings affidavits and submissions four issues arise for determination as follows:
    a. Whether the tribunal had jurisdiction to determine a question of ownership of land;
    b. Whether the Interested Party had ***locus standi*** to bring the claim on behalf of his deceased father;
    c. Whether the ***ex parte*** applicant was afforded a fair hearing before the Tribunal; and
    d. Whether the ex parte applicants Notice of Motion of 30th September 2010 is competent.

6. I have considered the submissions by counsel on the issues before the court and the case and statutory authorities cited, and I find that the issue of the competency of the Notice of Motion must be determined first before the merits thereof are considered, if necessary. If it is held to be incompetent, the same will be struck out without any need to examine the merits of the application.

7. I have noted the decision of Wendoh J. in ***Lilian Nkirote v. The Permanent Secretary, Ministry of Land and Housing*** **Nairobi** HC Misc Civil Suit NO. 433 of 2005 of 6th March 2009, in which the court struck out an Order 53 application which was supported by a Statement setting out the facts of the case verified by a 4-paragraphed affidavit which did not contain the facts to support the application. In the present case, in addition to the 'affidavit of verification' verifying the statement of 10th September 2009, there was filed together with the application for leave a 'supporting affidavit' sworn on the 10th September 2009 setting out in details facts in support of the Chamber Summons dated 14th September 2009. I do not agree the failure to set out the facts in support of the application in the verifying affidavit and setting these facts in the statement and in the affidavit filed in support of the chamber summons made the said Chamber Summons defective.

8. Moreover, the Constitution of Kenya 2010 requires the court to render justice without undue

regard to technicalities of procedure. In addition, the court in ***Nkirote*** found that the application was not supported by evidence because the verifying affidavit did not contain any facts, the applicant having placed all the facts in the statement. The present case is distinguishable on the basis that the facts of the case were set out in an affidavit entitled 'supporting affidavit' and not in the 'affidavit of verification'. By whatever name, there was an affidavit setting out the facts to verify the applicant's case set out in the Statement.

9. The defect in setting out the facts in the statement is cured by the supporting affidavit which restates the same facts in support of the application. The objection by counsel for the Interested Party as regards the prior dating of the affidavit of verification and the supporting affidavit as having been sworn on the 10th September 2010 before the date of the application for leave on 14th September 2010 is not well founded in view of the provisions of Order 19 rule 8 of the Civil Procedure Rules which preempts such objection, in these words:

> ***"8. Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned."***

10. It is true that the ex parte applicant filed the Notice Motion dated the 30th September 2009 without scrupulous regard of the rules in that he purported re-file the affidavit of verification and a statement and a supporting affidavit all now dated the 30th September 2009 in the same terms as the counterparts of those document dated the 10th September 2009 in support of the Chamber Summons for leave. The fresh documents filed in support of the Notice of Motion were unnecessary because Order 53 rule 4 (1) of the Civil Procedure Rules provides that:

> ***"4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."***

11. It was therefore unnecessary for the applicant to file the affidavits and the case would proceed on the basis of the affidavits and statement filed with the application for leave. The applicant will however be liable to the respondents and the Interested Party in costs of the application which unnecessarily included multiple affidavits setting out the same facts in breach of the Order 53 Rules.

12. Of greater moment is the objection by counsel for the Interested Party that the judicial review proceedings were time-barred having been filed outside the six months after the decision of the Tribunal as prescribed in the Rules. Order 53 rule 1 (2) provides so far as material that:

> ***"2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act;"***

The Law Reform Act section 9 which provides the foundation for the Order 53 application gives power to make rules for the filing of judicial review proceedings within 6 months. Section 9 (3) of the Act provides:

> "9. (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, ***leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law***; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave

until the appeal is determined or the time for appealing has expired."

13. Clearly, leave could not lawfully be granted to challenge the decision of the tribunal, which was made outside the 6-month period before the filing of the application for leave. The application for leave was filed on the 14th September 2009 within the 6-month limitation for the filing of judicial review proceedings for certiorari in respect to the judgment of the Senior Resident Magistrate's Court made in 18th March 2009 but not with respect to the decision of the tribunal or the award of 19th September 2008.

14. But as the tribunal award is not self-executing and it requires the adoption by the civil court as a judgment before it can be executed through the civil process of the Magistrate's Court, it is sufficient that the judicial review application is sought against the judgment of the court purporting to give effect to the tribunal's decision or award. Even if certiorari were issued against the judgment of the Resident Magistrates's court only, the tribunal award would be of no effect as it would not be executed following the quashing of the decision through which it was made a judgment of the court.

