



**IN THE MATTER OF AN APPLICATION BY MICHAEL NJUGUNA MUTHONI, LUCY WANGUI NGUGI, WANJIRU KAMAU WAWERU, DANIEL KAMAU KAMARU, DAVID NDUNGU KAMAU AND COSTA MWANGI MUTHONI FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF LAND PARCEL LR.NO.DAGORETTI/ THOGOTO/T.430**

**AND**

**IN THE MATTER OF KIKUYU SENIOR RESIDENT MAGISTRATE'S COURT LAND CASE NO.10 OF 2011**

**AND**

**IN THE MATTER OF KIKUYULANDDISPUTES TRIBUNAL CLAIM NO. KW/LND/14/1/14/2011**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**-VERSUS-**

- 1. MARY WAMBUI KIHU.....1<sup>ST</sup> RESPONDENT**
- 2. THE LAND DISPUTE TRIBUNAL KIKUYU DIVISION.....2<sup>ND</sup> RESPONDENT**
- 3. SENIOR RESIDENT MAGISTRATES COURT KIKUYU.....3<sup>RD</sup> RESPONDENT**

**EXPARTE**

- 1. MICHAEL NJUGUNA MUTHONI**
- 2. LUCY WANGUI NGUGI**
- 3. WANJIRU KAMAU WAWERU**
- 4. DANIEL KAMAU KAMARU**
- 5. DAVID NDUNGU KAMAU**

## 6. COSTA MWANGI MUTHONI

### J U D G M E N T

In the Notice of Motion dated 9<sup>th</sup> September 2011 and filed in Court on 16<sup>th</sup> September 2011, the Exparte Applicants herein commenced judicial review proceedings seeking the following orders:

- (1) A Judicial Review order of Certiorari to remove into the High Court and quash the proceedings in the Kikuyu Resident Magistrate's Court in Land Case No.10 of 2011 together with the award of Land Disputes Tribunal Claim No.KW/LND/14/1/14/2011.**
- (2) A Judicial Review order of prohibition to prohibit the Kikuyu Land Disputes Tribunal and the Kikuyu Resident Magistrate's Court from proceeding on matters relating to land parcel L.R. No. Dagoretti/Thogoto/T.430.**
- (3) The costs of this application be borne by the respondents.**

The application is supported by the statement of facts dated 1<sup>st</sup> September 2011 and the verifying affidavit sworn by the 2<sup>nd</sup> applicant Lucy Wangui Ngugi on even date on her own behalf and on behalf of the other five applicants.

The application is premised on grounds set out on its face which include the following main grounds;

- (a) That the applicants are the owners and occupiers of land parcel L.R. No.Dagoretti/Thogoto/T430.**
- (b) That the award of the Kikuyu Resident Magistrate's Court in Land Case No.10 of 2011 is a nullity as the Magistrate and the Land Disputes Tribunal had no jurisdiction to deal with the dispute as it relates to land parcel L.R.No.Dagoretti/Thogoto/T.430 which is registered under the Registered Lands Act (Cap.300) Laws of Kenya.**
- (c) The proceedings and the decision of the Kikuyu Land Disputes Tribunal and the Kikuyu Resident Magistrate's Court are void abinitio for want of jurisdiction.**
- (d) The applicants have been in occupation of the suit property since the year 1993 when the same was allocated to them.**
- (e) Kikuyu Senior Resident Magistrate's Court had no jurisdiction to entertain the elders' award.**
- (f) The Land Disputes Tribunal acted ultra vires its mandate and powers.**

Though served with the Notice of Motion, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any response to the motion and it can safely be concluded that they chose not to participate in these proceedings.

Mary Wambui Kihui who has been named as the 1<sup>st</sup> respondent opposed the motion through a replying affidavit she swore on 6<sup>th</sup> February 2012 and an affidavit sworn by one Stephen Gitau Muroko on 6<sup>th</sup> February 2012.

Though the 1<sup>st</sup> respondent did not complain that she had been wrongly sued as a respondent in this case as no substantive orders were sought against her, it is my view that she ought to have been joined in the proceedings as an interested party not as a respondent since as a private citizen sued in her individual capacity, she is not amenable to judicial review.

Judicial Review is the process by which the High Court exercises supervisory jurisdiction over inferior tribunals like the 2<sup>nd</sup> respondent, subordinate courts or other public bodies to ensure that their decisions

are made in accordance with the law and that they do not abuse their statutory powers to the detriment of citizens. Given the scope and purpose of judicial review, it is an anomaly to join a private citizen as a respondent in judicial review proceedings unless the private individual is sued in his capacity as a public officer.

