REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO.4 OF 2011

IN THE MATTER OF: APPLICANTION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: KAJIADO NORTH LAND DISPUTE NO.TC.241/11

AND

IN THE MATTER OF: LAND DISPUTES TRIBUAL KAJIADO NORTH

AND

IN THE MATTER OF: THE REGISTERED LAND ACT (CAP.300) LAWS OF KENYA

AND

IN THE MATTER OF: THE JUDICATURE ACT (CAP.8) LAWS OF KENYA

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE LAND DISPUTES TRIBUNAL, KAJIADO NORTH..... RESPONDENT

EX-PARTE

1. **RACHAEL GATHONI MBAI**
2. **MUEMA MBAI**

RULING

Before me is a Notice of Motion dated 28th January, 2011 in which **Rachael Gathoni Mbai** and her husband **Muema Mbai**, hereinafter "**the ex-parte applicants**" seek the following orders:-

1. That an order of certiorari do (sic) remove into this honourable court and quash the proceedings in

Kajiado North Land Dispute No.TC241/11 of 2010.

2. That and order of certiorari do** (sic) **remove into this honourable court and quash the stop order issued pursuant to the proceedings in Kajiado North Land Dispute No. TC.214/11 of 2010.

3. That an order of prohibition do issue to prohibit and restrain the Land Dispute No. TC.214/11 of 2010, from proceeding with, or hearing and determining, or hearing and determining Kajiado North Land Dispute No.TC241/11 of 2010 or in any way purporting to adjudicate over the boundary dispute between L.R. No.Ngong/Ngong 20617 and L.R. No.Ngong/Ngong 20618.

4. That the costs of these proceedings be borne by the Respondent."

From the material placed before me, the ex-parte applicants are registered as absolute proprietors of all that piece or parcel of land known as **Ngong/Ngong 20618**, hereinafter "**the suit premises"**. **Evans Kamau Kariuki** hereinafter "**the interested party**" on the other hand, is a neighbour of the ex-parte applicants and is the registered proprietor of all that piece or parcel of land known as **Ngong/Ngong/20617**. It does appear that the good neighbourliness between the trio at is all time low. The acrimony was precipitated by the interested party's claim that the boundary presently existing between the two parcels of land had encroached on his land parcel. To the interested party, the ex-parte applicants had encroached on his parcel of land to the extent of 0.10 ha or thereabouts. To remedy the situation, the interested party moved to the Land Disputes Tribunal, Kajiado, hereinafter "**the respondent**" and mounted a claim seeking the rectification of the boundary.

The ex-parte applicants on other hand take the view that the proceedings before the respondent were a none-starter on the basis that the respondent had purported to assume jurisdiction over a matter which it did not have and commenced proceedings in purported adjudication of the said dispute. The respondent had further purported to issue a "**stop order**" dated 18th November, 2010, restraining the ex-parte applicants from inter alia fencing the suit premises. That the issue being a boundary dispute it ought to be determined by the District Land Registrar and the Land Disputes Tribunal was in the circumstances barred from entertaining any action until the District Land Registrar determined the boundary.

In a rejoinder the interested party, retorted that as far as he was concerned, the question before the respondent was a boundary dispute which was also trespass and therefore the respondent had the necessary jurisdiction pursuant to provisions of section 3(1) of the Land Disputes Tribunals Act (*now repealed*) to entertain the dispute.

The ex-parte applicants being keen to quash the proceedings of the respondent in so far as it related to the dispute and the stop order moved this court by way of judicial review orders of certiorari and prohibition. They duly obtained leave to commence the same from **Mwilu J.** on 12th January, 2011. Leave so granted was also ordered to operate as stay of further proceedings before the respondent. Subsequent thereto, they filed the substantive Notice Motion that is the subject of this ruling.

When the application was served on the respondent and interested party, the respondent opted not to support or oppose the motion. In other words it did not file any papers in opposition to or in support of the motion.

