



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO. 72 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
OF CERTIORARI AND PROHIBITION UNDER ORDER 53 OF THE CIVIL PROCEDURE  
RULES**

**IN THE MATTER OF PROCEEDINGS AND ORDER OF GATUNDU SENIOR RESIDENT  
MAGISTRATE IN LAND DISPUTE TRIBUNAL CASE NO. 27 OF 2009**

**IN THE MATTER OF SECTION 7 AND 8 OF THE LAND DISPUTES TRIBUNAL ACT NO. 18  
OF 1990 AND THE REGISTERED LAND ACT**

**REPUBLIC .....APPLICANT**

**AND**

**SENIOR RESIDENT MAGISTRATE,**

**GATUNDU LAW COURT.....1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR,**

**THIKA DISTRICT REGISTRY.....2<sup>ND</sup> RESPONDENT**

**THIKA DISTRICT SURVEYOR.....3<sup>RD</sup> RESPONDENT**

**JOSEPH WAIHAKA GATITU .....INTERESTED PARTY**

**EX-PARTE**

**DAVID GITANGU CHEGE**

**JUDGEMENT**

**Introduction**

1. By a Motion on Notice dated 9<sup>th</sup> March 2012, the ex parte applicants herein, **David Gitangu Chege** seeks the following orders:
1. **THAT this Honourable Court be pleased to issue an order of certiorari removing to the High Court the proceedings and order delivered on 2<sup>nd</sup> November 2011 of the Senior Resident Magistrate, Gatundu Law Courts in Land disputes Tribunal Case No. 27 of 2009 in**

- respect of the Applicant's parcel of land known as Kiganjo/Mundoro/2561 for the purpose of being quashed..
2. THAT this Honourable Court be pleased to issue an order of prohibition prohibiting the Land Registrar, Thika District Registry from registering in favour of the 3<sup>rd</sup> Respondent, the transfer of one acre out of the land parcel known as Kiganjo/Mundoro/2561.
  3. THAT this Honourable Court be pleased to issue an order of mandamus compelling the Thika District Surveyor to cancel the subdivision and/or mutation forms for the one acre out of the land parcel known as Kiganjo/Mundoro/2561 in favour of the 3<sup>rd</sup> Respondent.
  4. THAT costs of this application be provided for.