However, the misjoinder of the 1<sup>st</sup> respondent in this case does not in any way affect the applicants' case since no substantive orders were sought against her.

Turning now to the facts of the case, briefly stated, the applicants' case is that they are the owners of land known as LR. No. Dagoretti/Thogoto/T.430 (*herein after referred to as the suit land*) and that they have been in its occupation since 1993 when the same was allocated to them by their local councillor with the blessings of the Kikuyu Town Council. It is apparent from the annexures to the applicants verifying affidavit that on an undisclosed date, the 1<sup>st</sup> respondent filed before the Kikuyu Land Disputes Tribunal Claim No. KW/LND/14/1/14/2011 claiming ownership of the said land.

The Kikuyu Division Land Disputes Tribunal (*hereinafter referred to as the tribunal*) heard all parties to the dispute and made its award on 24<sup>th</sup> June 2011 which was adopted as a judgment of the 3<sup>rd</sup> respondent, the Senior Resident Magistrate's Court at Kikuyu. The applicants contend that the said award had the effect of ordering their eviction from the suit land and that the suit land being land registered under the Registered Land Act Cap.300 Laws of Kenya, the 2<sup>nd</sup> respondent had no jurisdiction to entertain and hear a dispute relating to ownership of such land. The applicants further claimed that the 2<sup>nd</sup> respondent acted ultra vires the provisions of the Land Disputes Tribunals Act No.18 of 1990 in conducting the proceedings in Claim No.KW/LND/14/1/14/2011 and in making its determination expressed in the award dated 24<sup>th</sup> November 2011. It is the applicants' case that the said proceedings and award were void *abinitio* and nullities in law hence their prayer for an order of certiorari.

The 1<sup>st</sup> respondent in her replying affidavit denied that the applicants had been in continuous and uninterrupted occupation of the suit land and claimed that besides being the registered owner of the said land, she had also lived on the suit land with members of her family since 1982.

She also deponed that the 2<sup>nd</sup> respondent had jurisdiction to hear and determine the claim she had lodged before it since the same was based on a claim to occupy land and a complaint that the applicants had trespassed on the suit land. According to the 1<sup>st</sup> respondent, the dispute before the tribunal had nothing to do with title to the suit land or beneficial interest in the same.

It was therefore her position that the applicants' notice of motion had no merit and that it ought to be dismissed with costs.

Following the court's directions, the applicants and the 1<sup>st</sup> respondent's counsel filed written submissions on different dates which I have carefully considered.

Having read the pleadings in this case and considered the written submissions filed by counsel for the respective parties, I find that only two main issues arise for determination by the court in this case which are the following:

- (1) Did the 2<sup>nd</sup> respondent have jurisdiction to hear and determine the claim filed before it by the 1<sup>st</sup> respondent?
- (2) Are the applicants entitled to the reliefs sought?

I propose to deal with the two issues together since they are to a large extent inter-related.

Starting with the issue of jurisdiction, the firm of Kaburu Miriti & Co. Advocates which is on record for the applicants submitted that the 2<sup>nd</sup> respondent did not have jurisdiction to entertain, hear and determine

the dispute presented to it by the 1<sup>st</sup> respondent since the same related to claims of ownership and occupation of registered land. It was argued on behalf of the applicants that by virtue of Section 3(1) of the Land Disputes Tribunals Act No.18 of 1990, Land Dispute Tribunals' jurisdiction was limited to boundary disputes relating to unregistered land and that the 2<sup>nd</sup> respondent erred and acted ultra vires the Act by hearing a claim for eviction. Learned counsel further contended that there was no provision in the Act which empowered Land Disputes Tribunals to issue orders of eviction which according to him should be issued only by courts of Law.

Lastly in the supplementary submissions filed on 27<sup>th</sup> March 2012, counsel for the applicant relying on this court's decision in JR. No.15 of 2010 submitted that the 2<sup>nd</sup> respondent could not have had jurisdiction to entertain the 1<sup>st</sup> respondent's claim since the law creating Land Disputes Tribunals had been repealed and Land Disputes Tribunals are no longer in existence.

On its part, the firm of Kangethe and Mola Advocates which represented the 1<sup>st</sup> respondent in this proceedings submitted that the 1<sup>st</sup> respondent's claim before the 2<sup>nd</sup> respondent was founded on an action for trespass and illegal occupation of land without the consent of its registered owner which was within the jurisdiction of Land Disputes Tribunals donated by Section 3(1) (c) of the Act. It was therefore the 1<sup>st</sup> respondent's position that the 2<sup>nd</sup> respondent had jurisdiction to adjudicate on the dispute presented before it for determination by the 1<sup>st</sup> respondent.

