



JUDICIAL REVIEW

- *Order of prohibition can be directed to future acts that are contrary to the law.*

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
HIGH COURT MISC. APPLICATION 239 OF 2004

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AGAINST THE MERU CENTRAL DISTRICT AND DISPUTES TRIBUNAL

AND

IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT (ACT 18 OF 1990)

AND

IN THE MATTER OF THE MERU CENTRAL DISTRICT LAND DISPUTES TRIBUNAL CASE NO. 141 OF 2004

AND

IN THE MATTER OF LAND PARCEL NO. ABOTHUGUCHI/GAITU/411

REPUBLIC APPLICANT

VERSUS

THE DISTRICT COMMISSIONER (*as chairman Meru Central District Land Disputes Tribunal*) 1ST RESPONDENT
MERU CENTRAL DISTRICT LAND DISPUTES TRIBUNAL 2ND RESPONDENT

FREDRICK MUTWIRI MUTHAMIA 3RD RESPONDENT
FESTUS NTHAMBURI 4TH RESPONDENT
FABIANO GITI MUTHAMIA ALIAS MABIANO GITI 5TH RESPONDENT

JUDGMENT

The *ex parte* applicant Fabiano Giti Muthamia *alias* Mabiano Giti (**Fabiano**) obtained leave on 3rd December 2004 of this court to seek judicial review order of prohibition. On obtaining that leave, he filed a substantive Notice of Motion dated 20th December 2004. By that Notice of Motion, he seeks for an

order or prohibition prohibiting the 1st and 2nd respondents from entertaining, hearing and/or in any other way dealing with the 3rd and 4th respondent's claim over his land parcel number *Abothuguchi/Gaitu/411* (suit property). Fabiano deponed in his verifying affidavit that the suit property was registered in his name as absolute proprietor. He annexed to his affidavit the green card of the suit property which indeed shows that he is the registered owner and was so registered in 1967. He further deponed that the 3rd and 4th respondents had lodged a claim before the 1st and 2nd respondents alleging that Fabiano holds the suit property in trust for them. The said 3rd and 4th respondents allege that the suit property is family land. Fabiano deponed that the 1st and 2nd respondent lacked jurisdiction to entertain that claim. He therefore prayed that this court would protect the sanctity of his title and grant him prohibition orders to prohibit the 1st and 2nd respondent from entertaining that claim. The 3rd respondent in the replying affidavit sworn with the authority of the 4th respondent stated that he is the brother of Fabiano whilst the 4th respondent is the nephew of Fabiano. He said that the suit property was registered in the name of Fabiano by their old sickly father when Fabiano was a child. The suit property measures 10.90 acres. The 3rd respondent stated that he uses two acres of that land whilst the 4th respondent uses 1 ½ acres. That they have as family members occupied the land for over 30 years and in that period have carried out extensive developments on their portions. He stated that Fabiano had threatened to subdivide the land in order to alienate some of it. That they filed the action before the 1st and 2nd respondent to forestall that action. The 3rd respondent stated that he and the 4th respondent had a right to use and occupy the suit property and were entitled to enforce that right before the 1st and 2nd respondent. The jurisdiction of the land Dispute Tribunal is set out in the land Dispute Tribunal Act section 3 (1) (a) (b) and (c). That section is in the following terms:-

“3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

- (a) the division of, or the determination of boundaries to land, including land held in common;***
- (b) a claim to occupy or work land; or***
- (c) trespass to land***

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

Bearing in mind that section, I will reproduce the 3rd and 4th respondent's claim before the Tribunal. It is in the following terms:-

“The Land Disputes Tribunals Act 1990

(No. 18 of 1990)

An application to file a claim

To the Clerk

Meru Central District

Material facts on which the claimant intends to rely:-

- This suit land belongs to our late father therefore it is a family land.***
- The objector is our brother***
- He was registered this suit land by our father before he died.***
- Both of us have settled in this suit land and developed our portion and we have children who depend on us.***
- We have asked the objector that we sub divide this suit land and he has refused.***
- The objector is evicting us so that he can share this suit land with his sons only.***
- We have filed this dispute claiming our right.***

The learned counsel Mr. Maroro on behalf of the 1st and 2nd respondent argued that this action by

