



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC CASE 78 OF 2008**

**IN THE MATTER OF: AN APPLICATION TO APPLY FOR A JUDICIAL REVIEW ORDER  
OF**

**CERTIORARI**

**AND**

**IN THE MATTER OF: TIGANIA SENIOR RESIDENT MAGISTRATE'S COURT  
CIVIL CASE NO. 177**

**OF 2007**

**AND**

**IN THE MATTER OF: MAUA PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 37  
OF 2004**

**AND**

**IN THE MATTER OF: LAND PARCEL NO. 183 SITUATED IN AKIRANG'ONDU  
ADJUDICATION**

**SECTION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**SENIOR RESIDENT MAGISTRATE, TIGANIA**

**LAW COURTS ..... 1<sup>ST</sup> RESPONDENT**

ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT

AND

ISAAC MBITI JOHN M'THANGATHA..1<sup>ST</sup> INTERESTED PARTY

M'ITABARA M'IMYUNYA ..... 2<sup>ND</sup> INTERESTED PARTY

### JUDGMENT

The application before court is by way of notice of motion brought under sections 8 and 9 of the Law of Reform Act and Order LIII Rule 3(1) of the Civil Procedure Rules. The *ex parte* applicant seeks an order of *certiorari* to issue to quash the decree of Tigania Magistrate Court No. 177 of 2007. The interested parties and the respondents in this matter did not file papers in opposition to the application. The facts relied upon by the *ex parte* applicant are that she obtained a decree in Maua PMCC No. 37 of 2004 whereby the second interested party who is her husband was restrained from disposing land parcel No. 183 situated in Akirang' Ondu Adjudication Section. The terms of the decree in PMCC Maua No. 37 of 2004 were as follows:-

- (a) *The defendant holds land parcel No. 183 Akirang' odu Adjudication section in trust for the plaintiff and the children.***
- (b) *That an order of permanent injunction do and is hereby issued restraining the defendant from disposing land parcel no. 182 AKIRANG' ONDU ADJ. SECTION or dealing with the said land in any manner to prejudice the interest of the plaintiff***
- (c) *Costs and interest in this suit to go to the plaintiff.***

Thereafter, on 3<sup>rd</sup> April 2008 vide Tigania SRMCC No. 177 of 2007 the first respondent issued a decree which was contrary to the one quoted above. In that case, the first interested party is the plaintiff and the second interested party is the defendant. It is not clear what prayers were sought by the first interested party in that action but it is possible to deduce the same from the decree that came from that court and a subsequent order. The decree in Tigania SRMCC No. 177 of 2007 provided as follows:-

- (a) *Judgment be and is hereby entered for the plaintiff against the defendant on admission.***
- (b) *The defendant be and is hereby ordered to execute transfer of land parcel No. AKIRANG' ONDU ADJUDICATION Section to the plaintiff and in default the Executive Officer Tigania Law Courts to execute the said transfer.***

The same court in the same case issued the following order on 30<sup>th</sup> June 2008:-

- (1) *Judgment be and is hereby entered in favour of the plaintiff against the defendant admission.***
- (2) *The defendant is hereby ordered to execute transfer of Land Parcel No. AKIRANG' ONDU ADJ. SECTION to the plaintiff and in default thereof, Executive Officer Tigania Law Courts do execute the said transfer.***

As it is clear from the quoted decrees above, the orders issued by Tigania Court in case No. 177 of 2007 nullified the order that had previously been issued in favour of the *ex parte* applicant in Maua Case No. 37 of 2004. The *ex parte* applicant termed the orders of Tigania as illegal and enforceable. In my view, those orders were a clear abuse of the court process. In the case in Maua, the second interested party was the defendant. He was therefore very aware that the court had declared the parcel No. 183 AKIRANG' ONDU ADJ. SECTION to be family land and to be held in trust for the *ex parte* applicant and the children. By the order of that court, the second interested party was permanently enjoined from

disposing that land. It is clear that in participating in the Tigania case, the second interested party was probably of the view that he had formulated an ingenious method of defeating the order issued by the Maua magistrate court. As it can be seen from the extracted decree of the Tigania case, the second interested party admitted the claim made by the first interested party. The effect of that was to have the suit property transferred to the first interested party in a sense defeating the decree of Maua court. This court cannot countenance such an act by the interested parties. The *ex parte* applicant application to quash the decree and order of Tigania magistrate court is merited. The judgment of this court is as follows:-

***(1) This court does hereby issue an order of certiorari to bring into this court the decree dated 3<sup>rd</sup> April 2008 and the order dated 3<sup>rd</sup> June 2008 and all consequential made in Tigania SRMCC No. 177 of 2007 and order is issued that the same be quashed.***

***(2) The costs of this application dated 23.10.2008 and the application dated 3.10.08 for leave shall be paid by the two interested parties to the ex parte applicant.***

Dated and delivered at Meru this 25<sup>th</sup> day of July 2009.

**MARY KASANGO**

**JUDGE**