The interested party swore a replying affidavit. He contended that the application was frivolous, vexatious and otherwise an abuse of the process of court. The respondent had the necessary jurisdiction to adjudicate on the boundary dispute. Though the Land Disputes Tribunals Act had no express provisions for a stop order, the same could be implied as it was a necessary tool for the Land Disputes Tribunals to execute their statutory authority and mandate. The ex-parte applicants had attended the proceedings of the respondent on 9th and 16th December, 2010 respectively, and had lastly been required to avail registered mutation forms from the Lands Registry. Instead of doing so, the ex-parte applicants moved to this court for the orders aforesaid. The proceedings in the respondent having not been concluded, there was no decision on record whose legality may be challenged on any point of law and fact or that which can be said to be prejudicial to the ex-parte applicants in any way.

When the application came up for interpartes hearing before me on 26th October, 2011, **Mr. Mbaluto** for the ex-parte applicants and **Mr. Kariuki** for the interested party agreed to canvass the application by way of written submissions. An order to that effect was made by consent. Subsequently, parties filed and exchanged written submissions, which I have carefully read and considered alongside cited authorities.

Ordinarily, certiorari is issued to remove any judgment, order, decree, conviction or other proceedings for the purposes of it being quashed. See order 53 rule 2 of the Civil Procedure rules. From the foregoing and applying the *ejusdem generis* rule of interpretation, it is quite clear that certiorari will issue to quash a decision of sorts. Even if what is sought to be quashed are proceedings as the ex-parte applicants have sought therein, those proceedings must have resulted or culminated in a decision of one kind or another. What would be the purpose of quashing proceedings that are interdeterminate? I cannot think of any. Parties will simply revert to their original position. The court will therefore have acted in vain and as we all know, courts, do not act in vain. No decision that is prejudicial to the ex-parte applicants having been made by the respondent, this application is to my mind clearly an abuse of the court process. This issue was raised in the interested party's submissions. There was no response from the *ex-parte* applicants. If anything, they seem to have given it a wide berth.

Further it is a mandatory requirement that in case of an application for certiorari, the applicant will not be allowed to question the validity of any order, warrant commitment, conviction, inquisition or record unless before the hearing of the motion, they have lodged a copy thereof verified by an affidavit with the registrar, or account for his failure to do so to the satisfaction of the court. See orders 53 rule 7(1) of the Civil Procedure rules. In this case, the ex-parte applicants have not only failed to comply with the above mandatory requirement but they have also failed to annex the proceedings if any, sought to be quashed to the application. As it is, we are operating in darkness. The ex-parte applicants want this court to take them on their word that indeed there were proceedings before the respondent that are capable of being quashed. They want this court to assume and or speculate that indeed there are such proceedings. Courts of law do not act on assumptions, speculations and or suppositions. Much, as there is common ground that indeed there are such proceedings, the court need to be convinced of the existence of such proceedings. That can only be done by bringing on board such proceedings. In the absence of such, the court is being called upon to act in *vacuo*. What was so difficult on the part of the ex-parte applicants to have the alleged proceedings annexed to the application to enable this court look at them to satisfy itself that indeed there were such proceedings capable of being quashed and or prohibited.

Even if a decision and or proceedings sought to be quashed had been annexed to the application, I will still have dismissed the application on the following grounds;

Orders of certiorari will ordinarily issue in cases where a decision has been made without or in excess of jurisdiction or where the rules of Natural justice have been bent or overlooked or there is an error apparent on the face of the record or for such like reasons. I may also add that, judicial review is a public remedy and cannot issue against an individual in his private capacity.

How about prohibition? It is an order from this court directed to an inferior tribunal forbidding such tribunal from continuing with proceedings in excess of its jurisdiction or in contravention of the law. 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 and procedure of the inferior tribunal or a wrong decision on the merits. See **Kenya National Examination Council Vs. Republic Ex-parte Geoffrey Gathenji Njoroge & others (1997) eKLR**. Again may I also add that prohibition looks to the future as opposed to the past. As stated in the case of **Stanley Munga Githunguri Vs. Republic Criminal Application Number 271 of 1985** (**UR**) so that if the tribunal were to announce in advance that it would not consider itself bound by the rules of natural justice, the High Court would be obliged to prohibit it from so acting. 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.