Fabiano is premature because the 1st and 2nd respondents had not heard the matter. He submitted that Fabiano should have waited for the tribunal to hear and determine the matter and it is after the tribunal had made their decision that he could have moved for Judicial Review orders. He submitted further that Fabiano could not seek to lock out a party wishing to be heard by the 1st and 2nd respondents. He said that essentially there was no decision that was being challenged by Fabiano in this matter. Learned counsel for the 3rd and 4th respondent Mr. Gikunda Anampiu submitted that Fabiano was speculating in stating that the claim by the 3rd and 4th respondent was based on trust. This he said was because the tribunal had jurisdiction to determine dispute on trespass, use of land and boundary. He said that to grant prohibition as sought by Fabiano would block the 3rd and 4th respondent from claiming their rights under those ends. In the case **Kenya National Examination Council vs. Republic** [1997] eKLR. The Court of appeal in considering when the order of prohibition would issue stated:-

“It is an order of the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for the excess of jurisdiction or absence of it but also for the departure from the rules of natural justice. (Underlining mine)

In the case **Republic vs. The Commissioner of Police & Ano.** Misc. Application No. 534 of 2003 the court had this to say about the order of prohibition:-

“Prohibition

Prohibits unlawful act which a public authority is proposing to perform i.e. it operates as to the future.” (Underlining mine).”

In the website page of Wikipedia Order of Prohibition is defined as follows:-

PROHIBITING ORDER

A prohibition order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. Examples of where prohibiting orders may be appropriate include stopping the implementation of a decision in breach of natural justice, or to prevent a local authority licensing indecent films, or to prevent the deportation of someone whose immigration status has been wrongly decided.”

From those authorities it can be seen that the order of prohibition can issue to stop future acts which go beyond the jurisdiction of the Tribunal. From the claim which is reproduced above in this judgment filed by the 3rd and 4th respondents before the tribunal, it becomes clear that largely they were claiming their right to occupy the suit property. That right is within the jurisdiction of the Land Dispute Tribunal Act. It is only one ground which takes the claim beyond the jurisdiction of the tribunal that is, the claim that the suit property be divided amongst the family members. The tribunal’s jurisdiction does not lie in matters involving title. This position has been upheld by courts on countless number of times. In the case relied upon by Fabiano’s counsel, that is, **Republic vs. The District Commissioner (as Chairman) Meru Misc. Civil Application No. 223 of 2004.** The High Court was entertaining a judicial review application seeking to quash a decision of the tribunal which decision had ordered the transfer of a registered property to the interested party. Lenaola J in that case stated as follows:-

“A further point of consideration is this; the Tribunal used the terms “authorize” land registered in the names of the applicants to “revert” back to the 3rd respondent. What the Tribunal did not say expressly was that the titles held by the applicants ought to be cancelled and title thereby conferred on the 3rd respondent. I quite agree with counsel for the applicants that the Tribunal has no such mandate. S. 159 of the Registered Land Act, Cap 300 is clear on the point It provides inter alia as follows:-

“Civil suits and proceedings relating to the title to, or the possession of landor to any interest in the landbeing an interest registerable under this Act shall be tried by the Court.....”

The only proviso in that Section relevant to this case is that where the dispute falls under “the provisions of section 3(1) of the Land Disputes Tribunals Act”, then the dispute shall be tried under that Act (see Act No. 18/90).”

In my view, this court can issue orders to prohibit a tribunal from entertaining the claim by the 3rd and 4th respondents which would be in excess of the jurisdiction of the tribunal as set out in section 3 (1) of the Land Dispute Tribunal Act. It is for that reason that the court does grant the following orders:

1. The court does hereby issue an order of prohibition prohibiting the 1st and 4th respondent from entertaining any aspect the of the 3rd and 4th respondents’ claim which touches on the title Abothuguchi/Gaitu/411. It follows that the claim by 3rd and 4th respondents for the parcel Abothuguchi/Gaitu/411 to sub-divided cannot be entertained.

2. Since both sides have partially succeeded and because they are related to each other I will order that each party pays their own costs.

Dated, signed and delivered at Meru this 13th day of April 2011.

**MARY KASSANGO
JUDGE**