



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

**MISC. APPLICATION 267 OF 2006**

ISAAC MWANGI MAINA.....APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE'S COURT, NYAHURURU.....1<sup>ST</sup> RESPONDENT  
NYANDARUA-NORTH KINANGOP DIVISION LAND DISPUTES TRIBUNAL.....2<sup>ND</sup> RESPONDENT  
JANE WAMBUI MWANGI.....3<sup>RD</sup> RESPONDENT

**RULING**

The applicant in the instant motion seeks an order of Certiorari to quash the proceedings and award of the **Nyandarua-North Kinangop Division Land Disputes Tribunal in Land Dispute Case No.239 of 2005** as well as proceedings and adoption thereafter by the **Nyahururu Principal Magistrate in Principal Magistrate's Land Dispute Case No.14 of 2006** (erroneously stated as 2002). It is the applicant's contention that the Tribunal had no jurisdiction to entertain the dispute; that the dispute related to a division of matrimonial property; that the suit property is registered in the sole name of the applicant under the **Registered Land Act**.

Consequently, it was submitted that the adoption of the award by the Nyahururu Principal Magistrate was a nullity and of no consequence. The 3<sup>rd</sup> respondent, who should have been the interested party, **Jane Wambui** has deposed in reply to the application that the dispute concerned their matrimonial land, a share of which she is claiming on account of her marriage to the applicant;

that the land being a family land was communal and hence the Tribunal had jurisdiction to entertain the dispute.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents i.e. the Principal Magistrate, Nyahururu and Nyandarua-North Kinangop Division Land Disputes Tribunal, respectively, have filed grounds of opposition that the application is bad in law, misconceived and incurably defective; that the facts and the evidence presented in support of the application do not meet the threshold required for the grant of the orders sought; that the application offends mandatory provisions of **sections 8 and 9 of the Law Reform Act** and **Order 53 rules 1, 2, 3, 4 and 7 of the Civil Procedure Rules**; that the Tribunal acted within its jurisdiction; that the Principal Magistrate's Court at Nyahururu acted within its jurisdiction.

I have considered these averments, written submissions and authorities cited. The two broad issues for determination in this application are whether the procedure of instituting judicial review proceedings was complied with and whether the Tribunal and the Principal Magistrate's Court at Nyahururu acted within the law. It was submitted that the provisions of the **Law Reform Act** dealing with judicial review and those of **Order 53** were not complied with. Specifically it was argued that contrary to the provisions of **Order 53 rule 4(1) of the Civil Procedure Rules**, the applicant has introduced additional grounds and reliefs in the Notice of Motion which were

not in the statement of fact at the leave stage. Secondly, it was submitted that the introduction of additional affidavit dated 13<sup>th</sup> May, 2006 was in contravention of **Order 53 rule 4(2)** aforesaid.

Regarding the first ground, the additional grounds relied on by the applicant in the motion have not been specified. This court cannot

assume such matters in view of the fact that the application for leave was made in a separate miscellaneous file which is not part of this file.

Regarding the additional affidavit, I have noted that there is a 5 paragraph verifying affidavit dated 5<sup>th</sup> June, 2006 and a normal affidavit dated 13<sup>th</sup> May, 2006. In terms of **Order 53**, other than the verifying affidavit, the applicant can, with leave of the court and upon giving notice, file a further affidavit in response to affidavits of any other party under **rule 4(2)**. Again **rule 4(1)** directs that copies of any affidavits accompanying the application for leave shall be supplied on demand. The only other affidavit under **Order 53** is that provided in **rule 3(3)** where the applicant must file an affidavit giving the details (names and address) of persons who have been served with the notice of motion and those not served.

The affidavit dated 13<sup>th</sup> May, 2006 was clearly used at the stage of leave. Such affidavit can only be used beyond the leave stage only on demand. The 1<sup>st</sup> and 2<sup>nd</sup> respondents appear to be saying that they have not demanded the affidavit yet it is accompanying the notice of Motion. It is my considered view that no prejudice has been caused to the other parties by the inclusion of that affidavit. After all it deposes the very matters that are raised in the application as a whole.

I turn to consider the substantive issue in the application namely whether the Tribunal had jurisdiction. The Tribunal’s jurisdiction is spelt out in **section 3(1)** of the **Land Disputes Tribunals Act**, as:

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

It is common ground that the suit land is registered in the name of the applicant under the **Registered Land Act** (Cap 300).

The respondent and the interested party were husband and wife but the later has filed a divorce cause in Naivasha - **Divorce Cause No.291 of 2005**. The interested party’s claim before the Tribunal is summarized by her counsel’s submissions thus:

**“The applicant may be registered proprietor of Land Parcel No. L.R. NYANDARUA/OL’ARAGWA/OL’ARAGWA/12 but being married to the 3<sup>rd</sup> respondent herein he only held the land in trust for her and the rest of the family members..... It is our submission that this land was held in common since this was matrimonial property.”**

That was indeed the interested party’s claim, that she was entitled to the property in question as it was a family property held in trust for the family by the applicant; that she was entitled to a share of the property by reason of the same being a matrimonial property.

The Tribunal under the sub-heading “**FINDING**” at paragraphs 15 and 16 state:

**“15. We note that the *shamba* you gave your wife is not enough for her and her children whom you have neglected.**

**16. Customary (sic) when a person has three houses you have to divide your property according to the houses equally.”**

Then they decided that:

- “1. You are required to give your first wife 12 acres of land to cater for her and her children and access road.**
- 2. You are also required to build a proper house to your wife Jane Wambui Mwangi**  
.....”

Looking at the claim and the decision against **section 3(1)** aforesaid, there cannot be any doubt that the Tribunal lacked jurisdiction to give the above awards.

Issues of trust and division of matrimonial property are beyond the Tribunal. It is settled that where a Tribunal exceeds its powers or exercises powers that it does not have, or where it makes a decision in violation of the rules of natural justice, that decision is for quashing by this court by way of *certiorari*.

The jurisdiction of the magistrate’s court is clearly defined by **section 7** of the **Land Disputes Tribunal Act**. Apart from receiving

from the chairman of the Tribunal, the decision together with any disposition or documents used before the Tribunal, the magistrate's court can only enter judgment and a decree issued. The role is purely mechanical. The magistrate has no powers to reject or review the decision. By entering judgment in this matter the Principal Magistrate, Nyahururu acted within the law. However, the basis of that judgment was faulty. The judgment it follows cannot stand.

For the reasons given the decision of the **Nyandarua North- Kinangop Division Land Dispute Tribunal in Land Dispute Case No.239 of 2005** made on 21<sup>st</sup> February, 2006 and the subsequent proceedings and orders are hereby quashed with costs to the applicant.

**Dated, Signed and Delivered at Nakuru this 11<sup>th</sup> day of June, 2010.**

**W. OUKO**

**JUDGE**