### Applicant's Case

2. The same Motion is supported by Statutory Statements filed together with the Chamber Summons herein and the verifying affidavit sworn by the applicant on 3<sup>rd</sup> March 2012.
3. The applicants' case from the said documents is that he is the registered owner of the parcel of land known as Kiganjo/Mundoro/2561. In the year 2006, it is contended that the Applicant and the 3<sup>rd</sup> Respondent entered into verbal agreement for the sale of one acre out of the said land parcel at Kshs.400,000/=. According to him, the 3<sup>rd</sup> Respondent agreed that a sum of Kshs.230,000/= he had given to the applicant for another parcel of land be utilized as deposit for the purchase of the land leaving a balance of Kshs.170,000/= which was outstanding. However on 22<sup>nd</sup> January 2009 the applicant was summoned to the District Officer's office at Gatundu where he was compelled by the District Officer to accept the sum of Kshs.85,000/= from the 2<sup>nd</sup> Respondent instead of Kshs.170,000/= which was outstanding. Despite the applicant's objection, the 3<sup>rd</sup> Respondent obtained prepared a written agreement which the applicant was forced to sign and the said agreement was countersigned by the Chief, Kiganjo Location **Mr. Kamau Ikinya** and the Assistant Chief, Mundoro sub-location **Mrs. Dorcas Nyakio Kamau** and based on the agreement, the 3<sup>rd</sup> Respondent obtained consent to transfer from Gatundu Land Control Board without the applicant's consent and knowledge.
4. According to the applicant, the 3<sup>rd</sup> Respondent has caused his arrest and incarceration in police cells with the intention of intimidating him to execute a transfer form in the 3<sup>rd</sup> Respondent's favour. In September 2009, the 3<sup>rd</sup> Respondent filed a claim at Gatundu South Land Disputes Tribunal whose findings were that the applicant should transfer one acre out of the land parcel number Kiganjo/Mundoro/2561 to the 3<sup>rd</sup> Respondent on payment of the sum of Kshs.85,000/=. The said award the award was adopted as a judgement of the court on 3<sup>rd</sup> December 2009. Being dissatisfied with the judgment the applicant applied for certified copies of proceedings and judgement which were availed to him in January 2010 and he filed a memorandum of appeal at the Nyeri Provincial Land Dispute Tribunal in February 2010. During the pendency of the said appeal, the 3<sup>rd</sup> Respondent filed the application dated 6<sup>th</sup> December 2010 seeking that the applicant be compelled to sign the transfer form to transfer one acre to the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Respondent proceeded to order that the Applicant or the executive officer signs the transfer in favour of the 3<sup>rd</sup> Respondent when the 3<sup>rd</sup> Respondent had not complied with the award of the tribunal. Pursuant thereto, on 2<sup>nd</sup> November 2011, the 1<sup>st</sup> Respondent ordered transfer of one acre to the 2<sup>nd</sup> Respondent when the 3<sup>rd</sup> Respondent had not fulfilled the terms set out in the award.
5. According to the applicant, the 1<sup>st</sup> Respondent contravened the law as the Court was *functus officio* upon the filing of an appeal at the provincial land dispute tribunal and based on advice from the applicant's advocates, the action of the 1<sup>st</sup> Respondent were *ultra vires* and any orders given were null and void and therefore a proper case for judicial review. It is further contended by the applicant that in January 2012, the District Surveyor entered the applicant's land and proceeded to subdivide the Applicant's land to the detriment of the Applicant which action was null and void *ab initio*. To the applicant, the Land Registrar, Thika District Registry intends to register the 3<sup>rd</sup> Respondent's transfer form and his actions will perpetuate an illegality and the order of the Senior Resident Magistrate are null and void *ab initio*. It is further contended that the 1<sup>st</sup> Respondent acted in excess of his jurisdiction and in contravention of the mandatory provisions of the Land

- Dispute Tribunal Act while the learned magistrate acted in excess of his jurisdiction by interfering with the tribunal's award in contravention to section 8 of the **Land Disputes Tribunal Act**. To the applicant, the 1<sup>st</sup> Respondent acted in contravention of the provisions of **Land Dispute Tribunal Act** No. 18 of 1990 in transferring the land parcel Kiganjo/Mundoro/2561 when the Applicant has appealed to the Provincial Appeals Committee at Nyeri and acted in contravention of the law by entering judgment upon reading the award.
6. It is the applicant's position that the 1<sup>st</sup> Respondent acted in excess of his jurisdiction in not setting aside the decree when an appeal had been filed at the Provincial Appeals Committee at Nyeri, while the Land Registrar, Thika District Registry and the District Surveyor acted on an illegality when the order of the court was null and void *ab initio* and their action are of no consequence in law. It is averred that magistrate acted in contravention of the **Registered Land Act**.
  7. The applicant further aver that in February 2012, 3<sup>rd</sup> Respondent entered the Applicant's land, cut down the mature trees for purposes of charcoal burning and is currently uprooting napier grass with the intention of selling the land to third parties and the Applicant's application will be rendered nugatory if the 3<sup>rd</sup> Respondent is not prohibited from carrying out this illegal acts.

