REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 73 of 2009

IN THE MATTER OF: AN APPLICATION BY KARIUKI GITONGA FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE PROCEEDINGS AND RULING OF THE CENTRAL PROVINCE LAND DISPUTES APPEAL TRIBUNAL CLAIM NO.THIKA 4/2006

AND

IN THE MATTER OF: THE LAND DISPUTES TRIBUNAL ACT NO.18 OF 1990

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....
.....APPLICANT

VERSUS

CENTRAL PROVINCE LAND DISPUTES APPEAL TRIBUNAL.....1ST RESPONDENT
CHIEF MAGISTRATE'S COURT THIKA.....2ND RESPONDENT

ROSEMARY NJERI IRUNGU.....INTERESTED PARTY

EX-PARTE: KARIUKI GITONGA

J U D G M E N T

By a Notice of Motion filed on 11th August 2009 pursuant to leave granted on 22nd July 2009 to commence Judicial Review proceedings, the Exparte Applicant sought the following orders:

1) THAT an ORDER of CERTIORARI to remove into the High Court and quash all the proceedings and award taken and made by the Central Province Land Disputes Appeal Tribunal Claim No.4/2006 which decision confirmed the decision of Kakuzi Division Land Disputes Tribunal issued on 23rd September 05 instead of dealing with the Appeal as provided for in the Law on 22nd June 2009.

2) THAT an ORDER of PROHIBITION to Prohibit the Chief Magistrate Thika from entering any Application emanating from the decision of the Central Province Land Disputes Appeal Tribunal in claim No.Thika 4/2006 which decision was made on the 22nd June 2009.

3) An order condemning the Respondents to pay costs of the Application for leave and costs of the substantive Application.

The Application is supported by the statutory statement of facts dated 21st July 2009 and the affidavit sworn by Kariuki Gitonga, the Exparte Applicant on 21st July 2009.

The application is premised on grounds that

(a) The Central Province Land Disputes Appeal Tribunal acted without jurisdiction in Ordering among other things that the Applicant do vacate plot no.121.

(b) The Central Province Land Disputes Appeal Tribunal claim No.4/2006 as far as it touches Title to Land is a nullity as Tribunal has no jurisdiction to determine issues of Title.

(c) THAT the Central Province Land Disputes Appeal Tribunal acted *ultra vires* the Act by confirming a decision that was a nullity in the first instance instead of quashing it.

(d) THAT this Application has been brought without undue delay.

The application was opposed by both the Respondents and the Interested party. The Respondents filed grounds of opposition on 22nd January 2010 while the Interested Party swore a replying affidavit on 21st January 2010 which she filed in court on the same date.

Having read the pleadings in this case and having considered the written submissions filed by the Applicant and the Interested party, I find that the institution or body named as the 1st Respondent herein the Central Province Land Disputes Tribunal does not exist in law. The only body or institution that exists in law under the provisions of the Land Disputes Tribunals Act 1990 at the provincial level is the Provincial Land Disputes Appeals Tribunal Central Province. Naming a non-existent body as the 1st Respondent in this case would ordinarily make these Judicial Review proceedings incompetent but being lenient considering that the Applicant filed the proceedings in person and being a layman may not have understood the legal consequence of using the wrong terminology in describing the 1st Respondent, in the interest of justice I will be lenient in the interest of administering substantive justice and find that the entity the Applicant intended to name as the 1st Respondent is the Provincial Land Disputes Appeals Committee Central province as evidenced by his pleadings. Any reference to the 1st Respondent on this judgement will be a reference to the Provincial Land Disputes Appeals Committee Central Province not the Central Province Land Disputes Tribunal.

Turning now to the merits or otherwise of the Applicant's case and looking at the pleadings, I find that the gist of the Applicant's complaint in this case is that the 1st Respondent acted without jurisdiction by confirming an award made by the Kakuzi Division Land Disputes Tribunal on 23rd September 2005 which was in his view a nullity in law as the Kakuzi Land Disputes Tribunal had adjudicated on issues of ownership and title to land which was ***ultra vires*** Section 3 of the Land Disputes Tribunal Act.

It is the Applicant's case that instead of dealing with the appeal as prescribed by the law, the 1st Respondent confirmed the award of the Kakuzi Division Land Disputes Tribunal which apparently had by

then been adopted by the 2nd Respondent as a judgement of the court in Thika CMC D.O's Case No.55 of 2005 and a decree had subsequently been issued.

