



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

Miscellaneous Civil Application 14 of 2009

**REPUBLIC.....APPLICANT
VERSUS**

**NG'ARUA LAND DISPUTES TRIBUNAL.....1ST RESPONDENT
THE SENIOR PRINCIPAL MAGISTRATE NANYUKI.....2ND RESPONDENT**

AND

**CHARLES MWANGI MATHENGE.....1ST INTERESTED PARTY
DISTRICT LAND REGISTRAR, LAIKIPIA.....2ND INTERESTED PARTY
THE COMMISSIONER OF LANDS.....3RD INTERESTED PARTY**

**JOSEPH CHEGE GATUA &
ZACHARIA KARIMI GATUA.....EXPARTE APPLICANTS**

RULING

Pursuant to leave granted on 2nd July 2007, **JOSEPH CHEGE GATUA** and **ZACHARIA KARIMI GATUA**, the applicants herein, took out the Motion dated 9th July 2007 in which they applied for the following orders:

1. *THAT an order of Certiorari do issue to remove into this court for the purpose of being quashed the judgment and/or decree made by the Senior Principal Magistrate's Court Nanyuki in Land Case No. 37 of 2006 issued on 27th April 2007, arising from the award of Ng'arua Land Disputes Tribunal in Tribunal Case No. 9/206 in relation to Land parcel No. LAIKIPIA/KINAMBA MWENJE BLOCK 1/1235.*

2. *THAT an order of prohibition do issue to prohibit the Commissioner of Lands and/or the District Land Registrar, Laikipia from rectifying the Register hence nullifying title No. LAIKIPIA/KINAMBA MWENJE BLOCK/1235, transferring, and/or conferring proprietorship interest in the said parcel of land or processing further intended conferment of proprietorship interest of the said parcel of land to CHARLES MWANGI MATHENGE.*

The Motion is accompanied by the statutory statement of facts and is verified by the affidavit of **JOSEPH CHEGE GATUA**. **CHARLES MWANGI MATHENGE** the 1st Interested Party filed a replying affidavit to resist the Motion. The Provincial Litigation Counsel, filed a notice of Preliminary Objection to oppose the Motion on behalf of the Respondents and the 2nd and 3rd Interested Parties.

When the Motion came up for the substantive hearing, Miss Munyi, Learned Provincial State Counsel, argued two preliminary points of law. First, that the application for leave to institute the order for certiorari was filed out of time. Secondly, that the order of prohibition against the Commissioner for Lands and/or the District Land Registrar is untenable. **MR. CHWEYA**, learned advocate for the

Applicants, was of the view that since the Tribunal's decision is a nullity, this court has jurisdiction to quash the adopted decision irrespective as to whether or not leave was sought within the time prescribed. I have considered the rival submissions made by learned counsels. I have also considered the material placed before me. The history of this dispute started when **CHARLES MWANGI MATHENGE**, the 1st Interested Party herein, filed a complaint before the Laikipia Land Disputes Tribunal, claiming a portion of the parcel of land known as **L.R. NO. LAIKIPIA/KINAMBA MWENJE BLOCK 1/1255**. The complaint was heard and determined on 27th September 2006. The Tribunal awarded the 1st Interested Party 5 acres to be excised from the aforesaid parcel of land. The Applicants were each given 2½ acres. **JOSEPH CHEGE GATUA**, the 1st applicant herein, filed the Motion dated 25th October 2006 before the Senior Resident Magistrate's Court vide **NANYUKI SENIOR RESIDENT MAGISTRATE'S LAND CASE NO. 37 OF 2006** in which he sought for the award to be read and adopted as the judgment of that court. The Tribunal's decision was adopted as the judgment of the Nanyuki Senior Principal Magistrate's Court on 27th April 2007. The decision is the one the Applicants are now seeking to be quashed vide the Motion dated 9th July 2007. It is the submission of Miss Munyi, learned Provincial Litigation Counsel, that the application for leave was filed outside the six months fixed by the law. There is no doubt that the Laikipia Land Disputes Tribunal delivered its judgment on 27th September 2006. This fact is shown in the affidavit of **JOSEPH CHEGE GATUA** sworn and filed in support of the Motion dated 25th October 2006 filed in Nanyuki Senior Resident Magistrate's Court vide Nanyuki **SENIOR RESIDENT MAGISTRATE'S COURT LAND CASE NO. 37 OF 2006**. The application for leave so is dated 28th June 2007. In the aforesaid summons the Applicants had sought for leave to apply for an order of certiorari to quash the judgment and decree of the Nanyuki Senior Resident Magistrate's Court issued on 27th April 2007 vide Nanyuki Land Case No. 37 of 2007 arising from the decision of Ng'arua Land Disputes Tribunal vide Tribunal Case No. 9 of 2006 dated 27th September 2007. The facts in this matter are settled that the decision which was adopted by the Nanyuki Senior Principal Magistrate's Court was the award made on 27th September 2007. Under *Order LIII rule 2* of the Civil Procedure Rules, and the provisions of *Section 9 (3)* of the Law Reform Act, it is expressly stated that no leave should be given to apply for the orders of certiorari if six months have lapsed from the date of the decision. The decision which was adopted by the Senior Principal Magistrate's Court was made on 27th September 2006. The application for leave is dated 28th June 2007 and filed on 29th June 2007. The application for leave was filed nine (9) months after the Tribunal's decision was made. It is alleged that the Senior Principal Magistrate's Court had no jurisdiction to adopt the award. It is obvious that the decision of the Land Dispute's Tribunal can only be executed after it has been adopted as the decision of the subordinate court under *Section 7 (2)* of the Land Disputes Tribunal's Act No. 18 of 1990. The role of the subordinate court is largely formal. The adoptive order cannot be regarded to be the decision of the adopting court. In the English case of **R =VS= SECRETARY OF STATE EXPARTE HARBAGE [1978] 1 ALL E.R. 324** it was stated as follows:

“It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, the judge who granted leave to set aside such leave.”

In **AGA KHAN EDUCATION SERVICE KENYA =VS= ALI SEIF & 3 OTHERS C.A. NO. 257 OF 2003 (unreported)** at page 7, the Court of Appeal expressed itself as follows:

“So once there is an arguable case, leave is to be granted and the court, at that stage, is not called upon to go into the matter in depth. Again, by their very nature exparte orders are provisional and can be set aside by the judge who has granted it, of course if the judge is still available to do so. We think that if the judge who granted leave

cannot sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the Superior Court.”

In the end I am convinced the order for leave should be set aside. The order for leave is a provisional order which can be set aside on application and the court is not impeded from making the order if it is shown that the order of leave was made in contravention of the law or on misrepresented facts. The Applicant misled the Court dealing with the application for leave into believing that it was handling an application for leave to apply for an order of certiorari to quash the decision of the Senior Principal Magistrate’s Court.

In the end I am satisfied that the Preliminary Objection is well founded. It is upheld. Consequently the order for leave is set aside. The Motion therefore stands incompetent hence the same is hereby ordered struck out with costs to the Interested Parties.

Dated and delivered at Nyeri this 11th day of June 2010.

J. K. SERGON

JUDGE

In open court in the presence of:-

Mr. Wairoma for the Respondent

Wachira holding brief Ndegwa

No appearance for Chweya for Applicant.