



IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO.26 OF 2008

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI AND PROHIBITION**

AND

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

AND

**IN THE MATTER OF BAHATI LAND DISPUTES TRIBUNAL CLAIM NO.19 OF 2005,
NAKURU CHIEF MAGISTRATE'S COURT LAND DISPUTES NO.69 OF 2006 (JOSEPHAT
WAKIBI KAGURU V. NDARA KAGURU)**

AND

**IN THE MATTER OF A COURT ORDER DATED 25TH MARCH, 2008 ISSUED BY THE HON.
RESIDENT MAGISTRATE AT NAKURU**

AND

IN THE MATTER OF AN APPLICATION BY:

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE'S COURT, NAKURU.....1ST RESPONDENT

BAHATI LAND DISPUTES, TRIBUNAL.....2ND RESPONDENT

AND

JOSEPHAT WAKIBI KAGURU.....INTERESTED PARTY

EXPARTE

NDARA KARUGU.....APPLICANT

RULING

The applicant is challenging the order of the 1st respondent, the Chief Magistrate, Nakuru, made on 25th March, 2008 and those issued on 17th March, 2008 by the 2nd respondent, Bahati Land Disputes Tribunal. The applicant has deposed that the impugned orders were made without jurisdiction and ought to be quashed by an order of *certiorari*. The applicant also prays for an order of prohibition to stop the respondent and interested parties from executing the order of 25th March, 2008, decree issued on 20th December, 2006.

Starting with the last order, the Tribunal, delivered a decision that:

“After considering all what had been brought before the Tribunal and also checking on the documents produced, the Tribunal rules as follows:

- 1. The shamba should be divided among the three brothers, Josephat Wakibi Kaguru, Ndara Kaguru and Josephat Gacheru, who is in Tanzania to three equal parts.**
- 2. The Tribunal recommends the surveyor to come and mark the boundary of the said brothers (sic).”**

The orders of the Chief Magistrate, Nakuru issued on 25th March, 2008 directed the Executive Officer of this court to sign all relevant papers to facilitate the transfer of the portion of land awarded to the interested parties. It would appear that this order was necessitated by the decree in terms of the Tribunal decision set out above.

The interested party has filed both the grounds of opposition and a replying affidavit in which he has argued that the application is time-barred and has no merit as the Tribunal had jurisdiction to entertain the dispute being a dispute relating to beneficial ownership to land; that the applicant held the suit land in trust of his brothers.

I have considered these arguments, written submissions and authorities relied on by counsel for the parties. The applicant seeks two orders – *certiorari* and prohibition. An order of *certiorari* will issue to quash a decision if it is shown that the decision was made without or in excess of jurisdiction or if the questioned decision was arrived at in violation of the rules of natural justice. An order of prohibition forbids a tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land or if the rules of natural justice have not been complied with.

A third aspect of this matter relates to the question whether a decision of the Tribunal made on 17th March, 2006 is capable of being quashed by an application for *certiorari* brought on 6th August, 2008. Starting with the latter, the limitation imposed by **Section 9(3) of the Law Reform Act and Order 53 rule 2 of the Civil Procedure Rules** prohibits the grant of an order of *certiorari* in certain cases; that is:

“.....any judgment, order, decree, conviction or other proceedings”

The Court of Appeal in **Wilson Osolo V. John Ojiambo Ocholla & the Attorney General**, Civil Appeal No.6 of 1995 emphasised that:

“It can readily be seen that Order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act.

There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (Cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.

It therefore is apparent that the extension of time granted by Platt, J, was a nullity. Any steps taken thereafter are therefore of no consequence.”

I reiterate that the application seeks the quashing of the orders made on 25th March, 2008 by the Chief Magistrate, Nakuru:

“.....together with all previous decrees or orders issued by the said 1st respondent and the orders issued by the 2nd Respondent on 17th March, 2008.”

The last date (17th March, 2008) ought to be 17th March, 2006, the date the Tribunal rendered its decision. The prayer also includes the decree of 20th December, 2006.

In terms of **Section 9(3)** and **Order 53 rule 2** aforesaid, both the order of 17th March, 2006 and the decree of 20th December, 2006 cannot be quashed by an order of *certiorari*, having been made or issued over two years before the institution of this matter. That leave the order of 25th March, 2008. It is the order where the Resident Magistrate directed the Executive Officer to sign all relevant papers to facilitate transfer of the portion awarded to the interested party. The question that arises is whether the magistrate had jurisdiction to issue such an order.

After the chairman of the Tribunal has filed the decision in the magistrate’s court, the role of the magistrate by dint of **Section 7(2)** of the repealed **Land Disputes Tribunal Act** is to:

“,,,,,enter judgment in accordance with the decision of the Tribunal and upon judgment being entered, a decree shall issue and shall be enforced in the manner provided for under the Civil Procedure Act.”

(Emphasis supplied)

What the Magistrate’s court did in this matter was part of the process of execution of a decree which was well within its jurisdiction..

The next question is whether an order of prohibition can issue to stop the respondents and interested parties:

“.....from executing, effecting or implementing the order issue on 25th March, 2008, the decree given on 20th December, 2006 and all arising from a decision of the Bahati Land Disputes Tribunal claim No.19 of 2005 given on 17th March, 2006.”

It must be emphasized that an order of prohibition cannot stop an order or decision which has already been made. It looks to the future. See **Kenya National Examinations Council V. Republic, Exparte Geoffrey Gathenji Njoroge and Others**, Civil Appeal No,266 of 1996. Prohibition cannot stop the orders of 20th December, 2006 and 25th March, 2008. Secondly, an order of prohibition, as I have already stated, can only issue where the tribunal or body has exceeded its jurisdiction or is in contravention of the laws of the land or has failed to comply with the rules of natural justice.

Both the Tribunal and the Chief Magistrate’s Court having rendered their decisions, it is Impractical to stop them, the applicant has not indicated which laws have been violated by the respondent.

In the result, this application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 12th day of March, 2012.

**W. OUKO
JUDGE**