



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS CIVIL APPLICATION 58 OF 2011

**IN THE MATTER OF: AN APPLICATION BY SAID ALI MWALESO FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION.**

AND

**IN THE MATTER OF: THE PROVINCIAL LAND APPEALS COMMITTEE –
COAST. APPEAL CASE NO. 255 OF 2003 AND TITLE NUMBER KWALE/MAWEICHE/89**

AND

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

AND

THE REGISTERED LAND ACT CAP. 300 LAWS OF KENYA

BETWEEN

THE REPUBLIC

VERSUS

THE SENIOR RESIDENT MAGISTRATE – KWALE.....1ST RESPONDENT

THE PROVINCIAL LAND APPEALS COMMITTEE –COAST.....2ND RESPONDENT

**ABDALLA ALI MWANGAO AND ABDALLA ALI MWAKUTUNZA (in their capacities as Legal
Representatives of
ALI SAIDI MWAKUTUNZA – DECEASED).....3RD RESPONDENT**

**THE DISTRICT LANDS REGISTRAR – KWALE.....4TH
RESPONDENT**

EX PARTE

SAID ALI MWALESO.....APPLICANT

JUDGMENT

(1) The Applicant who is the registered proprietor of the suit property Kwale/Maweche/89 measuring 30 hectares seeks judicial review orders against the decision of the Provincial Appeals Committee of 29th October 2008 adopted by the senior Resident Magistrate's Court, Kwale to subdivide the suit property between the Applicant and his late uncle's estate. The appeal arose from a determination of the Msambweni District Land Disputes Tribunal in Land dispute Case No. 6 of 2002 of 23rd July 2002 and adopted by the Kwale Senior Resident Magistrate's Court in Land Case No. 4 of 2003 on 12th March 2003.

(2) The Applicant's Notice of Motion dated 6th June 2011 seeks the following orders:

(a) Certiorari to quash the order of Kwale Senior Resident Magistrate's Court in Land Case No. 4 of 2003 made on 27th April 2011 to sub-divide the suit property.

(b) Certiorari to quash the decision of the Coast Provincial Appeals Committee made on 29th October 2008 in Appeal Case No. 255 of 2003 which was adopted by Kwale Senior Resident Magistrate's Court on 27th April 2011.

(c) Prohibition against the District Land Registrar Kwale from issuing two title deeds in respect of the suit property pursuant to the Kwale Senior Resident Magistrate's order of 27th April 2011.

(3) The Applicant contends principally that the Provincial Appeals Committee and the District Land Disputes Tribunal lacked jurisdiction under the Land Disputes Tribunal Act to determine the issue of ownership of the suit property and to revoke title and that the order of 27th April 2011 issued by the Kwale Senior Resident Magistrate's Court had the effect of rectifying the register of land which was beyond the jurisdiction of the Land Disputes Tribunal whose determination the Senior Resident Magistrate's Court sought to give effect. The Applicant urged the court to disregard procedural technicalities in line with the spirit of the Constitution under Article 22 (3) (d) of the Constitution with regard to the Applicant's failure to appeal from the decision of the Provincial Appeals Committee.

(4) The State Counsel representing the Lower Court, the Provincial Appeals Committee and the District Lands Registrar, Kwale (the 1st, 2nd and 4th Respondents) did not, despite opportunity granted to do so, file any affidavits or submissions in response.

(5) For the 3rd Respondent, a replying affidavit was filed and submissions made to the effect that:

(a) The orders of Kwale Senior Resident Magistrate's Court issued on 12th February 2003 and PAC (Provincial Appeals Committee) on 29th October 2008 cannot be quashed by certiorari due to limitation of time.

(b) Judicial Review should only be applied where the Applicant has no alternative remedy while in this case the Applicant had a right of appeal which he failed to exercise within the prescribed time.

(c) By appealing to the Provincial Appeals Committee from the District Land Dispute Tribunal, the Applicant recognized their jurisdiction.

(d) The order of Kwale Senior Resident Magistrate's Court of 12th February 2003 concerned remain in force, and

(e) The Article 22 (3) (d) of the Constitution was not absolute and it should be considered along side section 9 (3) of the Land Reform Act and Order 53 section 2 of the Civil Procedure Rules on procedural requirements.

(6) Two issues arise for determination from the pleadings, affidavits and submissions in this case, namely:

- (a) Whether the order of Certiorari will issue to quash the determination of the Tribunal and the Provincial Appeals Committee as adopted by the Senior Resident Magistrate's Court, Kwale, and
- (b) Whether an order of Prohibition will issue to restrain the enforcement of the Senior Resident Magistrate's Court order issued pursuant to the determination of the Provincial Appeals Committee.
- (7) Whether the order of certiorari will issue to quash the determination of the Tribunal and the Provincial Appeals Committee.**

It is trite law that the Land Disputes Tribunal established under the repealed Land Disputes Tribunal Act, 1990 did not have jurisdiction to deal with disputes relating to ownership of land. See section 3 of the Act and my decision in **Ronald Rai Mwanyika v. Chakaya Nduto, Msa HCCC No 215 of 2011 (O.S)**.