15. Moreover, if the tribunal had no jurisdiction in the matter that it purported to deal with, it would be upon the High Court so to declare pursuant to its supervisory jurisdiction under Article 165 (6) of the Constitution 2010 which provides as follows:

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

Needless to say, the provisions of Article 165 of the Constitution would prevail against the time limitation of section 9 of the Law Reform Act.

16. I am encouraged to so hold in order to allow the applicant to substantively challenge the decision of the Tribunal on the substantive grounds of jurisdiction and *locus standi*. If the tribunal had no jurisdiction its decision on the matter will be a nullity as will be all subsequent proceedings before the magistrate's court in execution thereof. If the decision, which is a nullity cannot be challenged because of the 6-month limitation on the procedure for filing of the judicial review proceeding for certiorari then the court would have upheld or condoned an illegality, in this case in respect to jurisdiction and applicant's *locus standi* if it is shown that the Interested party lacked standing to move the Tribunal for the order that it made and which is impugned by these proceedings.

17. As held by the Court of Appeal in ***Mapis Investment (K) Ltd v Kenya Railways Corporation*** *(2005) 2 KLR 410*, no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of contract or transaction which is illegal, if the illegality is duly brought to the notice of the court.

18. Considering the effect of the 6-month statutory limit in similar circumstances, in Mombasa HC Misc. Civil Application (JR) No. 58 of 2011, *Republic v. The Senior Resident Magistrate – Kwale and 3 Ors Ex Parte Said Ali Mwaleso*,, I held that:

> Because of the statutory limit of 6 months prescribed under section 9 (3) of the Law Reform Act, Certiorari may only issue against the order of the Senior Resident Magistrate's Court of 27th April 2011 pursuant to the Provincial Appeals Committee decision. It will not issue to quash the decision of the Provincial Appeals Committee of

29th October 2008 and the Land Disputes Tribunal of 23rd July 2002 which was adopted by the Kwale Senior Resident Magistrate's Court in Land Case No 4 of 2003 on 12th February 2003. However, in view of the legal position that the Tribunal and the Provincial Appeals Committee whose decisions the Lower Court sought to enforce have no jurisdiction in a matter of ownership of land, this court must be able to declare it so. Since the 1953 decision of **Barnard v. National Dock Labour Board**, the importance of declarations in situations where certiorari was unavailable for reason of time limitation has been acknowledged. Discussing this advantage of declarations, **Wade & Forsyth, Administrative Law 9th Ed (2004) at p. 649** observed:

"The advantages of the declaration were brought into prominence in 1953 in Barnard v. National Dock Labour Board (1953) 2 Q.B. 18. Dock workers in London had been dismissed for refusing to operate a new system for the unloading of raw sugar, and began actions for declaration that their dismissal was illegal. When they obtained discovery of documents they found that the vital order had been made not by the Local Board but the Port Manager, who had no power to make it. Thus they won their case. But had they applied for certiorari they would probably have been unable to discover the irregularity and they would have been out of time, more than six months having expired. The Court of Appeal observed that certiorari was 'hedged round by limitations' and that it was right to grant declarations and injunctions in order to prevent statutory tribunals from disregarding the law."

The Constitution of Kenya 2010 provides for the remedies of declaration, injunction and judicial review orders in applications for enforcement of fundamental human rights and freedoms under Article 22 of the Constitution. The Applicant sought to rely on the principle of disregard of technicalities of procedure in achieving the justice of the case. I have on numerous occasions held that in line with the established tradition of the court through the full bench decision in **Githunguri v. Attorney General No. 2 (1986) KLR 1**, the court is entitled to treat an application for judicial review as one for the enforcement of fundamental human rights and freedoms and thereafter make appropriate orders thereon as such. In the present case, the Applicant's judicial review application for Certiorari may be treated, and I will so deem it, as an application for the enforcement of the right to property under Article 40 of the Constitution. As such an application, the remedy of declaration in addition to judicial review orders may be made to declare the want of jurisdiction of the tribunal and the Provincial Appeals Committee to deal with issue of ownership of land, without regard to the six month limitation for the grant of certiorari."

