



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

Judicial Review 53 of 2008

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW FOR ORDERS OF
CERTIORARI AND PROHIBITION**

AND

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

AND

IN ACCORDANCE WITH ORDER LIII OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

NAHASHON MUKUNDI NGUNYI.....APPLICANT

VERSUS

**THE DIVISIONAL LAND DISTRICT
TRIBUNAL, NORTH KINANGOP.....1ST RESPONDENT**

**THE PRINCIPAL MAGISTRATE
NYAHURURU LAW COURTS.....2ND RESPONDENT**

**AND
RUTH W. KAHUNGI.....INTERESTED PARTY**

EX-PARTE

REPUBLIC

RULING

This Ruling relates to a Notice of Motion dated 4th December 2006 and filed pursuant to leave of court granted to the ex-parte applicant on 14th November 2006. The Applicant's Motion seeks -

(1) *an order prohibiting the Principal Magistrate's Court in Nyahururu and any other subordinate court from granting and issuing any orders adopting the award of the Divisional Land Disputes Tribunal of North Kinangop made on 1st September 2006 or in any manner from dealing with Nyahururu Principal Magistrate's Land Dispute Case No. 44 of 2006 relating to parcels of land Title Nos. Nyandarua/Ol Aragwai/236 and Nyandarua/Ol Aragwai/2117.*

(2) an order of certiorari against the Divisional Land Dispute Tribunal of North Kinangop to bring to the High Court for the purposes of being quashed the proceedings and decision by the North Kinangop Land Disputes Tribunal made on 1st September 2006 relating to parcels of Title Numbers Nyandarua/Ol Aragwai/2306 and Nyandarua/Ol Aragwai/2117;

(3) an order for costs.

The application is founded upon the Statement of Facts and the Affidavit Verifying the Facts filed together with the Application for leave referred to above, and the grounds that -

(a) the Applicant is the registered owner of all those land parcels known as Title Nos. Nyandarua/Ol Aragwai/2306 and Nyandarua/Ol Aragwai/2117.

(b) the Applicant is registered as trustee of the said land parcels on behalf of the family;

(c) the North Kinangop Land Disputes Tribunal acted in excess of its jurisdiction against the provisions of the Land Disputes Tribunals Act 1990 (No. 18 of 1990) of the Laws of Kenya;

(d) On 1st September 2006 the Land Dispute Tribunal North Kinangop made an award to the effect that the Applicant do transfer parcel Title No. Nyandarua/Ol Aragwai/2306 to the Interested Party names.

(e) the Principal Magistrate's Court at Nyahururu has no jurisdiction to deal with Titles in terms of Section 159 of the Registered Land Act, (Cap. 300, Laws of Kenya);

The motion was expressed to be served upon the Registrar High Court of Kenya, Nairobi, the Principal Magistrate Nyahururu Law Courts, Nyahururu, the Land Disputes Tribunal, North Kinangop, and the Interested Party.

According to the Affidavit of one Noel M. N. Muniyithya a process server of the High Court, the Interested Party, Ruth W. Kahungi was served with the Notice of Motion at 3.55 p.m. on 11th December 2006. Thereafter the Interested Party has been served with a mention notice for 26th February 2007; on 15th February 2007, by one Victor Mulwa sworn on 23rd February 2006, another mention notice for the 9th April 2008 (according to the Affidavit of Service of Samuel M. Ndirangu (a duly authorized process server) sworn on 31st March 2008.

On 9th April 2008, the Hon. Nyamu J (as he then was) directed all parties to file and serve their written submissions within 14 days, and directed the file to be transferred to the Environment and Land Division and that a hearing date be taken in the Registry within 14 days, and that notice of the order to issue.

When the file landed at the Environment and Land Division Hon. Osiemo J., ordered that the file be transferred to Nakuru. On 10th February 2009, the firm of Mirugi Kariuki & Company filed a Notice of Change of Advocates. When the matter went before Hon. Lady Justice Mugo on 25th September 2009, the Judge directed that the ex parte Applicant's Notice of Motion (*supra*) be served on the Attorney-General in accordance with the procedure laid down in Order V, rule 9A in compliance with section 13 of the Government Proceedings Act, (Cap. 40, Laws of Kenya). No such service was effected upon the Attorney General and as a consequence the learned judge declined to rule on the Motion, and directed that the Attorney General be served within 7 days failing which the stay granted herein shall be lifted and will if so facto lapse.

Although there is no Affidavit of Service on record of the Motion on the Attorney General, a Notice was sent to the Deputy Registrar, of this court, by way of a letter dated 25th November 2009 that the Attorney-General was duly served on 30th September 2009 (*within the 7 days ordered by Lady Justice Mugo*). This is confirmed by the Notice of Appointment of Advocates dated 2nd March 2010 signed by Muthoni Kimani, MBS, Senior Deputy Solicitor General for the Attorney-General.

Even prior to the filing by the Attorney-General of his Notice of Appointment of Advocates mention notices for 3rd March 2008, had been served upon the Interested Party and the Attorney-General respectively on 16th February 2010 and 18th February 2010. The Mention Notice of 3rd February 2010 also required the parties to file their written submissions, by 3rd March 2010 when the court would give directions/ruling date on the Motion.

