



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**JUDICIAL REVIEW NO 90 OF 2009**

**DANIEL KIBUI WAITITU.....APPLICANT**

**VERSUS**

**KIPIRIRI DISTRICT LANDS DISPUTES TRIBUNAL .....RESPONDENT**

**J U D G E M E N T**

This is a Judicial Review application. The ex-parte applicant is Daniel Kibui Waititu who filed the Notice of Motion dated 23/9/09 in which he seeks an order of Certiorari to issue to remove to this court, the proceedings and award of the Kipipiri District Land Disputes Tribunal in Kipipiri Division case no 46 of 2008 for purposes of quashing the same . The Respondent is the Kipipiri Land Disputes Tribunal while the Interested Parties are Gladys Wairimu Kiragu and Kiragu Waititu .

The application is predicated on grounds found in the Statutory statement and the affidavit of the applicant dated 23/9/09, submissions and authorities filed by Mr Njogu, counsel for the applicant on 28/2/2011. The application was opposed by the Interested parties who filed a replying affidavit dated 11/7/2010 , submissions and authorities on 5/11/2010.

The Respondent did not appear.

The ex-parte applicant is the brother of the 2<sup>nd</sup> Interested Party, Kiragu Waititu, who are both sons of one Beth Ngima Waititu (deceased) . The 1<sup>st</sup> Interested Party is the wife of the 2<sup>nd</sup> Interested Party who is said to be dumb and deaf and that his why his wife filed a suit on his behalf at the Land Disputes Tribunal.

The applicant contends that land parcels Nyandarua /Kirima/1716 and 1717 were allotted to him by the Settlement Fund Trustee ( DW1) and he made payments for the said plots (DW2). Titles in respect of 1716 and 1717 were issued to him on 17/11/99 as evidenced by the copies of title (DKW 6 )and (7). He also attached the search certificates as proof of ownership (DW8) and (9). The 2<sup>nd</sup> Interested Party filed Kipipiri LDT case 46/2008, claiming that the land belonged to their mother , Beth Ngima and that the late Beth Ngima had wished that the land be subdivided into 2 equal portions and to be shared by her 2 sons equally. The applicant denied that he was registered as proprietor to hold the land in trust , on behalf of himself and his brother. The Tribunal heard the dispute and directed that the Nyandarua Surveyor do curve 3 Ha (7 acres) out of the plot 1716 and surrender it to the Interested Parties (DKW 10) and the decision was adopted by the Nyahururu PM'S Court. It is the applicants contention that the tribunal had no jurisdiction to determine the said claim which was based on trust and the award is therefore a nullity and should be quashed by

an order of Certiorari . Counsel relied on **Republic Vrs Kajiado Land Disputes Tribunal HM ISC 1689/2001** where the court held that the court has supervisory functions over tribunals to strike out nullities. He also cited **Republic VRS Nyandarua Land Disputes Tribunal no 79/1999**, where the court held that the court had jurisdiction to quash any decision made by the tribunal without jurisdiction.

The 2nd Interested Party deponed that their mother, Beth Ngima was allotted the said piece of land 277 Kirima Scheme in 1966 and the ex -parte applicant requested to be registered as trustee to which their mother agreed, on condition that the land was held in trust . He further deponed that the land belongs to Beth Ngima, who paid the Settlement Fund Trustee and upon completion of payments, the applicant was registered as the proprietor and that according to Kikuyu Customary Law, the land was held in trust for the sons of Beth Ngima and the tribunal had jurisdiction to determine the claim for division of property and that the issue of trust that has been raised herein is misplaced . Mr Nderitu, Counsel for the Interested Parties also argued that if the applicant was dissatisfied with the decision , he should have appealed as provided under section 8(1) of the Land Disputes Tribunal Act . Counsel relied on many decisions inter alia **Republic Vrs JSC ex-parte Pareno (2004) I KLR 203, Wamukoya Vrs Kipsaina Land Disputes TRibunal (2003) KLR 59.**

The jurisdiction to hear and determine disputes is donated to the Tribunal by section 3(1) of the Land Dispute Tribunal Act. The said section provides as hereunder:-

**“3(1) subject to the Act , all cases of a Civil Nature involving a dispute to,**  
**(a) The division of, or the determination of boundaries to land, including land held in common,**  
**(b) a claim to occupying or work land, or**  
**(c) trespass to land,**

**Shall be heard and determined by a tribunal established under section 4”**

Having considered all the rival arguments made before this court, it is apparent that the suit land, Nyandarua /Kirima/1716 and 1717, are both registered under the Registered Land Act, Cap 300 Laws of Kenya. The suit land was registered in the name of the ex-parte applicant as absolute owner since 17/11/1999. I have read the proceedings before the Land Disputes Tribunal Kipipiri which were exhibited ( DKW 10) and it is apparent that the applicant and the 1<sup>st</sup> Interested Party have a dispute over the ownership of the said land. The Interested Party alleges that the land was held in trust, for the benefit of both the applicant and the 1<sup>st</sup> Interested Party which the applicant denies. That dispute is reinforced by the decision made by the tribunal . The Tribunal’s award reads as follows: -

- (1) In view of the facts before this Panel of elders, Mr Daniel Kibui Waititu is guilty of monopolizing the land in question and denying his brother Kiragu his birth rights of owning his Mother’s land.**
- (2) Through this ruling, the Nyandarua District Land Surveyor is requested to curve 3 Ha. or 7 acres of land from Nyandarua/Kirima/1716**
- (3) .....**

By this decision the tribunal made a disposition of land from the applicant to the respondent which action fell outside the mandate of the Tribunal as conferred by Section 3(1) of the Act . The applicant being an absolute proprietor , the title could only be defeated or challenged on account of fraud and the Tribunal had no jurisdiction to make such a determination . Since the allegation was that the land was held in trust, the only court with jurisdiction to determine that issue was the High Court or a Resident Magistrate’s Court where the property does not exceed a value of British pounds 25,000. Under section 159 of the Registered Land Act. I am therefore satisfied that the Land Disputes Tribunal Kipipiri lacked the jurisdiction to hear and determine the claim

between the applicant and the 1<sup>st</sup> interested party and therefore acted in excess of the jurisdiction conferred by section 3(1) of the Act. As was held in the Kajiado Land Disputes Tribunal case, an order of certiorari lies to quash a decision made in excess or without jurisdiction or a nullity. An appeal only lies on the merits of a decision but in this case, the decision is a nullity and only a order of certiorari can issue to quash it.

Although the applicant is aware that the award of the Land Disputes Tribunal had been adopted by the Principal Magistrate's Court, Nyahururu. The applicant has not sought to have the courts award quashed. However, since the decision that gave rise to the proceedings. in the Principal Magistrate's Court is annulity anyway, the Court will quash the decision of the Land Disputes Tribunal and it follows that all subsequent proceedings and orders arising therefrom are nullities. Prayer 1 of the Notice of Motion dated 23/9/2009 is granted with costs to the applicant.

**DATED AND DELIVERED THIS 11<sup>th</sup> DAY OF MAY, 2011.**

**RPV WENDOH  
JUDGE**

**PRESENT**

Mrs Kereri holding brief for Mr Njogu for Applicant

Mr Nderitu for Respondent for 1<sup>st</sup> and 2 Interested Parties

Kennedy Oguma – Court Clerk