19. **Did the Tribunal have jurisdiction?**

In considering the issue whether to **quash the determination of the Land Tribunal** in Mombasa HC Misc. Civil Application (JR) No. 58 of 2011, *Republic v. The Senior Resident Magistrate – Kwale and 3 Ors Ex Parte Said Ali Mwaleso***,** this court held as follows:

"It is trite law that the Land Disputes Tribunal established under the repealed Land Disputes Tribunal Act, 1990 did not have jurisdiction to deal with disputes relating to ownership of land. See section 3 of the Act and my decision in **Ronald Rai Mwanyika v. Chakaya Nduto, Msa HCCC No 215 of 2011 (O.S)."**

I have also noted decisions to similar effect that the land tribunal has no jurisdiction to determine matters of ownership of land in the authorities of *ex p. Sorothani Marura* Mombasa HC Misc Application no. 135 of 1998, per Waki, J (as he then was), *Republic v. Land Registrar, Kwale and Anor. ex p. Formation House Ltd* Mombasa Hc Misc. application No. 438 of 2006 per Maraga J (as he then was) and *Republic v. The Bahari Land Disputes Tribunal and 2 Ors ex p. Stanley Kalume Wanje* Mombasa Misc. Application No. 641 of 2005 per Sergon, J.

In appreciating the limitation of the tribunal's jurisdiction, counsel for the Interested Party asserted that

the matter before the tribunal involved only a claim to occupy the land rather than ownership thereof and was therefore within the jurisdiction of the tribunal under section 3 of the Land Disputes Tribunal Act 1990. But, pray, in what capacity would the applicant claim the right to occupy the land? In his own words, the Interested party in the replying affidavit referred to above said that he claimed the whole parcel of land, which he claimed had been occupied and owned by his deceased father, as follows:

> *"5. THAT I do not accept as true the contents of paragraph 5 of the said affidavit and I further state that when I reported the matter to the Taveta Land Dispute Tribunal, which necessitated the elders to meet,* ***I stated that my claim was for the whole parcel of land*** *(and it is only identifiable by way of boundary marks since it has never been surveyed) currently occupied by the applicant). All this evidence was tendered while at the Tribunal as shown by a copy of the Tribunal Proceedings annexed hereto and marked as exhibit "PM-1."*

8. *THAT in respect to paragraph 8 of the affidavit, while at the Tribunal it was not in dispute that my father David Kimaru used to* ***occupy and own the said suit land.*** *As a matter of fact even witnesses for the applicant such as one David Colombo while testifying before the Tribunal stated that my father used to occupy and own the suit land and further that, certain old men like, Mzee Mbamba, Makiata, Hussein Nyaki were neighbours to my father. This can be seen at page 7 of the Tribunal proceedings."*

20. The Tribunal's award was clear that it was declaring the respondent as owner of 1/3 of the parcel of land while the applicant herein kept the 2/3 thereof, when it rendered its decision as follows:

> **"<u>Decision</u>**

a. **By virtue of the claimant's age, which we have regarded as a tender age (ie. Born 1969-1965=6 years) the land in dispute was left under the care of Matano Kihiriso (caretaker) so the land was still constant in the hands of the claimant. More so the claimant, his brothers and step mother visited the house which their father was living and spent 2 nights (1978) hence the claimant is entitled to a portion of land.**
b. **Even though the claimant took us around the whole area including to a place where Kimulu is living we have nothing to comment on that one unless and until a case has been filed against Kimulu.**
c. **Since the disputed land on the upper side home stead has been developed and house erected, it is our decision that the claimant be given 1/3 (one third) of the disputed land and the objector 2/3 (two thirds) of the disputed land. Division to be done later."**

Looking at the said decision of the Tribunal dated 19th November 2008 set out above, I have no doubt that the tribunal dealt with the issue of ownership of the parcel of land, a matter that was outside the jurisdiction of the Tribunal under the repealed Land Disputes Tribunal Act 1990.

21. Having held that the tribunal had no jurisdiction to determine a question relating to ownership of land, the related issue as to whether the claim was time barred by the provisions of sections 7 and 9 of the Limitations of Actions act and section 13 (3) of the Land Disputes Tribunal Act 1990 is merely academic. Sections 7 and 9 (2) of the Limitations of Actions Act is in the following terms:

> *"7. An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*
>
> *9. (2) where the person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of his death."*

Section 13 (3) of the Land Dispute Tribunal Act prohibited the tribunal from taking cognizance of disputes which were time-barred by the law of limitations as follows:

> *"(3) For the 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 brining 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"*

In any event, the question of law whether the dispute before the court is barred by limitation of actions depends on an inquiry and determination of the facts relating to the claim as to when the respondent's father died and whether he was the last person entitled to the land so that the right of action accrued on the date of his death. Such inquiry would require viva voce evidence and, in agreeing with Wendoh J. in the case of *Sanghani Investiment Ltd v. Officer in Charge of Nairobi Remand and Allocation Prison*, (2007) EA 354, I consider that such determination is not the proper province of judicial review proceedings.

