



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE**

**Miscellaneous Civil Appeal 541 of 2003**

**IN THE MATTER OF AN APPLICATION FOR CERTIORARI AND PROHIBITION BY JOHN  
KIMANI MWAURA**

**AND**

**IN THE MATTER OF PROCEEDINGS AND AWARD OF THE PROVINCIAL LAND  
DISPUTES APPEALS COMMITTEE CENTRAL PROVINCE DATED 24<sup>TH</sup> JANUARY 2003**

**BETWEEN**

**REPUBLIC**

**VERSUS**

**THE CHAIRMAN, PROVINCIAL LAND DISPUTE**

**APPEAL COMMITTEE CENTRAL PROVINCE.....RESPONDENT**

**AND**

**MWAURA KIMANI.....INTERESTED PARTY**

**JOHN KIMANI MWAURA.....APPLICANT**

**R U L I N G**

**The Application**

1. The application before court is the Notice of Motion dated 23/09/2003 and filed in court on 23/09/2003. The Applicant is John Kimani Mwaura. John Kimani Mwaura is son to Mwaura Kimani the Interested Party herein. The application is expressed to be brought under the Law Reform Act, Cap 26, The Land Disputes Tribunals Act, No. 12 of 1990, Section 3A of the Civil Procedure Act Order LIII Rule 3 of the Civil Procedure Rules and all enabling provisions, rules and regulations. The Applicant seeks **ORDERS-**

1. *THAT this Honourable Court be pleased to issue an order of CERTIORARI and an order of PROHIBITION to:-*
  - (a) *Remove into the High Court the award of the Chairman Provincial Land Disputes Appeals Committee Central Province dated 24<sup>th</sup> January 2003 REF MARAGWA 31/2002 and quash the same by an order of certiorari.*
  - (b) *Prohibit the Respondent either singly or jointly from taking any proceedings and/or making order similar to or in the same manner as the award and order the subject of Judicial Review.*
  - (c) *Compel the Respondent to strictly adhere to the law and evidence in any further and/or other proceedings relevant to this matter should this Honourable Court deem it fit, fair and just to refer the matter to it.*
2. *THAT this Honourable Court be pleased to make such orders as it deems fair and just for further/other proceedings relating to this matter.*
3. *THAT the costs hereof be awarded to the Applicant.*

3. The application is supported by 3 brief grounds on the face thereof, that is to say –

- (a) *The Respondent failed, refused, ignored and/or neglected to comply with and/or apply the relevant law in regard to the matter herein and in particulars the Land Disputes Act.*
- (b) *The above led to a wrong decision in this matter.*
- (c) *The procedure for an appeal herein is not appropriate as the judgment herein emanated from proceedings tkane and an award made by a body which lacked the legal jurisdiction to do what it purported to do, or to make the said Award.*

4. The Applicant states that the application is also premised on the Applicant's verifying affidavit of John Kimani Mwaura but other than the Verifying Affidavit annexed to the Chamber Summons application dated 3/06/2003, an application filed by the Applicant seeking leave of court to commence Judicial Review Proceedings, there is no other Verifying Affidavit on the record.

5. The application is opposed by the Interested Party, Mwaura Kimani. There are 4 grounds of objection to the application, namely:-

- (a) *THAT the application is bad in law vexatious and an abuse of court process.*
- (b) *THAT the application and reliefs sought are premised on wrong principles of law as are contrary to section 27 and 28 of the Registered Land Act. (sic)*
- (c) *THAT the Applicant has failed to comply with all the requisites of Order LIII.*
- (d) *THAT the Tribunal sitting at Kigumo in the Kigumo LDT Case No. 28 of 1997*

*lacked jurisdiction thereby arriving at ultra vires orders hence the whole proceedings were and are per incuriam.*

### **The Background of the Case**

6. The dispute herein concerns a parcel of land known as Loc. 4/GATITU/295 [THE SUIT LAND]. The Applicant herein, John Kimani Mwaura is the son to Mwaura Kimani, the Interested Party. On 18/06/1998, the Applicant took his father to Kigumo Land Disputes Tribunal seeking half share in the suit land. This was in Kigumo Tribunal Case No. 28 of 1997. The Kigumo Land Disputes Tribunal ruled that the Applicant was entitled to the half share he sought and went further to decree that the Applicant be issued with a title deed for the same. Judgment in terms of the award was entered by the Muranga Principal Magistrate's Court on 16/06/2000.
7. Being dissatisfied with the award and the subsequent judgment, the Interested Party, Mwaura Kimani, filed High Court Misc. Application Number 895 of 1998. That application was dismissed by Kuloba J (as he then was) on 25/04/2001. Armed with the judgment and decree of the PM's Court at Muranga, the Applicant went to the Land Registrar at Muranga for execution of the decree, only to discover that the suit land in the meantime been subdivided into 8 portions. On 22/03/2002, the Applicant went to court at Muranga and obtained an order for the cancellation of the new titles. The Registrar declined the Applicant's request on the ground that the Interested Party had lodged an appeal to the Provincial Appeals Committee.
8. The Interested Party's appeal was heard by the Provincial Appeal's Committee and by its ruling of 23/01/2002, the Provincial Committee set aside the award which had been made a judgment of the court on 16/06/2000. The above facts are the genesis of this application. The Applicant contends that the purported appeal to the Provincial Committee was filed way beyond the 60 days provided for under the Land Disputes Tribunals Act, 1990 and that in the circumstances the Provincial Appeals Committee had no jurisdiction to hear and determine the Interested Party's appeal. The Applicant also contends that no provisions exist under the Land Disputes Tribunals Act 1990, for enlargement of time for filing of appeals to the Provincial Appeals Committee and that even if such provisions existed, no evidence had been made available to show that the Interested Party took advantage of the provisions.