It is worth noting however that the Applicant did not challenge the legal validity of the award made by the Kakuzi Division Land disputes Tribunal or the action by the 2nd Respondent in adopting the same as an order of the court in the instant Notice of Motion despite having named the Chief Magistrate's Court Thika as the 2nd Respondent. There is also no evidence to show that the said award or orders of the 2nd Respondent adopting the award as a judgement of the court was ever challenged in any other court.

On behalf of the Interested Party, it was submitted that the application is bad in law and amounts to an abuse of the court process as the orders sought to be quashed by orders of certiorari do not exist and that the orders sought in the application are not available to the applicant. It was argued on behalf of the Respondents that the Applicant sought orders of certiorari to quash the 1st Respondent's decision made on 22nd June 2009 which did not exist and that the decision of the 1st Respondent annexed to the Notice of Motion was clearly made on 28th May 2009 and that leave had not been obtained to quash such a decision.

It is also the Interested party's claim that the order of prohibition sought in Prayer 2 had been overtaken by events as the 2nd Respondent had already issued a decree in Thika CMC D.O's Case No.55 of 2005 on 30th January 2006 and as prohibition looks into the future not past events, the said order was not available to the Applicant.

Turning now to the issues raised in opposition to the application, though it is clear from the face of the application that the orders the Applicant sought to have quashed were the orders allegedly made by the 1st Respondent on 22nd June 2009, the Applicant exhibited the orders he was referring to in his application as annexture marked KG3. Looking at this annexture, it is very clear that the applicant confused the date of certification of the order in question with the actual date of the decision. The decision was made on 28th May 2009 but the certification was done on 22nd June 2009. The Applicant's mistake in indicating in his pleadings date of certification as date of the order being challenged is in my view not fatal to the applicant's case since the order being challenged was exhibited at the leave stage and the court granting leave must have seen and appreciated its contents before granting leave. The court has looked at the said order and has confirmed that on the face of it, it is the order being challenged by the applicant herein and the mix up in dates does not affect the substance of the said order and cannot be used as a basis of defeating the application. Since the orders being challenged have been exhibited, I find no substance in the claim that the orders being challenged do not exist.

I also find no substance in the submission that the prayer for order of prohibition has been overtaken by events as the 2nd Respondent issued a decree in the matter on 30th January 2006 since a reading of Prayer 2 reveals that the order of prohibition sought was to prohibit the 2nd Respondent from entertaining any application emanating from the decision of the 1st Respondent in Claim No. Thika 4/2006 and not Thika CMC D.O's Case No.55 of 2005 which was already finalized and a decree issued. In the premises, the order sought has not been overtaken by events since there is no evidence that 1st Respondent's decision in Claim No.Thika 4/2006 has been filed with the 2nd Respondent. It is however doubtful whether the filing of the said award would have any legal effect in view of the fact that the award of the Kakuzi Land Disputes Tribunal had been adopted as an order of the court and transformed into a valid judgement of the 2nd Respondent before decision in Claim No.4/2006 was made by the 1st Respondent. The said judgement is apparently still in force.

Turning now to the claim that the 1st Respondent acted without jurisdiction in the way it handled Claim No.4/2006, it would appear from the grounds upon which the application is based that this claim is founded on the Applicant's view that Claim No.4/2006 concerned a dispute touching on title to land and that the 1st Respondent had no jurisdiction to deal with issues relating to title to land. It was also the applicant's view that 1st Respondent acted without jurisdiction by confirming the decisions of the Kakuzi

Division Land Disputes Tribunal which was a nullity instead of quashing it.

Looking at Section 8 of the Land Dispute Tribunals Act ***(hereinafter referred to as the Act)*** which deals with appeals from District Land Disputes Tribunals to the Provincial Appeal Committees and to the High Court, I do not see how the 1st Respondent exceeded or acted without jurisdiction in determining the appeal made to it by the applicant.

