



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Miscellaneous Civil Application 261 of 2005

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW
AND IN THE MATTER OF NYANDARUA OL-KALOU DIVISION LAND DISPUTES TRIBUNAL CASE NO.10
OF 2004 & NYAHURURU P.M.C. LAND DISPUTE TRIBUNAL CASE NO.39 OF 2003

AND

IN THE MATTER OF

REPUBLIC.....APPLICANT

AND

NYANDARUA OL-KALOU DIVISION LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

PRINCIPLA MAGISTRATE'S COURT NYAHURURU.....2ND RESPONDENT

EX PARTE

NAHASHON MWANGI KARANJA.....SUBJECT

RULING

From a letter addressed to M/s. Gakuhi Chege and Company Advocates, advocates for the applicant dated 7th September, 2005 by Kiplenge, Ogola & Mugambi Advocates, it is apparent that leave to institute these proceedings for judicial review was granted in High Court Misc. Civil Application No.229 of 2005. Following that leave, a motion was brought on 26th April, 2005 in which the applicant Nahashon Mwangi Karanja sought an order of *Certiorari* to quash the decision of **Nyandarua Ol-Kalou Land Dispute Tribunal in Tribunal Case No. 39 of 2003** (erroneously stated as No.10 of 2004 in the Motion) and the resultant proceedings in **Nyahururu PMC Land Dispute Tribunal Case No.10 of 2004**. This is an extremely protracted dispute that has remained unresolved for several years. In 2003 it was referred to the **Nyandarua Ol Kalou Division Land Dispute Tribunal in Dispute No.39/2003**, the subject of this application.

After hearing the parties, the Tribunal found that:

“1. the Tribunal has established that there is a dispute between the two parties

2. it has been established that the dispute has lasted more than forty (40) years

3. **it was established that the dispute is of land claim but not boundary**
4. **it was noted that the Land Registrar and Surveyor had visited the disputed ground in 1995 and the anomaly on the ground was noted which was not rectified**
5. **it was found that the Surveyor had done his work in both parcels but he never showed the parties the boundary.”**

Consequently, the Tribunal made the following award:

“1. the court to execute the documents

2. **the surveyor to visit the disputed area and rectify the boundaries on the ground to tally with the acreage shown in the Title Deed for both parties**
3. **the Land Registrar to amend the Mutation and the Title Deed to conform with acreage on the ground**
4. **both parties to meet survey fees.”**

The decision was rendered on 27th October, 2004 following a referral by the subordinate court from an earlier decision of the same Tribunal given on 3rd July, 2003 in **Dispute No.5 of 2003**. This application has challenged the Tribunal’s decision of 27th October, 2004 on the grounds that the Tribunal had no jurisdiction to entertain the dispute; that the claim was lodged out of time and that it was *res judicata*. Starting with the last ground, it was the applicant’s contention that the Tribunal could not entertain the dispute in view of the fact that the same issues, subject matter and parties were involved in an earlier dispute, being **Tribunal Case No. 5 of 2003** which decided with finality the issues in controversy. Similarly the Land Registrar had also determined the dispute.

On the question of jurisdiction, the applicant argues that the issue in dispute is not the boundary but a claim to land, which is outside **section 3(1)** of the **Land Disputes Tribunal Act, No. 8 of 1990**.

On limitation of actions, it was submitted that the dispute arose over forty years before the filing of the case in the subordinate court. The determination of this application depends on the interpretation of **section 3(1)** aforesaid which stipulates the jurisdiction of the Tribunal to be

- 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

Was the dispute related to any one or more of the above areas?

From the evidence, pleadings and correspondence, it would appear that the dispute related to boundary between two parcels, NYANDARUA/OL KALOU WEST 2 AND NYANDARUA/OLKALOU WEST 3 belonging to the interested party and the applicant, respectively.