### **Interested Party's Case**

8. The application was opposed by a replying affidavit sworn by **Joseph Waithaka Gatitu**, the interested party herein on 16<sup>th</sup> May 2012.
9. According to him, in the year 2006, he was looking for land to Purchase and was introduced to the Applicant herein by one **James Kariuki Gachanja**. According to him, the Applicant knew somebody who was selling land and it transpired that the applicant was taking care of that same portion of land and the land in question at that time was L.R. No. Kiganjo/Mundoro/160 belonging to one **Esther Wangari Njuguna**. According to the interested party, an acre of land was going for Kshs.280,000/= and since he wanted one acre he prepared a bankers cheque for Kshs.200,000/= in favour of **Esther Wangari Njuguna** which cheque he passed over to the Applicant for onward transmission to the Seller. He was to pay the balance of Kshs.80,000/= upon being given consent to transfer by the Land Control Board. However, after one year he learnt from the Applicant that the land which he was invited to buy had been sold to somebody else. Accordingly, he informed the applicant that he wanted a refund of his money and the applicant informed him that instead of a refund he could surrender to the interested party one acre from the three he was also buying so that the interested party get the title directly. The interested party however later learnt that the applicant used his money to purchase the same piece of land forming the 3 acres while all along pretending to be purchasing the same for the interested party.
10. According to the interested party it was his understanding that the applicant would have him get his 1 acre and him take his two acres but to the interested party's surprise he later learnt that the applicant proceeded to the Land Control Board and had the whole portion of land registered in his name vide Kiganjo/Mundoro/2561, on or about the 28<sup>th</sup> day of November 2007. So when in December 2007 the interested learnt that the applicant had title to the whole 3 acres he asked him to sub divide the title immediately and give the interested party his one acre of land but the applicant was reluctant to do so despite several efforts through people who knew him. So in January 2009, the interested party reported the matter to the District Officer's office Gatundu where after discussions it was agreed that the interested party pays the applicant the sum of Kshs.85,000/= and he was to sign the application for consent to transfer the 1 acre purchased by the interested party to him. According to the interested party, the applicant signed the Application for Consent forms upon which the applicant obtained Consent to transfer one acre to the interested party. However, the Applicant refused and or neglected to transfer the land to the interested party as a result of which the interested party filed Land Disputes Tribunal Case Number 6 of 2009 at the Gatundu South Land Disputes Tribunal which heard both parties. According to legal advice from the interested party's advocates, the applicant was supposed to appeal to the Provincial appeals Board within 30 days of reading of the award which was supposed to be on or about the 4<sup>th</sup> of October 2011. Despite that, at the expiry of the mandatory period of appeal, no appeal had been filed, hence the interested party moved the court in order to have the Court orders effected by

filing an application in court on 6<sup>th</sup> December 2010. Once again, the Applicant was accorded an opportunity to be heard and the court gave a ruling on the merits of the Case, and his remedy lied on appeal. However, there is no appeal pending in the Provincial Appeals Committee as the same Tribunal has communicated to the Parties to that effect.

11. To the interested party therefore, the application has got no merit and should be dismissed with costs.

### **Determinations**

12. Before dealing with the merits of this application it is clear that the intitulement of the application at leave stage was improper. As a result of that improper intitulement, there is a confusion even from the applicant's own documents filed herein since in some cases **Joseph Waithaka Gatitu** is the 3<sup>rd</sup> respondent or the interested party.

13. In **Farmers Bus Service and Others vs. The Transport Licensing Appeal Tribunal [1959] EA 779** it was held that when proceedings in the High Court by originating summons or originating motion are *inter partes*, it is not sufficient to intitule them as 'In the matter of', etc. This must be followed by the names of the applicants and respondents. However, the Court further provided that The *ex parte* application for leave to apply for an order (for prerogative writ) should have been intituled:

**“In the matter of an application by (applicants) for leave to apply for an order of Certiorari**

**and**

**In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive, all of 1958, of the Transport Licensing Appeal Tribunal.”**

14. Similarly, the issue of intitulement of an application for leave was dealt with by **Maraga, J** (as he then was) in **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563**, where he held that an application for leave ought to be intituled as hereunder:

**In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition**

**And**

**In the Matter of Kenya Ports Authority Act**

**And**

**In the Matter of the National Environmental Management and Co-ordination Act 1999.**

15. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

**“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.**

16. It is however important that parties in judicial review proceedings be properly intitled at every stage of the proceedings in order to avoid unnecessary confusion like the one the applicant herein has found himself in.
17. These being judicial review proceedings, it is important to appreciate the extent of the court's jurisdiction thereunder. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”**

18. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4<sup>th</sup> Edition Vol (1)(1) Para 60.***

19. 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.***

20. In my view 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** 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 of actions taken in breach of a Court order 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.

