REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Misc Appli 67of 2006

REPUBLIC …….....…… APPLICANT

VERSUS

M'IBERE M'KAIBUA ……..…...…. INTERESTED PARTY

THE CHAIRMAN MERU NORTH DISTRICT L.D.T …….. 1ST RESPONDENT

THE ATTORNEY GENERAL ……...…… 2ND RESPONDENT

EX-PARTE APPLICANT: PETER NJIRU M'MAILUTHA

RULING

This is a judicial review application in which the applicant is seeking *certiorari* to quash the decision of the Land Dispute Tribunal, Meru North District (The Tribunal) in Land Dispute Tribunal No.72 of 2005. The applicant also seeks prohibition of the implementation of the decision of the Tribunal.

The Motion was filed after leave was granted in accordance with Order 53 of the Civil Procedure Rules. Also filed are the statement and verifying affidavit. It is the applicant's case that he is the owner of the land, the subject matter of this application, which was also the subject in dispute before the Tribunal, measuring over 3000 acres. That the same has neither been adjudicated or demarcated. That the land was bequeathed to him by his late father in the 1950s. That proceedings were instituted before the Tribunal in Case No.72 of 2005 in respect of the suit land. The applicant further states that the parties to the dispute were heard and the Tribunal visited the disputed land. In its decision, it was submitted, the Tribunal found that the suit land belonged to the Interest Party and went further to order that the same be registered in the name of the interested party. To that extend, the applicant argued, the Tribunal overstepped its mandate; hence this application. Although the Attorney General was served no appearance was entered and no reply to the application filed

The interested party filed a replying affidavit in which he contends that the application is fatally defective. That the applicant participated in the Tribunal proceedings and cannot be heard this late to complain about its jurisdiction. In any case the Tribunal had jurisdiction. I have now considered the application and take the following view of the same.

First, I have noted that the application seeks what it describes as "the writ of *certiorari"* and the "writ of prohibition". This court has no jurisdiction to issue writs of prohibition; *certiorari* or even *mandamus*. See the Law Reform Act, which is the basis for Judicial Review Law in Kenya. Section 8(1) and (2) provides as follows:

"8(1) The High Court shall not, whether in the exercise of its Civil or Criminal jurisdiction, issue any of the prerogative writs of *mandamus,* Prohibition or *certiorari.*

8(2) In any case in which the High Court in England is, by virtue of the provision of Section 7 of the Administration of Justice(Miscellaneous Provisions) Act, 1938 of United Kingdom empowered to make an order of *mandamus*, prohibition or *certiorari*, the High Court shall have power to make a like order"

The High Court in Kenya, in terms of the above provision cannot make what were known in England as prerogative writs. But instead it can issue orders, as opposed to writs, of *mandamus*, prohibition and *certiorari.* I say no on this point.

The application, as should be understood, the description of writ notwithstanding, is clearly seeking orders of *certiorari* and prohibition. An order of *certiorari* will issue if the decision complained of is made without or in excess of jurisdiction or where the rules of natural justice are not adhered to. The applicant contends that the Tribunal lacked jurisdiction in the proceedings between him and the interested party and that in making the decision in question it exceeded its jurisdiction.

The Tribunal is accused of basing its decision on the finding of Njuri Ncheke Council of Elders to which the dispute had been earlier referred by the interested party. The Njuri Ncheke found in favour of the interested party against one M'Itob Baitabathi who is alleged to have invaded the suit land. After the Njuri Ncheke found for the interested party and the said M'Itobi Baitabathi left the land, the applicant, without any colour of right also invaded the land and a dispute arose when the applicant demolished the interested party's house and carried away harvested crops. The interested party referred the matter, once again, to the Njuri Ncheke but the applicant did not appear.

That is the extent of the Njuri Ncheke's participation in the dispute. How did the Tribunal deal with the finding of Njuri Ncheke? First, it is clear from the proceedings before the Tribunal that the Chairmen representing Njuri Ncheke from Ntonyiri, Igembe Central, Laare and the Secretary, Njuri Ncheke, Mutuati testified before the Tribunal.

The Tribunal, in its award observed that the issue of ownership was decided by the Njuri Ncheke. It expressed itself as follows;

"One fact we established was that the plaintiff claimed the disputed land through traditional settlement and was successfully awarded the land by Njuri Ncheke Council of Elders through a "Nthenge"(he goat) oath."