Testifying in **Dispute No.5 of 2003**, the interested party stated when he was asked by the tribunal **“What was your claim?”** Interested party:-

“It was a boundary claim”

He complained that the applicant’s land had eaten into his portion of land by nearly 6½ acres. It is also contended that the title document in the possession of the interested party in relation to parcel No.3 shows a larger parcel than the actual one on the ground.

Finally, in undated proceedings before the Land Registrar headed **“BOUNDARY DISPUTE,”** the Registrar in a

rather contradictory ruling first observed that:

“The problem between the two parcels of land is their common boundary which both of them seem not to know

Both of them show different points, which has brought the present problem.”

He went ahead to make the following findings:

“Upon taking the measurements of the two plots, it was found that the respondent had encroached into the applicant’s land by 92 meters on the upper side along the road and by 82 meters on the lower side. This translates to 2.64ha.”

The Registrar then rather strangely concluded that:

“This being the case, it is my considered opinion that it is only prudent if the right boundary is marked on the ground to conform with both the Registry Index Map and the area development plan. However, since the area in dispute is really big portion that the applicant is claiming, I will suggest without any prejudice that he obtains an order from a competent court because it appears to me that this ceases to be a boundary dispute but a land claim (sic).”

However one looks at it, the dispute is clearly on the extent of each parcel of land which in essence is a question of boundary.

But this is not an ordinary boundary dispute. The dispute as I have explained is in relation to a claim by the interested party that his title document shows a larger parcel than he actually occupies on the ground. That is a question beyond the determination of the Tribunal and in terms of **sections 3, 19, 20, 21, 142(1)(c) and 159** of the **Registered Land Act** ought to have been conclusively dealt with by the Registrar. This is particularly so in view of the contradicting positions on the two parcels of land. For instance, at some stage, during the hearing of the dispute by the tribunal, the interested party claimed that parcel No.3 measured 8Ha, which according to him translated to 15 acres. He also claims that the applicant’s land (parcel No.2) encompasses 6½ acres of his land. That his parcel is larger on paper than it is on the ground. Yet another contention in the various documents annexed to the application is that parcel No.3 is 4.76Ha while the green card for the same parcel shows that it is 5.2Ha. Parcel No.2 on the other hand is shown to measure 9.47Ha. A copy of the title deed in respect of parcel No.2 is specific that it is 3.99Ha. Although by dint of **section 159** of the **Registered Land Act**, the Tribunal can entertain a dispute under the Act if the dispute comes within the provisions of **section 3(1)** of the **Land Disputes Tribunals Act**, the dispute herein is of the nature that could only be resolved by either the Registrar or the High Court as the confusion is not on the ground where the boundary between the two parcels are clearly marked and fixed. The confusion, instead, is with the documents at the lands office.

To the extent explained hereinabove, the Tribunal had no jurisdiction to give the directions it gave. But even if I was to find that the Tribunal acted within its powers, the claim would still have been caught up by the provisions of the **Limitation of Actions Act**. The parties herein were allocated their respective parcels in 1963/64. According to paragraph 3 of the applicant’s statement of facts:

“ 3. THAT in 1988, his neighbour one JOHN NDUNGU NJINU, the proposed interested party who owns plot No.3 OL KALOU WEST SCHEME started claiming land and registered a dispute with the NYANDARUA DISTRICT LAND REGISTRAR for determination of boundary between the respective pieces of land.”
(Emphasis supplied)

The fact of the dispute erupting in 1988 has support in a number of documents annexed to this application. An action to recover land must be brought within twelve (12) years. The action was filed in the Tribunal in 2003, fifteen (15) years after the cause of action arose.

I do not wish to address the other matters raised suffice to reiterate that the interested party’s only option was the Registrar.

For the reasons stated, the decision of the Tribunal in Land **Dispute No.39 of 2003** together with subsequent orders are quashed by an order of *Certiorari*.

Costs to the applicant.

Dated, Signed and Delivered at Nakuru this 9th day of June, 2010.

**W. OUKO
JUDGE**