



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 15 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF *CERTIORARI***

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE AMATTER OF OL KALOU LAND DISPUTES TRIBUNAL CASE NO.28 OF 2008**

**AND**

**IN THE MATTER OF NYAHURURU PRINCIPAL MAGISTRATE'S COURT LAND CASE  
NO.31 OF 2010**

**AND**

**IN THE MATTER OF THE REPUBLIC**

**AND**

**BENSON MAINA  
KARAYA.....1<sup>ST</sup> APPLICANT**

**HANNAH WAITHERA ITABU.....  
.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**OL KALOU LAND DISPUTES  
TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**NYAHURURU PRINCIPAL  
MAGISTRATE.....2<sup>ND</sup> RESPONDENT**

**AND**

**JOSPAT NGANGA KIRIIRI.....  
.....1<sup>ST</sup> INTERESTED PARTY**

ALLAN NJUGUNA KIRIIRI.....  
....2<sup>ND</sup> INTERESTED PARTY

JOSEPH KAMAU KIRIIRI.....3<sup>RD</sup>  
INTERESTED PARTY

### RULING

After obtaining leave, the applicants have now brought a substantive motion challenging the decision of the Ol Kalou Land Dispute Tribunal rendered on 11<sup>th</sup> November, 2010 and seeking that that decision as well as proceedings before the Principal Magistrate, Nyahururu be quashed by order of *certiorari*.

The application is premised on the grounds that the Tribunal's decision was beyond its jurisdiction; that the award is against the provisions of the Registered Land Act; that the award was annulity hence incapable of founding a judgment; that the award contradicts a court decree issued in Nyahururu P.M. Civil Suit No.125 of 2008.

The respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties although served did not respond to the application or participate when the application came up for arguments.

The 1<sup>st</sup> interested party through counsel filed grounds of opposition in which it was argued that the application was fatally defective as it was filed without leave; that leave granted on 8<sup>th</sup> March, 2011 related to different parties from those introduced in the application; that the Tribunal did not order the cancellation of the title and finally that the applicants having filed an appeal against the decision of the Tribunal in Appeal case Nyandarua Central No.1/2010 are in abuse of the court process by bringing this application.

I have considered the forgoing arguments, written submissions and authorities relied on. **Section 3** of the repealed **Land Dispute Tribunal Act** limited the jurisdiction of the Tribunal to:

- a) division of land;
- b) claim to occupy or work land;
- c) trespass of land

The Tribunal after hearing the evidence of the parties and their witnesses made the following decision:

#### **“Award**

- 1. The court to execute the documents.**
- 2. The court to cancel the title deed No.Nyandarua/Sabugo/1062 which is registered under the name of Benson Maina Karaya.**
- 3. Hannah Waithera Itabu to refund to Benson Maina Karaya the money she received from him in respect of the land sale.**
- 4. The land parcel No. Nyandarua/Sabugo/1062 to be registered under the names of sons of the late Monicah Wangari Kiriiri-**
  - i) Joseph Kamau Kiriiri**
  - ii) Allan Njuguna Kiriiri**

### iii) Josphat Nganga Kiriiri.”

It is worth noting that the claim before the Tribunal was between Monica Wangari Kiriiri and Josphat Nganga Kiriiri as the plaintiffs and Hannah Waithera Itabu and Benson Maina Karaya as the defendants. It was the plaintiffs’ case that the suit property, measuring 10 acres, was allocated to the two widows of the late Kiriiri Kibui. The first widow Nyaigwa predeceased the 2<sup>nd</sup> widow, Monicah who brought up the 1<sup>st</sup> widow’s two daughters, Hannah Waithera and Margaret Wanjiru. Monicah who had eight children also subsequently died.

It was during the period of her hospitalization that Hannah filed a succession cause and was issued with a grant of probate for the estate of her mother, the 1<sup>st</sup> widow. In obtaining the grant, Hannah did not disclose the existence of other family members. Upon the grant being confirmed, Hannah sub-divided the land and began to sell. Among the buyers was Benson Maina Karaya who purchased the suit land No.1062 on which lived the children of the 2<sup>nd</sup> widow.

In view of this background and the decision earlier on reproduced, can it be said, as submitted by counsel for the 1<sup>st</sup> interested party that the dispute related to trespass to land and therefore within the ambit of **Section 3(1)** of the repealed Act?

The Tribunal specifically directed that the court cancels the title to the suit land. It had no such powers to direct a court (High Court, I believe) to do that.

It further ordered Hannah to refund the purchase price to Benson Maina Karaya, determining contractual obligations of the parties and finally the Tribunal ordered the suit property to be registered in the names of three individuals, thereby dealing with ownership of the suit property. To submit that the dispute related to trespass and therefore the decision was in accord with **Section 3** aforesaid is to stretch the meaning of the word trespass.

It must also be noted that the genesis of the dispute was the petition for grant of probate filed by Hannah. It was a matter for succession and in particular for provision for dependants. Finally in Nyahururu P.M.C.C. No.125 of 2008, the court found that Benson Maina Karaya is the lawfully registered proprietor of the suit property and eviction and injunctive orders were issued against Josphat Nganga.

It is noteworthy that Monicah and Josphat referred the dispute to the Tribunal when they knew quite well that Nyahururu PMCC No.125 of 2008 was pending determination.

For the 1<sup>st</sup> interested party- Josphat Nganga Kiriiri, it has been submitted that the application is defective for having been brought against persons who were not parties at the leave stage. No provision of the law was cited in support of that position. An application for leave must be accompanied by, *inter alia*, a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought. Nowhere does the order require that all the parties be disclosed at the leave stage. It is only the notice of motion that must be served on all persons directly affected and thereafter affidavit giving the names and address of such persons, the place and date of service is filed.

Apart from the fact that there is no requirement to join all the parties at the leave stage, the 1<sup>st</sup> interested party has not suffered any prejudice as he has fully participated in the matter.

Finally, it was also submitted for the 1<sup>st</sup> interested party that this application amounts to an abuse of the court process as the applicants have challenged the tribunal’s decision on appeal. The appeal is said to be Appeal Case Nyandarua Central No.1/2010. Two things ought to be noted. Appeals are to the Provincial Appeals Committees. It therefore cannot be in Nyandarua.

Secondly, from the 1<sup>st</sup> interested party’s submissions it is abundantly clear that the argument being advanced is not that there is an appeal but that by dint of **Section 8** of the **Act**, the appellant ought to have

appealed against the decision of the Tribunal instead of bringing a judicial review application. The power of the High Court to supervise courts subordinate to it is both constitutional and statutory and cannot be limited.

For all the reasons stated, this application is allowed and the decision of the Tribunal is hereby quashed by *certiorari*. *Certiorari* is however not available as prayed to quash the proceedings before the magistrate's court because the court itself has not been shown to have exceeded its jurisdiction or violated any law or failed to adhere to the rules of natural justice. The correct relief ought to have been an order of prohibition. However, with the quashing of the substratum, the proceedings before the Magistrate must of necessity collapse.

Costs to the applicants.

**Dated, Signed and Delivered at Nakuru this 6<sup>th</sup> day of March, 2012.**

**W. OUKO  
JUDGE**