### **The Interested Party's Stand**

9. The Interested Party filed his submissions through the firm of P.N. Morigori & Company Advocates. The Interested Party contends that he is the registered owner of the suit land and that according to section 27 of the Registered Land Act, (the RLA) Cap 300 of the Laws of Kenya, he and he alone enjoys all rights and privileges accompanying such registration. He also contends that the Land Disputes Tribunals Act 1990, and in particular section 3 thereof sets the boundaries of the powers conferred upon the Land Disputes Tribunals established under the Act. The Interested Party argues that matters relating to title are not for such Tribunals to deal with. The Interested Party contends further that disputes pertaining to title of land are governed by section 159 of the RLA, namely that the jurisdiction for dealing with such matters is vested in the High Court. Section 159 of the RLA provides -

*“159. Civil suits and proceedings relating to title to or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate court, or, where the disputes comes within the provisions of Part IIIA of the Magistrates’ Courts Act, in accordance with that Part.”*

10. It is the Interested Party’s case that neither the Kigumo Land Disputes Tribunal nor the Provincial Appeals Committee can abrogate to itself powers that it does not have under the Land Disputes Tribunals Act. The Interested Party wants the awards of the District and Provincial Tribunals nullified since, in the Interested Party’s view, they were made in contravention of the provisions of section 3(1) of the Land Disputes Tribunals Act, 1990. The relevant subsection reads:-

*“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*

### **The Respondent’s Stand**

11. The Respondent filed its submissions on 27/07/2009. The Respondent contends that the Applicant’s application offends the provisions of Order LIII Rule 2 of the Civil Procedure Rules which provides thus:-

*“(2) Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”*

12. The Respondent contends that since Rule 2 of Order LIII of the Civil Procedure Rules is couched in mandatory terms, its non-compliance makes the application fatally defective. The Respondent also argues that though there is no time bar in respect of prohibitions, the same should not be allowed since the order for certiorari lacks merit; and that to issue an order of prohibition would be acting in vain. The Respondent wants the Applicant’s application dismissed.

### **Authorities**

13. The Respondent relied on **Nairobi Misc. Application Number 752 of 2006 Magnate Ventures Ltd & Another –vs- The City Council of Nairobi & 2 Others** in which it was held inter alia, at page 22 of Wendoh J’s ruling that

*“I do agree with the Court of Appeal decision in NYAGAS CASE (supra and WILSON OSOLO CASE (supra) that there is no provision for extension of the 6 months period under Order 53 Civil Procedure Rules. However that is not exactly what the MWALULU CASE dealt with. The court did not allow the extension of time but found that Order 53 Rules 2 and 7 do not deny this court jurisdiction to grant orders of certiorari outside 6 months in relation to administrative orders other than formal judgments, orders, decrees, convictions or other proceedings of inferior courts or Tribunals. The court said,*

*“A careful scrutiny of S.9 of the Law Reform Act, pursuant to which order 53 Rules were made and in particular 2 and 7 which it is contended denies this court jurisdiction to grant or give the orders of certiorari outside 6 months reveals that only formal judgments, orders, decrees, convictions or other proceedings in an inferior court or tribunal fall within the 6 months period stipulated --- Order 53 Rules 2 when prescribes the time limit does not also include anything covered by the principle of ultra vires or any nullities or decisions made without jurisdiction at all.”*

14. What is clear from the above analysis of Rule 2 Order LIII of the Civil Procedure Rules is that formal judgments, orders, decrees, convictions or other proceedings in an inferior court or tribunal fall within the 6 months period stipulated. The instant case is one in point and it is covered by the 6 months period.
15. The second authority relied on by the Respondent is Kisii HCC Misc. Application No. 15 of 2006 JOSEPH GETAMA ROSWE –VS- NTIMARU DIVISION LAND DISPUTES

TRIBUNAL & ANOTHER in which the court applied Rule 2 of Order LIII to find and to hold that an application by which the Applicant sought to quash an award made 8 months prior to the making of the application for leave could not be maintained.

16. In Busia HCC Misc. Application No. 8 of 2002 – MICHAEL OYUGI & 4 OTHERS –VS- BUDALANGI LAND DISPUTES TRIBUNAL & 2 OTHERS, the court applied Rule 2 of Order LIII of the Civil Procedure Rules and struck out the main motion that was premised on leave obtained by the Applicant some 17 months after the decision sought to be quashed was made.

**Findings and Conclusions**

17. In the instant case, the award by the Tribunal was made a judgment of the court at Muranga on 16/06/2000. The ruling of the Provincial Appeals Committee was made on 23/01/2002. The actions which the Applicant seeks to have quashed were made more than 6 months before the instant application was filed.
18. On the basis of the above findings, the Applicant's application is incompetent and fatally defective and cannot therefore succeed. The same is hereby dismissed with costs to the Interested Party and the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 5<sup>th</sup> day of March 2010.

**R.N. SITATI**

**JUDGE**

In the presence of

No appearance For the Applicant

No appearance For Interested Party

Mr. Cherogny for Kimeli For Respondent

Weche - Court clerk