In answer to the applicant's submission that the 2<sup>nd</sup> respondent had no jurisdiction to hear the dispute as the law that had created Land Dispute Tribunals had been repealed by the Environment and Land Court Act of 2011, the 1<sup>st</sup> respondent submitted that the 2<sup>nd</sup> respondent was legally in existence by the time it heard and decided on the dispute subject matter of these proceedings on 24<sup>th</sup> June 2011 and that the new legislation which came into effect in August 2011 only affected claims that were pending hearing before the Land Disputes Tribunals but not claims which had been finalized.

Having considered the rival submissions made by the parties on the issue of jurisdiction, I wish to state from the outset that the exparte applicants' submission that the 2<sup>nd</sup> respondent had no jurisdiction to entertain or determine the 1<sup>st</sup> respondents' claim in view of the enactment of the Environment and Land Court Act, No.19 of 2011 (**hereinafter referred to as Act No. 19 of 2011**) which repealed the law under which the Land Disputes Tribunals had been created is both misconceived and unsustainable. It is important to note that the said legislation was enacted into law on 27<sup>th</sup> August 2011 and came into force on 30<sup>th</sup> August 2011. This means that its provisions started to have legal effect or had the force of law on 30<sup>th</sup> August 2011 and therefore Section 31 thereof which repealed the Land Disputes Tribunal Act No.18 of 1990 could only take effect from the date of commencement of the Act which is expressly stated to be 30<sup>th</sup> August 2011. Given the clear expression of the Legislations commencement date on the face of the statute itself, it is clear that Parliament could not have intended it to have retrospective effect.

Though Act No.19 of 2011 in repealing the Land Disputes Tribunals Act dismantled Land Disputes Tribunals created under the Act, it did not and could not have deprived the Land Disputes Tribunals which were legally in existence prior to its commencement date of their jurisdiction donated by Section 3 (1) of the Repealed Act.

From the annexures to the applicants' verifying affidavit, it is clear that the 2<sup>nd</sup> respondent concluded its hearing of the dispute in the 1<sup>st</sup> respondent's claim on 16<sup>th</sup> June 2011 and rendered its award on 24<sup>th</sup> June 2011 well before the commencement date of Act No.19 of 2011 on 30<sup>th</sup> August 2011. I think it is appropriate at this stage to distinguish this case from the case relied upon by the applicants namely **Misc. Appn. No. JR. No.15 of 2010, R –Vs- The District Commissioner, Kiambu and 3 Others.**

With much respect to the applicants' counsel, it is my finding that the said case has no relevance or application to the present case.

In that case, (JR No 15 of 2010) the ex parte applicant had sought inter alia an order of Mandamus to compel the Kiambu District Land Disputes Tribunal to immediately or within a reasonable time hear and determine a claim lodged before it by the ex parte applicant and make its award according to the law. The applicants had been challenging the decision of the Kiambu Land Disputes Tribunal to terminate proceedings before it in a dispute filed by the applicant following an order from the Kiambu District Commissioner before hearing it on merit.

The Judicial Review proceedings in that case were filed on 8<sup>th</sup> April 2010 but it was not until March 2012 when judgment therein was delivered by my brother Korir J. By this time, Act No.19 of 2011 had come into operation and by then the Kiambu District Lands Disputes Tribunal had ceased to exist by virtue of Section 31 of the said Act which had repealed the Land Disputes Tribunals Act.

That is why J. Korir in dismissing the application held that issuing an order of mandamus to compel the Kiambu District Land Disputes Tribunal to hear and determine a dispute previously lodged with it when the Tribunal was no longer in existence by dint of S31 of Act No 19 of 2011 was an exercise in futility and would be tantamount to the court acting in vain.

The instant case does not share similar facts. In this case the applicants seeks inter alia an order of Certiorari to quash the decision of the 2<sup>nd</sup> respondent in the award dated 24<sup>th</sup> June 2011 and proceedings before the 3<sup>rd</sup> respondent emanating from the said award. The applicants are challenging a decision the 2<sup>nd</sup> respondent in this case had rendered when it was legally in existence in June 2011 as opposed to the Tribunal in JR No 15 of 2010 which had ceased to exist by the time judgment was delivered and was therefore legally incapable of handling any dispute.

Having found that Act No 19 of 2010 did not have retrospective effect and could not have affected the tribunals jurisdiction as at June 2011 when it made the impugned award, the only other aspect on the issue of jurisdiction that is remaining for determination by this court is whether the tribunal was legally mandated to hear and determine the claim presented to it by the 1<sup>st</sup> respondent.

Having perused the pleadings filed herein, I find that the applicant did not annex a copy of the statement of claim filed with the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent. As such it is impossible to establish for certain the exact claim made by the 1<sup>st</sup> respondent against the applicants herein before the tribunal.