Because of the statutory limit of 6 months prescribed under section 9 (3) of the Law Reform Act, Certiorari may only issue against the order of the Senior Resident Magistrate's Court of 27th April 2011 pursuant to the Provincial Appeals Committee decision. It will not issue to quash the decision of the Provincial Appeals Committee of 29th October 2008 and the Land Disputes Tribunal of 23rd July 2002 which was adopted by the Kwale Senior Resident Magistrate's Court in Land Case No 4 of 2003 on 12th February 2003. However, in view of the legal position that the Tribunal and the Provincial Appeals Committee whose decisions the Lower Court sought to enforce have no jurisdiction in a matter of ownership of land, this court must be able to declare it so. Since the 1953 decision of **Barnard v. National Dock Labour Board**, the importance of declarations in situations where certiorari was unavailable for reason of time limitation has been acknowledged. Discussing this advantage of declarations, **Wade & Forsyth, Administrative Law 9th Ed (2004) at p. 649** observed:

*“The advantages of the declaration were brought into prominence in 1953 in **Barnard v. National Dock Labour Board (1953) 2 Q.B. 18. Dock workers in London had been dismissed for refusing to operate a new system for the unloading of raw sugar, and began actions for declaration that their dismissal was illegal. When they obtained discovery of documents they found that the vital order had been made not by the Local Board but the Port Manager, who had no power to make it. Thus they won their case. But had they applied for certiorari they would probably have been unable to discover the irregularity and they would have been out of time, more than six months having expired. The Court of Appeal observed that certiorari was ‘hedged round by limitations’ and that it was right to grant declarations and injunctions in order to prevent statutory tribunals from disregarding the law.”***

(9) The Constitution of Kenya 2010 provides for the remedies of declaration, injunction and judicial review orders in applications for enforcement of fundamental human rights and freedoms under Article 22 of the Constitution. The Applicant sought to rely on the principle of disregard of technicalities of procedure in achieving the justice of the case. I have on numerous occasions held that in line with the established tradition of the court through the full bench decision in **Githunguri v. Attorney General No. 2 (1986) KLR 1**, the court is entitled to treat an application for judicial review as one for the enforcement of fundamental human rights and freedoms and thereafter make appropriate orders thereon as such. In the present case, the Applicant's judicial review application for Certiorari may be treated, and I will so deem it, as an application for the enforcement of the right to property under Article 40 of the Constitution. As such an application, the remedy of declaration in addition to judicial review orders may be made to declare the want of jurisdiction of the tribunal and the Provincial Appeals Committee to deal with issue of ownership of land, without regard to the six month limitation for the grant of certiorari.

(10) It does not matter for the grant of judicial review orders that there is provision for appeal and that the Applicant has not availed himself of the remedy. Indeed, under the section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, the only requirement is that the appeal be determined or the time limited for appeal lapses before an application for leave to file for judicial review is considered. Even on principle, there is, as **Wade & Forsyth ibid at p. 703** observe no requirement for exhaustion of remedies before judicial review:

“In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies

before judicial review can be granted. A vital respect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeals which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal, for example where an appeal is already in progress, or the object is to raise a test case on a point of law.”

The Applicant in this case cannot be denied the opportunity to seek judicial review merely because he did not exercise his right to appeal from the decision of the Provincial Appeals Committee, which did not in any event have jurisdiction over the matter. The Applicant’s appeal to the Provincial Appeals Committee does not raise an estoppel to his raising objection on jurisdiction as there can be no estoppel to the law.

(11) Whether an order of prohibition will issue.

The order of prohibition is a consequential accompaniment of the order of Certiorari to prohibit acts in furtherance of the want of jurisdiction, in this case, of the Tribunal and the Provincial Appeals Committee by the orders of the court adopting the decision of the two inferior bodies. The same would therefore issue as prayed.

(12) Accordingly, for the foregoing reasons, I make the following orders on the Applicant’s Notice of Motion dated 6th June 2011:

(a) An order of Certiorari will issue as prayed to quash the order of Kwale Senior Resident Magistrate’s Court in Land Case No. 4 of 2003 made on 27th April 2011 to sub-divide the suit property.

(b) An order of Declaration is issued declaring that the Land Disputes Tribunal and Provincial Appeals Committee have no jurisdiction to determine disputes relating to ownership of land and that therefore the respective decisions of 23rd July 2002 and 29th October 2008 adopted by the Kwale Senior Resident Magistrate’s Court in Land Case No. 4 of 2003 on 12th February 2003 and 27th April 2003, respectively, are illegal, null and void.

(c) An order of Prohibition against the District Land Registrar, Kwale from acting upon the orders of the Kwale Senior Resident Magistrate’s Court orders of 12th February 2003 and 27th April 2011.

(d) There will be no order as to costs.

EDWARD M. MURIITHI
JUDGE

Dated and delivered this 14th day of September 2012.

F. TUIYOTT

JUDGE

In the presence of:

Mr. Alwenya for the Applicant

Mr. Shariff for the Respondent

Moriasi - Court Clerk