I have spent a bit of time on the scope and purport of judicial review and in particular orders of certiorari

and prohibition because these are the orders that the ex-parte applicants have sought in the instant application. However, in the circumstances of this case, are those orders really available to them?

Going through the pleadings, there is no single paragraph in which the ex-parte applicants are complaining that there has been a breach of the principles of natural justice in the proceedings before the respondent. I do not think that they could have made such claim since from the affidavit of the interested party and which depositions have not been recanted and or countered by the ex-parte applicants, they are said to have attended the proceedings before the respondent on 9th December, 2010. However, because they did not have any documentary evidence to back up their position, the sitting was adjourned to 16th December, 2010. Apparently, on this day, the ex-parte applicants brought a survey plan drawn by their own surveyor. The respondent whereupon requested them to bring a duly registered mutation form from the Lands Registry, Kajiado on the hearing date which had then been scheduled for 13th January, 2011. This was to enable the Tribunal determine the dispute once and for all. It would appear and that is the position of the interested party, that the order by the respondent to the *ex-parte* applicants for the production of a duly registered mutation form *ex-parte* detailing the registered boundaries, precipitated these proceedings.

To my mind it smacks of bad faith for parties who have submitted themselves to a process to turn around and attempt to block it once they have hit a dead end. This is the case here. The ex-parte applicants having accepted to appear before the respondent and contest the interested parties' claim on merit, they should have allowed the process to go the whole hog rather than place stumbling blocks at every turn and or corner. Further, I understand that the 1st ex-parte applicant is an advocate of the High Court of Kenya. That being the case, one would expect that she would have raised the issue of jurisdiction with the respondent in her personal capacity and have the respondent rule on it rather than rushing to this court. No breach of rules of natural justice has been alleged and proved, since the ex-parte applicants have actively participated in the proceedings before the respondent without any hindrance until they were ordered to avail a duly registered mutation form from the land registry.

For their redemption, the ex-parte applicants have, sought to rely on the provisions of the Registered Land Act. It is their case that the respondent has no jurisdiction to hear and determine the boundary dispute and that the respondent in purporting to do so has acted *ultra vires* the Registered Land Act and in particular section 21 thereof. That section provides as follows:

"21 (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2). Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2) he shall make a note to that effect on the registry map and in the register and shall file such plan to description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit."

To them, the registrar has not determined the position of the aforesaid boundary pursuant to the aforesaid provisions of law. They further submit that until the registrar has determined the position of the disputed boundary as aforesaid all courts are prohibited from entertaining any action or other proceedings relating to the dispute. Land disputes Tribunals created under Land Disputes Tribunals Act are courts by dint of

sections 3 and 159 of the Registered Land Act. Accordingly, it is clear that the respondent, being a court as contemplated under the Registered Land Act, has fallen foul of section 21 of the act by purporting to adjudicate over the boundary dispute whereas the registrar has not made a determination of the boundary pursuant to section 21 of the Registered Land Act

The response by the interested party is that section 12 of the Land Disputes Tribunal Act introduced an amendment to section 159 of the Registered Land Act and caused the Tribunals to take up any dispute that arose within section 3(1) of the Land Disputes Tribunals Act which gave such tribunals jurisdiction to handle all cases of a civil nature involving disputes as to;

(a)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.

In view of the above provisions, it is the contention of the interested party that the respondent has jurisdiction to determine the boundary.

My take on these contrasting positions is that where there are competing statutes generally and ordinarily, one statute should not take precedence over the other so that it can form a basis of a judicial review application for certiorari and or prohibition as I am being invited to hold in these proceedings. One statute cannot be used to oust the jurisdiction of the other so that a party can come to court clinging on one statute claiming that the other violated the provisions of the statute he is clinging on and to that extent, proceedings undertaken under the other statute should be held to be *ultra vires* on account of the statute in his possession. This is what is happening here. Under the Registered Land Act, the duty to settle boundary disputes is vested in the Land Registrar. Yet under the Land Disputes Tribunals Act, the tribunals established thereunder have jurisdiction to determine all cases of a civil nature involving determination of boundaries amongst other disputes.