The Tribunal further found that the decision of Njuri Ncheke was final, unless only by cleansing. In my view, what the Tribunal expressed in this regard cannot amount to taking into account extraneous matters. These are matters which were canvassed before the Tribunal. The Tribunal is also accused of relying on customary law, interpreting sketch plans and adjudicating dispute of land over which it had no jurisdiction. The basis of the Tribunal's authority is the Land Disputes Tribunal Act, 1990. Section 3 spells out the Tribunal's jurisdiction as resolving disputes as to:-

- division of, or the determination of boundaries to land, including land held in common
- a claim to occupy or work land; or
- trespass to land

The Tribunal is enjoined under Section 3(7) of the Act to adjudicate upon a claim and reach its decision in accordance with recognized customary law. It was not out of order for the Tribunal to rely on customary law as explained by the officials of Njuri Ncheke who testified before it.

On the sketch plans, Section 7 of the Act recognizes that other than a Claim and an Answer a party can rely on any other *"depositions and documents which have been taken or proved before the Tribunal"*.

The crux of the matter is, however, on the issue of whether or not the Tribunal had jurisdiction to adjudicate the dispute in question. The applicant has argued that the land in question falls within an area where consolidation is in progress. The other fundamental point is whether the Tribunal had jurisdiction to order that the interested party be registered as the proprietor of the disputed land. Starting with the first issue, I have already set out the jurisdiction of the Tribunal with regard to resolving dispute involving specific type of land. Land is defined in Section 2 as follows;

" Land" means "agricultural land" as defined in Section 2 of the Land Control Act, whether or not registered under the Registered Land Act, <u>but does not include</u> land situated within an adjudication Section declared under the Land Adjudication Act or the Land Consolidation Act, or land which is the subject of determination by the Land Registration Court under the Land Titles Act"(emphasis supplied).

"Agricultural Land" is, in turn defined in Section 2 of the Land Control Act to mean;

> "(a) land that is not within

(i) a municipality or township; or

(ii) an area which was on, or at anytime after the 1st July,1952 a Trading Centre under the Trading Centre Ordinance(now repealed); or

(iii) a market"

The Tribunal's jurisdiction is limited to agricultural land as defined above. The disputed land is generally described by the bordering land marks and neighbouring land as it is conceded that it has not been adjudicated. The Tribunal is precluded from dealing with land within an adjudication section declared under the Adjudication Act. Under Section 5 of the Act an adjudication section can only be declared by the adjudication officer by notice. It is a requirement that a separate notice shall be published in respect of each adjudication Section, and in each such notice the area of the adjudication section shall be defined as clearly as possible. It is, therefore, not enough to merely state that land falls within an adjudication section. One must go further to demonstrate that indeed the section has been published in a notice by the adjudication officer as an adjudication section. The applicant has not done this.

Does the land fall within an area where consolidation is in progress? Again no evidence was adduced on this aspect of the matter. It can therefore be concluded that the land is agricultural as it is not within a municipality or township. The parties before the Tribunal testified of grazing of cattle and cultivation of crops. According to the Tribunal the land is located in Matinyiru area of Mutuati Division and is not adjudicated. It is sandwitched between Matinyuru/Kigene hills, Ruongo Rua Mpuria hills, Ilungo and Maiga ya Tala hills.

The next matter is the order issued by the Tribunal to the effect that;

"…… the respondent, his agents and assignees(sic) vacate the

disputed land in favour of the plaintiff and that the disputed land be registered to(sic) the plaintiff to the extent of the attached sketch map once the region is declared adjudication section".

Although both the Claim and Answer are not part of the record before me, it is apparent that both the applicant and the interested party are claiming ownership of the land. On the one hand the applicant is asserting that he inherited the land from his father but was driven away following the shifta menace in the area. After the shiftas were eradicated he returned to the land, built a house and planted crops. That in his youth his father lived and grazed on the suit land. On the other hand the interested party is categorical that the applicant invaded(trespassed) on his land on which he had built a house, grazed cattle and planted food crops.

It was therefore a dispute as to who was entitled to the ownership of the disputed land. By entertaining this dispute the Tribunal acted *ulta vires* its powers. Its decision is for quashing. It is therefore ordered that the decision of the Land Dispute Tribunal, Meru North in LDT Case NO.72of 2005 and subsequent orders are hereby quashed. The applicant sought for prohibition. This relief is not available as the Magistrate's court has already acted on the Tribunals decision. Prohibition is issues to prevent a future event.

Costs of this application is awarded to the applicant.

DATED AND DELIVERED AT MERU THIS 2ND DAY OF MARCH,2007

W. OUKO

JUDGE