The court can only deduce what the claim was all about from the proceedings before the tribunal and the written submissions filed by the parties.

The applicant's counsel in his submission stated that the 1<sup>st</sup> respondent had sought an order for the applicant's eviction from the suit land but a look at the proceedings before the tribunal does not expressly show that the claim sought an order of eviction against the applicants. The proceedings however show that the 1<sup>st</sup> respondent's claim was founded on an action for trespass to land – See page 8 of the proceedings annexed to applicants affidavit **marked as “LWNI”**.

In her evidence before the tribunal, the 1<sup>st</sup> respondent narrated how she had acquired title to the suit land and asserted her right to occupy the same as its registered owner. The applicant's on the other hand maintained that they had occupied the suit land since 1993 when the same was allocated to them by the area councillor. They did not expressly lay any claim of ownership to the suit land nor did they challenge the 1<sup>st</sup> Respondents title to it.

At the end of the proceedings, the tribunal made an award in the following terms:

“(1) The Kikuyu Land Tribunal confirm that the Dagoretti/Thogoto/T.430 (0.50) acres belong to Mary Wambui Kihui.

(3) She got all the legal document to prove that this plot belong to her with no doubt.

(4) The seven Objectors should follow up with the area councillor/Town Council of Kikuyu to show them where to go.

Appeal allowed within 30 days from the date of this order”

In my opinion, the dispute before the tribunal did not seek to determine ownership of the suit land since the 1<sup>st</sup> respondent’s title to the land was not in question. The 1<sup>st</sup> respondent in my view was simply asserting her exclusive right to occupy the suit land being its registered owner while the applicants were resisting her claim on grounds that they also had the right to occupy the same not as proprietors thereof but as licensees of their area councillor. They clearly did not have the authority or consent of its registered owner the 1<sup>st</sup> respondent to occupy the said land.

It is therefore my finding that the dispute for adjudication before the tribunal was founded on the 1<sup>st</sup> respondent’s claim that the applicants had occupied land in respect of which she was the registered owner without her authority and consent which amounted to trespass to land. It is therefore my conclusion that the dispute squarely fell under the jurisdiction of the Kikuyu Land Disputes Tribunal by virtue of Section 3(1) (c) of the Act which is in the following terms:

“Subject to this Act, all cases of a civil nature involving a dispute as to –

- (a).....,
- (b) .....,
- (c) trespass to land,

shall be heard and determined by a Tribunal established under section 4”.

The award finally delivered by the tribunal as reproduced herein above clearly shows that the tribunal merely confirmed the fact that the 1<sup>st</sup> respondent was the registered proprietor of the suit land and that the applicants had no lawful rights to the suit land meaning that they were trespassers and they were advised to look for alternative settlement. Contrary to the submissions made by the applicants’ counsel, the tribunal did not issue an eviction order.

In view of the foregoing, it is my finding and decision that the tribunal acted within its jurisdiction and in accordance with the law in hearing and determining the dispute presented to it by the 1<sup>st</sup> respondent – **see Muhia –Vs- Mutura (1999) IEA 209 (CAK) at Page 212.**

That being the case, this court cannot interfere with the award of the tribunal since it was a decision made by the tribunal within its statutory mandate and following the due process of the law.

Flowing from this finding, it follows that the 3<sup>rd</sup> respondent’s action of adopting the award as a judgment of the court in accordance with Section 7 of the Act was lawful and any execution proceedings that would follow as a consequence of that judgment would in the same vein be lawful and done in accordance with the law.

In the circumstances, I am satisfied that the applicants have not demonstrated that any of the grounds upon which courts would issue orders of certiorari and prohibition exists in this case. The same have been illustrated in Halisbury’s Laws of England Vol.I, 4<sup>th</sup> Edition Page 202;

“Certiorari will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record, breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury. Prohibition will issue to forbid any such determination.”

In view of the foregoing, I find that the applicants have not demonstrated that they are entitled to the reliefs sought in this case. They have not proved that either the 2<sup>nd</sup> or 3<sup>rd</sup> Respondents acted or made decisions which were outside their jurisdiction or were contrary to the law.

In the result, I find no merit in the Notice of Motion dated 9<sup>th</sup> September 2011 and it is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**Dated, Signed and Delivered** by me at Nairobi this 26<sup>th</sup> day of July, 2012.

**C. W. GITHUA**  
**JUDGE**

***In the presence of:***

Florence - Court Clerk

N/A for Applicant

M/s Kisa for 1<sup>st</sup> Respondent

N/A for 2<sup>nd</sup> Respondent

N/A for 3<sup>rd</sup> Respondent