



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**Misc. Appli. 75 of 2006**

**M'MUTHAURA M'MUKUA ..... EXPARTE**

**VERSUS**

**SENIOR RESIDENT MAGISTRATE..... RESPONDENT**

**SOLOMON KUNGANIA MURUGU ..... 1<sup>ST</sup> INTERESTED PARTY**

**MANENE MBOROKI ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

The facts in this dispute are fairly straight forward and largely uncontroverted. The applicant has brought the instant motion under Order 53 of the Civil Procedure Rules as well as sections 8 and 9 of the Law Reform Act seeking orders of *certiorari*, *mandamus* and prohibition.

According to the statement of facts, verifying affidavit and annexures, the applicant made a reference to the Meru Central District Land Disputes Tribunal in LDT No. 63 of 2005 in respect of parcel of land No. NTIMA/NTAKIRA/1635. The tribunal in its award dated 5<sup>th</sup> July 2005 directed that the suit land be shared between the applicant and the 1<sup>st</sup> interested party as well as three others, namely, M'Muthaura M'Mikwa, M'Rinchoni M'Mikwa and M'Mukiira M'Mikwa.

That award was filed in the magistrate's court and read to the parties on 25<sup>th</sup> August 2005. The parties were advised of their rights to appeal against the award within twenty days. No appeal was preferred.

On 8<sup>th</sup> November 2005 the 1<sup>st</sup> interested party filed an application by way of a chamber summons before the magistrate's court praying that the award be confirmed as judgment of the court and for orders against the District Land Registrar to compel him to remove the caution placed on the suit land. He also sought that the District Land Registrar and the District Surveyor to be ordered to excise  $\frac{1}{4}$  of the suit land facing the road to be allocated to him (the 1<sup>st</sup> interested party) and finally that the Executive Officer of the court be empowered to sign all the necessary documents to effect the transfer.

All the prayers were granted *exparte* on 21<sup>st</sup> December 2005. The applicant was aggrieved by the orders and sought leave on 17<sup>th</sup> May 2006 to bring judicial review proceedings. Leave was granted, which leave was to operate as a stay of execution of the orders in question or further orders pending the hearing of the motion herein. The motion was subsequently filed.

The applicant's main contention in the application is that the magistrate's court had no jurisdiction to entertain and award orders to the effect that the  $\frac{1}{4}$  portion awarded to the 1<sup>st</sup> respondent be excised from the portion of the suit land facing the road; that the learned magistrate also had no jurisdiction to order the removal of the caution on the suit land and finally that she had no jurisdiction to order the Executive Officer to sign the documents to effect the transfer.

The applicant, therefore seeks that an order of *certiorari* be issued to remove to this court Meru CM LDT Case No. 63 of

2005 for the purpose of quashing the orders dated 22<sup>nd</sup> December, 2005. He further seeks an order of mandamus to be issued to the magistrate to compel her to order the Land Registrar, Meru to cancel and close the register for the sub division of the suit land and to retain the original register as at 22<sup>nd</sup> December 2005.

Finally, the applicant seeks an order of prohibition to be issued against the magistrate from issuing orders or further orders in Meru CM L.D.T. No. 63 of 2005 which are in excess of her jurisdiction or contrary to the award filed by the tribunal. The magistrate was served with the application but failed to enter appearance or even reply to the same.

The 1<sup>st</sup> interested party filed a replying affidavit for himself and on behalf of the 2<sup>nd</sup> respondent in which they maintain that the magistrate had jurisdiction in the matter. That the application for judicial review has been brought one year after the decision being challenged. They further state that after the orders in question were made they obtained a consent from the Land Control Board after which they proceeded to sub divide the suit land into two portions, namely, NTIMA/NTAKIRA/3834 and 3835, respective hence No. NTIMA/NTAKIRA/1635 – the suit land ceased to exist at the time this application was brought. That No. 3834 now belongs to a third party. That the orders sought will serve no useful purpose.

I have considered these ritual arguments as well as submissions by both counsel. I have also taken into account the two authorities cited by counsel for the applicant. An order of *certiorari* is intended to quash a decision made without or in excess of jurisdiction or where the rules of natural justice have not been complied with. Mandamus, on the other hand, will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

Finally an order of prohibition is directed to an inferior tribunal or body and its purpose is to stop that tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the law or in violation of rules of natural justice. See **Kenya National Examination Council and Republic Exparte Geoffrey Gathenji Njoroge and nine (9) others**, Civil appeal No. 266 of 1996.

The first matter I intend to deal with is the question of whether or not this application was brought after six months of the decision being challenged. Order 53 Rule 2 of the Civil Procedure Rules provides that leave shall not be granted to apply for an order of *certiorari* unless the application for leave is made not later than six months after the date of the decision being challenged.