Whether the applicant had locus standi.

It is trite law that a person can only pursue a claim on behalf of an estate of a deceased person upon being appointed a personal representative of the deceased by way of grant of probate or Letter of administration to the estate. See the in accordance the 5-judge bench decision of the Court of Appeal ***Trouistik Union International & Another v. Jane Mbeyu & Another*** C.A No. 145 of 1990 (per Apaloo CJ, Kwach, Cocker, Omolo and Tunoi JJA) which is binding upon this court.

As the Interested party did not demonstrate that he had been lawfully appointed to represent his deceased father in the suit for recovery for the land, he clearly had no locus standi in the matter. It matters not that he was not of age of majority at the time of his father's death and that he was consequently advised by the elders to wait until he became of age, as he claimed.

Counsel for the Interested Party and for the Respondent urged that judicial review orders should not be granted where the applicant could have but did not appeal from the decision of the Tribunal. To be sure, the existence of a remedy of appeal is no bar for judicial review because judicial review is not concerned, as with the appeal, with the merits of the case but only with the legality of the process of determination of the case. On the availability of the remedy of appeal, I observed in ***Ex Parte Said Ali Mwaleso,*** supra, that:

> "It does not matter for the grant of judicial review orders that there is provision for appeal and that the Applicant has not availed himself of the remedy. Indeed, under the section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, the only requirement is that the appeal be determined or the time limited for appeal lapses before an application for leave to file for judicial review is considered. Even on principle, there is, as **Wade & Forsyth ibid at p. 703** observe no requirement for exhaustion of remedies before judicial review:
>
> ***"In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital respect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeals which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal, for example where an appeal is already in progress, or the object is to raise a test case on a point of law."***

The Applicant in this case cannot be denied the opportunity to seek judicial review merely because he did not exercise his right to appeal from the decision of the Provincial Appeals Committee, which did not in any event have jurisdiction over the matter. The Applicant's appeal to the Provincial Appeals Committee does not raise an estoppel to his raising objection on jurisdiction as there can be no estoppel to the law."

22. I agree with the decision of Wendoh J. in *Sanghani Investiment Ltd v. Officer in Charge of Nairobi Remand and Allocation Prison,* (2007) EA 354 that judicial review procedure cannot be used for determination of disputes in ownership of land where there would be need to for viva voce evidence and proof of original documents. However, with tremendous respect to counsel for the Interested Party who relied on the decision, the issue before this court is, not the adjudication of any dispute of ownership between the parties but rather a determination of the issue whether the tribunal had jurisdiction to deal with the issue of ownership of the parcel of land as presented before it by the Interested Party herein.
23. Having held that the tribunal had no jurisdiction to deal with the issue of ownership of the suit parcel of land as it purported to do, I do not have to decide the issue whether the applicant was afforded a fair opportunity to be heard at the tribunal. I would however observe that the applicant did participate in the tribunal proceedings and was largely afforded an opportunity to be heard and I am therefore not prepared to hold that his right to fair hearing was infringed.

24. *Accordingly, for the foregoing reasons, I make the following orders on the Applicant's Notice of Motion herein:*

(a) An order of certiorari do issue to remove into the High Court and quash the judgment by the Senior Resident Magistrate, Taveta arising from land dispute tribunal case no. 3 of 2009.

(b) An order of Declaration is issued declaring that the Land Disputes Tribunal had no jurisdiction to determine disputes relating to ownership of land and that therefore the tribunal's decision of 19th November 2008 was illegal, null and void.

(c) An order of Prohibition against the respondents and the interested party herein from interfering, trespassing, sub-dividing and/or dealing in any way with a unregistered parcel of land bordering/adjacent to Tuhire irrigation scheme Challa within Taveta District.

(d) For his less than scrupulous observance of the applicable rules of court in filing the judicial review proceedings, the applicant will pay to Respondent the costs of these proceedings.

27. On the merits of the case, for avoidance of doubt, the Interested Party is at liberty, subject to any valid defences including limitation of actions, upon taking out a grant of representation to the estate of his deceased father to file suitable proceedings to pursue his father's interest in the suit parcel of land in the appropriate court, the Environment and Land Court.

Dated and delivered this 19th day of November 2013.

EDWARD M. MURIITHI

JUDGE

In the presence of:

No Appearance for the Applicant and the Interested Party

Miss Kiti for the Respondent

Ms Osundwa - Court Assistant