



REPUBLIC.....APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE, NAKURU.....1ST RESPONDENT

BAHATI LAND DISPUTE TRIBUNAL.....2ND RESPONDENT

EX-PARTE

MARGARET MUTHONI MWANGI.....SUBJECT

RAHAB KANU GITONGA.....INTERESTED PARTY

RULING

By a notice of motion dated 7th November 2006 brought under **Order 53 rule 3 of the Civil Procedure Rules**, the subject herein seeks orders of prohibition against the Senior Resident Magistrate Nakuru, restraining the court from adopting the Bahati Land Disputes Tribunal Award curiously dated the ‘4th day of Wednesday 2005’ and which was issued in the Land Disputes Tribunal Cause No. 29 of 2005.

The subject (*applicant*) is the administratrix of the estate of the registered owner of land parcel No. BAHATI/BAHATI BLOCK 1/1677 and challenges the tribunal’s award on the basis that it was issued in total lack of jurisdiction on the part of tribunal. To the extent that the said award ordered the cancellation of the subject’s title it is in the subject’s opinion null and void. The proceedings before the tribunal are also challenged for having been conducted 20 years outside the statutory limitation of 12 years and also because they were conducted without the involvement of the estate of the deceased owner who passed away on 16th January 2005, four months prior to the tribunal hearing on 4th May 2005. Submitting on behalf of the subject **Mr. Githui** argued that a prohibitory order was an appropriate remedy in the circumstances since the decision of the tribunal, which in the circumstances is *ultra vires*, void and of no effect, ought not to be adopted by the court. He cited the following authorities in support of this position, which authorities have been duly considered;

1. **Emmanuel Obwanya Alutseshe vs. Henry Kombo Alutseshe** Civil Appeal No. 62 of 2001,
2. **Republic vs. Nandi Hills Tribunal. Ex-parte Alfred Kabus**, Misc. Application No. 134 of 2003,
3. **Beatrice M’Marete vs. Republic & 3 Others**, Civil Appeal No. 259 of 2000,
4. **Republic vs. Funyula Land Disputes Tribunal**, Misc. Application No. 78 of 2003.

Opposing the application learned counsel **Ms. Njoro** submitted that by seeking an order of prohibition instead of one of certiorari the subject was attempting to avoid being caught up by limitation under **Order 53 rule 2**. Counsel cited the case of **Kenya National Examinations Council vs. Republic Civil Appeal No. 266 of 1996** to support his argument.

The award challenged by the subject ordered, inter alia, that the parcel of land in question *i.e.* Bahati/Bahati Block 1/1677 belongs to Mrs Rahab Gitonga and that the land certificate issued to Mr. Francis Mwangi Gitonga (*the deceased*) over the same parcel be withdrawn and cancelled and a new one be issued to Mrs Rahab Gitonga. Under **section 3(1) of the Land Disputes Tribunal Act (No. 18 of 1990)** the mandate of the tribunal to arbitrate in matters of land is limited to;

(i) Division or determination of boundaries

(ii) A claim to occupy or to work land

(iii) Trespass

Clearly therefore the orders made by the tribunal were outside its jurisdiction. Under **Order 7** of the Act an award of the tribunal is to be filed in the magistrates' court whereupon the court shall enter judgment in accordance with the decision of the tribunal and upon judgment being entered a decree shall issue, which decree, according to **subsection 2 of section 7**, shall be enforceable in the manner provided under the **Civil Procedure Act**. That being the case I am of the persuasion that a prohibitory order is necessary in order to avoid an illegality being given effect by the adoption of the award.

A court of law must not and will never condone an illegality. I am of the considered view that, given the definition of a prohibition in **Halbury's Laws of England (4th edn.)** at paragraph 128 cited in **Re Kisima Farm Ltd KLR (E&L)1** at page 58 it is quite clear that a prohibition may issue whenever there is a likelihood that provisions of existing laws will be violated. The said definition reads as follows:

"The order of prohibition is an order issuing out of the High Court of Justice and directed to an ecclesiastical or inferior temporal court, or to the Crown Court, which forbids that court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land."

The parcel of land in question is registered under the **Registered Lands Act (Cap 300 of the Laws of Kenya)** which governs all dealings touching on title. Under **sections 143 and 159 of Cap 300** only the High Court or the Resident Magistrate's Court can order the cancellation or amendment of any registration, subject to the limits as to jurisdiction provided under **section 159**.

It may be argued, perhaps, that a person in the position of the subject ought to wait and appeal against any decree as would issue pursuant to **section 7** of the Act. It was held in the case of **Commissioner of Lands & Another vs. Coastal Aquaculture Ltd KLR (E&L)1** page 264 that the existence of a right of appeal to the court from a tribunal does not deprive the courts the power to grant an order or prohibition to restrain the tribunal from acting outside its jurisdiction. Although in the present case the order sought is directed at the Resident Magistrate's Court not the tribunal (*which has already made its award*) I am of the considered view that any and every likelihood of an illegal order being given effect must be nipped in the bud.

For the above reasons I find that the application has merit and the same is allowed with an order that parties bear their own costs of the same.

Dated signed and delivered at Nakuru this 30th day of October, 2009

M. G. MUGO

JUDGE