The decision being challenged in the present motion is that of the learned Senior Resident Magistrate made on 21<sup>st</sup> December 2005 and not that of the Tribunal dated 5<sup>th</sup> July 2005.

Leave was sought by way of chamber summons dated and filed on 17<sup>th</sup> May 2006 a period of five months. That ground must fail.

The next question is whether an order of *certiorari* is available to the applicant. I have already noted that the 1<sup>st</sup> interested party brought an application in the magistrate's court for the confirmation of the Tribunal's award as judgment. That application also sought three other substantive orders, namely,

- (i) that the District Land Registrar be ordered to remove the caution on the suit land,
- (ii) that the District Land Registrar and the District Land Surveyor to excise  $\frac{1}{4}$  of the suit land facing the road and register the same in the name of the 1<sup>st</sup> respondent.

Those prayers were granted. The Land Disputes Tribunal Act clearly and deliberately defines the jurisdiction of every level of litigation under it. For instance the jurisdiction of the Tribunal is spelt out in section 3 that of the magistrate's court in Section 7, while section 8 provides for the Land Disputes Appeals Committee. Finally, the High Court's jurisdiction is found in section 8(9).

The role of the magistrate's court under section 7 is stated as follows:-

***“7(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any dispositions or documents which have been taken or proved before the Tribunal***

***(2). The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”*** (emphasis supplied).

The preamble to the Act states:-

***“An Act of parliament to limit the jurisdiction of magistrate’s courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes.”***

That clearly demonstrates the place of the magistrates in disputes under the Act. Long before the decision in **Zedekiah M. Mwale V. Bikeke Farm Directors H.C. Appeal No. Kitale** 25 of 1998 to which I was referred, Nambuye, J in **Makau Philip Mutiso V. Kanko ole Lepen** HCC Appeal No. Machakos 163 of 1999, held, among other things, as follows:-

***“When the provisions of section 7 are applied to the facts of this appeal it is evidently clear that all the three parties concerned were wrong, namely the appellant’s counsel, the respondent’s counsel and the magistrate. The reasons are:-***

1. ....

2. ....

***3. The learned trial magistrate was wrong because all that he is required to do under the Act is to receive the award and enter judgment and thereafter a decree is to be drawn and execution to issue. No other proceedings are to be undertaken in the lower court.”***

I, on the basis of the foregoing, find that the Senior Resident Magistrate, the respondent herein exceeded her jurisdiction when she made the orders in question. It must of course be noted that the first order confirming the award as judgment was within the law and in order. However, it cannot be severed from the rest of the decision. The orders made on 21<sup>st</sup> December 2005 and issued on 22<sup>nd</sup> December 2005 are hereby quashed.

I turn to consider the prayer for mandamus. It is sought to be issued to the Senior Resident Magistrate to compel her to order the Land Registrar, Meru to cancel and close the register opened for sub-division and retain the original register. I have just held that the role and duty of a magistrate under this Act is restricted to entering judgment in terms of the Tribunal’s award. The Senior Resident Magistrate has no jurisdiction to order anybody to do anything with regard to the suit property.

Secondly, Mandamus as I have stated, is a prerogative remedy which compels the performance of a public duty imposed by statute where the person or body or whom the duty is imposed fails or refuses to perform the same. The public duty imposed on the Senior Resident Magistrate by virtue of Section 7 is to receive the award from the Tribunal and enter judgment in accordance with the award. That, the Senior Resident Magistrate has done, albeit irregularly. Mandamus is, therefore, not available in that regard.

Finally, an order of prohibition is intended to restrain a tribunal or body from continuing proceedings which are in excess of its jurisdiction or in contravention of the law or contrary to the rules of natural justice. The order of prohibition is sought against the Senior Resident Magistrate from issuing orders or further orders in L.D.T No. 63 of 2005.

It is said that prohibition looks to the future. Where a decision has been made, as is the case in this matter, whether in excess or without jurisdiction or even in violation of rules of natural justice, an order of prohibition would be nugatory. The order can prevent the making of a decision before it is actually made.

It has been averred that this application has been overtaken by events as the suit land no longer exists following its sub-division and eventual transfer of a portion thereof to a third party. The sub-division and the resultant transfer were made possible by the order of the Senior Resident Magistrate lifting, without jurisdiction, the caution and empowering the Executive Officer to sign the relevant documents.

It is trite that a judgment or order of a court made without jurisdiction is a nullity. See Halsburys Laws of England, 3<sup>rd</sup> Edition, Vol. 9 at page 351:-

***“Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”***

This is expressed in the Latin maxim *ex nihilo nihil fit* (out of nothing comes nothing). Having quashed the judgment it is upon the parties to move the lower court start the process afresh from that stage.

I award costs to the applicant against the 1<sup>st</sup> interested party.

Orders accordingly.

Dated and delivered at Meru this 3<sup>rd</sup> ...day of June... 2008.

**W. OUKO**

**JUDGE**