The memorandum of appeal **marked KG2** shows that the 1st Respondent was properly moved by the applicant as required by Section 8(3) of the Act and thereafter as shown by the proceedings before the 1st Respondent marked KG3, the appeal was heard by the appeals committee when it was properly constituted and it reached its decision after hearing parties to the appeal. After hearing the appeal, the law allowed the 1st Respondent to reach whatever decision it found appropriate provided it gave reasons for its decision. Section 8(7) of the Act states as follows:

"After giving each party an opportunity to state his case, the Appeals Committee shall determine the appeal giving reasons for its decision:

Provided that the Committee may in its discretion permit the party appealing to reply to the other party's submission if that submission contains any new matter not previously introduced at the hearing or on the appeal"

In my view, going by the provision of Section 8(7) of the Act, it was open for the 1st Respondent to either confirm the decision appealed against, nullify it or make an independent decision based on the facts before it. There is therefore no basis for the claim that the 1st Respondent acted without jurisdiction by confirming the decision of the Kakuzi Divisional Lands Tribunal instead of quashing it. Infact the 1st Respondent would not have had any jurisdiction to quash the said decision as power to quash decisions made by public bodies like land dispute Tribunals is only vested in the High Court in its supervisory jurisdiction by way of Judicial Review. It is important to note that the 1st Respondent was dealing with an appeal lodged with it by the applicant and made a decision based on facts presented before it in that appeal and in my view this was done in accordance with the relevant provisions of the law ***(Section 8 of the Land Disputes Tribunals Act).***

The law did not require the 1st Respondent to decide the appeals before it in a particular way and if the applicant was dissatisfied with the decision of the 1st Respondent, his remedy lay in an appeal to the High Court in line with Section 9 of the Act not by proceeding to the High Court by way of Judicial Review.

Having said that, I think it is also important to note that looking at the decision and award of the 1st Respondent, there are aspects of that decision that shows that the 1st Respondent dealt with some issues concerning ownership of the land in question which though not registered in the names of either of the parties to the dispute was nevertheless registered land since it was registered in the name of the Settlement Fund Trustee which is not a party to this suit – ***see annexture to Interested Party's replying affidavit marked RNI 1.***

However, since the 1st Respondent was confirming on appeal the decision made by the Kakuzi Land Disputes Tribunal which heard the original dispute under Section 3 of the Act and though it is clear that the said land disputes Tribunal had no jurisdiction to determine issues regarding registered land, as stated earlier, no orders of certiorari have been sought in this proceedings to quash the original decision of the land disputes tribunal or orders of the 2nd Respondent adopting the same as a Judgement of the subordinate court.

There is no evidence that the said decision has ever been challenged in the High Court and has been quashed or set aside in other court proceedings or overturned on appeal to the High Court.

In the circumstances of this case, I find that since the 1st Respondent's decision confirmed the earlier

decision by the Kakuzi land disputes Tribunal whose legal validity has apparently not been challenged todate in any court of law and which is now a valid judgement of the Chief Magistrate's Court Thika by virtue of Section 7(2) of the Act, no useful purpose will be served by this court issuing the orders prayed for by the Applicant in this case. I make this finding because even if the court were to issue orders of certiorari quashing the decision of the 1st Respondent as prayed, the decision of the Kakuzi Land Disputes Tribunal which is now a valid judgement of the 2nd Respondent's in D.O's Case No.55 of 2005 would still be in place and enforceable against the Applicant by dint of Section 7(2) of the Land Disputes Tribunals Act and Rule 20 of the Land Disputes Tribunals (Forms and procedure) Rules 1993 which provides that such a judgement is ***"enforceable in the manner provided for under the Civil Procedure Act".***

Such a judgement I must add must be respected and recognized like any other court judgement so long as it exists and remains in force.

In view of the existence of 2nd Respondent's judgement in D.O's Case No.55 of 2005, I find that it would not be necessary and it will not serve any useful purpose if this court were to issue the orders sought by the Applicant herein.

Judicial Review remedies are discretionary and they can only be issued if the court is satisfied that they are efficacious in the circumstances of the case and that they will serve the ends of justice.

As demonstrated hereinabove, issuing the orders sought by the Applicant herein will neither be necessary nor efficacious given the existence of a valid court judgement incorporating the decision of the Kakuzi Land Disputes Tribunal which todate remains valid and enforceable against the Applicant in this case. Such orders if issued would in my view be superfluous.

In the circumstances, I find that the Applicant has failed to prove that he is deserving of the orders sought in this case and accordingly, I find no merit in the Notice of Motion dated 4th August 2009. The said Notice of Motion is hereby dismissed with no orders as to costs.

Dated, **Signed**and**Delivered** by me at Nairobi this 13th day of March, 2012.

C. W. GITHUA
JUDGE
In the presence of:

Florence – Court Clerk

Mr. Kiprop holding brief for Mwangi Irungu for Applicant

N/A for Respondents

Mr. Munyororo holding brief for Rono for Interested Party