21. A similar position was adopted by **Nyamu, J** (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** in which he held that despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.

22. In its decision Gatundu South Land Disputes Tribunal in Claim No. 6 of 2009 made an award in which it ordered that the interested party herein is due for a portion of the suit parcel of land which

- the applicant herein, the registered owner thereof should transfer to him and that the said interested party should pay to the applicant the remaining balance of Kshs 85,000/= immediately.
23. The Court of Appeal however 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.
24. In this case it is clear that the decision of the Tribunal would have entailed the subdivision of the suit parcel of land into two parcels and the opening a register in respect of each sub-division and thereafter the transfer of part thereof to the interested party. It is therefore arguable whether the decision of the said Tribunal was made in excess of jurisdiction. However as that Tribunal is not a party before this Court and as its decision is not challenged under these proceedings I will say no more on that issue.
25. It is however contended that the Magistrate's Court had no jurisdiction to grant the orders which in effect were to implement the decision arising from the adoption of the award especially when there was an appeal pending before the Provincial Land Disputes Tribunal, Nyeri. In **Zedekiah M Mwale vs. Bikeke Farm Directors & Another Kitale HCCA NO. 25 of 1998** the Court held which holding I associate myself with that a magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a Land Disputes Tribunal's award filed in court as section 7(2) only compels the magistrate to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.
26. Similarly, in **Peter Ouma Mitai vs. John Nyarara Kisii HCCA No. 297 of 2005, Musinga, J** (as he then was) following the decision in **Zedekiah M Mwale vs. Bikeke Farm Directors & Another** (supra) expressed himself as follows:

**“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate's court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. In any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise.”**

27. To contend that the magistrate had no power to give orders whose effect would be to implement the decision given by the Court is in my view misconceived. As was held in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005:**

**“The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”**

28. Accordingly it is my view that the Court always retains inherent power to ensure that its decisions are implemented hence the orders which were made by the learned Magistrate towards the implementation of the decision of the Tribunal would have been lawful and within jurisdiction if the Tribunal had the powers to issue the same.
29. What then is the effect of the filing of an appeal against the decision of a Tribunal to the Appeals

Committee? **Khamoni, J** had an occasion to grapple with the issue in **Wamwea vs. Catholic Diocese of Murang'a Registered Trustees [2003] KLR 389** where he expressed his concerns as follows:

**“The Legislature in enacting the Land Disputes Tribunals Act seems to have assumed that everybody acting under the Act was going to be a keen lady or gentleman who, if chairman or successful party, would not run to a magistrate’s court to file a Tribunal’s decision or an Appeal’s Committee’s decision before the expiry of the time allowed by section 8 and further that once an appeal has been filed and served, no party would move a magistrate’s court for judgement in accordance with the decision appealed against. Unfortunately that assumption is not turning out to be the reality.”**

30. Mercifully that piece of legislation which created more problems than solutions is no more and we trust that next time the Legislature decides to introduce legislation in that direction more research will be undertaken to determine its viability before the same is enacted.
31. Accordingly, there was no express provision for stay of proceedings in the Magistrate’s Court upon the filing of an appeal to the Provincial Land Disputes Appeals Committee.
32. The interested party contends that there was no such appeal filed and exhibited a copy of the letter from the Provincial Commissioner’s Office, Central Province in which the latter informed the applicant that his appeal would not be heard in light of a decree given in the Magistrate’s Court, Gatundu. Whether the Appeals Committee was right in arriving at that decision is not a matter which properly before the Court since that decision is not the subject of these proceedings.
33. Accordingly it must now be clear that the Notice of Motion dated 9<sup>th</sup> March 2012 is unmerited. Accordingly the same is dismissed with costs to the interested party.

**Dated at Nairobi this 18<sup>th</sup> day of December 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Maina for Ms Chirau for Respondent***