It is common ground that the dispute before the respondent involves a boundary. So that under the Registered Land Act, the registrar will have jurisdiction just as the respondent will have under the Land Disputes Tribunals Act. So why should the Registered Land Act prevail over the Land Disputes Tribunals Act. This then brings me to the principles of construction of statutes.

The Registered Land Act came into force on 16th September, 1963. By then the Land Disputes Tribunals Act had not yet been enacted. Indeed it was so enacted and came into force on 1st July, 1993. Section 25 of the Interpretation and General Provisions Act, provides inter alia:-

"...where one written law amends another written law, the amending written law shall so far as it is consistent with the tenor thereof and unless a contrary intention appears, be construed as one with the amended written law".

Act number 18 of 1990 and indeed section 12 of the Land Disputes Act, introduced an amendment to section 159 of the Registered Land Act and allowed the Land Disputes Tribunals to take up disputes involving boundaries. Therefore, the ex-parte applicants are not right when they submit that the respondent had no jurisdiction to entertain the proceedings.

Further it is a principle of interpretation of statutes that the later law amends the earlier law as provided for in section 25 of The Interpretation and General Provisions Act. Since the Land Disputes Tribunals Act came into force much later than the Registered Land Act and provided for the land disputes relating to determination of boundaries to be dealt with by tribunals established under it, it must then follow that the jurisdiction of the registrar under the Registered Land Act over such matters must have been ousted and or interfered with. When enacting the Land Disputes Tribunals Act, parliament must have been aware of the provisions of section 21 of the Registered Land Act. It must then have donated the land registrar's powers in that regard to the tribunals established under the Land Disputes Act. I think that by parliament

not directly or expressly repealing section 21, it intended that the Land Registrar would determine a boundary where none had been fixed and noted in the register. In this case the boundary having been fixed and registered, any consequential dispute arising therefrom can only be dealt with by respondent. The issue of determination of boundaries falls squarely within the purview of the respondent according to section 3(1) thereof.

In the case of **Wanjiku Muhia vs. Ng'ang'a Mutura, C.A.No.142 of 2000 (UR**) the court of appeal had occasion to consider whether the Land Disputes Tribunals had jurisdiction to deal with agricultural land registered under the Registered Land Act. The same argument has been advanced by the *ex-parte* applicant. The court delivered itself thus:-

"The subject matter before the magistrate was agricultural land registered under the Registered Land Act. The relief sought was eviction of the appellant on the ground that she was illegally occupying the respondent's land without his consent. We understand this to mean she was a trespasser having no lawful rights to the land. Therefore it was a dispute in terms of section 3(1) (c) that squarely falls under the jurisdiction of the Land Disputes Tribunal established under section 4 of the Act."

Again on the basis of this authority, the argument by the ex-parte applicants that by the respondent assuming jurisdiction over the dispute, it had fallen foul of section 21 of the Registered Land Act by purporting to adjudicate over the boundary dispute whereas the Registrar had not made a determination of the boundary pursuant to section 21(2) and (3) holds no water at all. The respondent has not acted *ultra vires* in assuming jurisdiction therefor.

The upshot of all the foregoing is that:-

. There is no decision made that can be quashed

. No proceedings have been attached to the application that would have satisfied this court that indeed there were such proceedings capable of being quashed and or prohibited.

. There was no breach of rules of natural justice with regard to the proceedings before the respondent

. There was no want or excess of jurisdiction by the respondent when it assumed jurisdiction and presided over the dispute.

. There is no error apparent and or on the face of the proceedings at all.

These are the main considerations if an order for certiorari and or prohibition has to issue. In their absence, this application has no legs to stand on. It is accordingly dismissed with costs to the interested party.

Ruling dated, signed and d**elivered** at **Machakos**, this **15th** day of **February**, 20**12**.

ASIKE-MAKHANDIA
JUDGE