So when this matter was mentioned 3rd March 2010, only the ex parte Applicant's counsel had filed written submissions. Since the Attorney-General had filed his Notice of Appointment of Advocate, it confirmed that the orders by Lady Justice Mugo made on 25th September 2009 had been complied with and this court is at liberty to deliver this Ruling.

Although applications are properly served upon the Attorney-General, and the Attorney-General quite often gets involved in judicial review matters particularly those relating to halting of prosecution of some ex parte applicants, in matters relating to judicial review of decisions of Land Disputes Tribunals, the disputes are usually between the parties contesting the decision of the tribunal the ex parte complainant (*applicant*) and the Interested Party (*usually the beneficiary of the decision of the Tribunal*) more often than not he (the AG) merely holds a watching brief. This case is one such example. The North Kinangop District Land Disputes Tribunal made a decision on 1st September 2006 in which it ruled that Title No. Nyandarua/Ol Aragwai/2306 should be registered in the name of Ruth W. Kahungi instead of Mr. Nahashon Mukundi Kahugia, and even directed that the Executive Officer (*of this Honourable Court*) do sign the documents to cause change of documents relating to Nyandarua/Ol Aragwai/2306.

The firm of Mirugi Kariuki has raised six issues in his written submissions on behalf of the ex-parte applicant. The issue is just but one - whether the North Kinangop Land Disputes Tribunal had the necessary jurisdiction to determine a question of title from one party to another. The answer to this question has been stated in every court that the Land Disputes Tribunal does not have any such jurisdiction. Hon. Mr. Justice Maraga, the Presiding Judge of this court put it this way - **"The Tribunal had absolutely no jurisdiction to do any of these things. It appears to me that Tribunals established under the Act think that they can deal with literally anything under the sun as long as it involves land. That of course is wrong. The long and short of this matter is that the Tribunal had absolutely no jurisdiction to entertain a dispute on ownership of property."**

The learned Judge made the above observations in the case of R. vs. Olenguruone Land Disputes Tribunal, ex-parte Richard Koech (*Nakuru H.C.C. Misc. Application No. 412 of 2006*). This is exactly the case here. The North Kinangop Land Disputes Tribunal found as a fact that the land in question i.e. 10 acres of Mr. Mukundi was divided into two No. 2117 and 2306, being 2117 Mr. Mukundi and 2306 should be Ruth's land.

The law establishing Land Disputes Tribunals confers on them a specific jurisdiction under Section 3(1) of the Lands Disputes Tribunals Act 1990 (No. 18 of 1990 (the Act)). The jurisdiction is limited to disputes involving:

- (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;*

Beyond these three areas the Tribunals tread illegally when they declare that someone else's land belongs to some one else. Hon. Mr. Justice Khamoni in exhaustive judgment in **WAMWEA vs. CATHOLIC DIOCESE OF MURANGA REGISTERED TRUSTEES [2003] KLR 389** put it in a language that even lay people such as most members of tribunals should understand -

"Tribunals and Land Disputes Appeals Committees do not have jurisdiction to hear disputes over title to land. Disputes over contracts are also not under their jurisdiction."

The tribunal's reasoning appears to be that the Interested Party being a sister to the ex-parte applicant is entitled to a portion of their late mother's parcel of land. This may well be so. The problem is the law. It does not grant Land Disputes Tribunals the power to dish out land to anyone who comes before them however meritorious the claims may appear. Only the High Court has such power under Section 159 of the Registered Land Act, (Cap. 300, Laws of Kenya). The Section says -

"S. 159 - Civil suits and proceedings relating to title to or possession of land, or to the title to 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 pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunals Act, in accordance with that Act."

That Section as I held in the case of **Josephine Wairimu Nganga vs. Francis Wangombe Chege (Nakuru H.C. Civil Appeal No. 228 of 2008)**,

"gives a triple jurisdiction, first on issues to title to, or possession of, land or to title to a lease or charge registered under the Act, to the High Court, and "secondly where the value of the land is KES25,000=00 or below, where the jurisdiction may be exercised by a Resident Magistrate, and thirdly to the Land Disputes Tribunals where the disputes do not concern registered or registrable interests in land, under the Act."

In this case, to defeat the title of the ex parte Applicant the Interested Party will need to move the High Court under Section 143 of the Registered Land that the registration by the Respondent (*even if it is a first registration, (the section says - other than a first registration)*) was obtained, made, or omitted by fraud or mistake, or if a purchaser in possession, acquired the land for valuable consideration without knowledge, or without contributing substantially to the fraud, mistake by his act, neglect or default.

For those reasons, the decision of the North Kinangop District Land Disputes Tribunal made on 1st September 2006 is called up to this court and quashed and set aside by order of certiorari.

Having quashed the decision of the Tribunal, there is nothing to prohibit. The prayer for an order of prohibition does not lie and is therefore denied.

As this is a family dispute and this Ruling may not be end of the matter, I direct that each party shall bear its own costs. There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 14th day of May, 2010

M. J. ANYARA EMUKULE
JUDGE