



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 412 of 2002

CHRISTOPHER KAGEMA GICHUHI PLAINTIFF/APPLICANT

Versus

LIVINGSTONE GITOME KOHIGUKA..... DEFENDANT/RESPONDENT

RULING

In this Notice of Motion dated 21st May 2007 the Applicant wants this Court to review its ruling dated 19th March 2007, set it aside and reinstate the Plaintiff's Complaint dated 7th March 2002. The application is brought under order XLIV Rules 1,2 and 3 of the Civil Procedure Rules and Sections 3A and 80 of the Civil Procedure Act.

Grounds in support of the application are that the ruling in question was based on mistakes or errors of law and facts on face of record, and that otherwise there are sufficient reasons to justify the review.

Mr. Nabutete argued the application for the Applicant while Mr. Achoko represented the Respondent. The latter did not say much only remarking that section 3 of the Land Disputes Tribunals Act gives jurisdiction to the Tribunal and that the Land Registrar had visited the suit parcel of Land to settle boundary dispute.

Otherwise Mr. Nabutete said the following: that section 3 of the Land Disputes Tribunals Act does not oust the jurisdiction of the High Court and continued and say; we submit there were errors on the face of the record both law and fact.

First, this was a Preliminary Objection raised on the spot and not raised early. It was therefore an ambush.

The Court was told had no jurisdiction because this was a matter governed by section 3 of the Land Disputes Tribunals Act and that also the Land Registrar had dealt with the case under section 21 of the Registered Land Act.

We submit that was a grave error. First, section 21 of the Act deals specifically with boundary.

The facts are that there are two pieces of land involved L.R.No.Ngong/Ngong/5862 belonging to the Applicant and registered in his name, and L.R. No/Ngong/Ngong.3132 belonging to the Respondent and registered in his name.

The fact of the two pieces of land was not disclosed. The fact that they are separated by a road and

therefore don't share a boundary and there could have been no boundary dispute.

It means that section 3 of the Land Disputes Tribunals Act could not apply this case being in the High Court which is not affected by section 3 of the Land Disputes Tribunals Act as that Act took from section 159 of the Registered Land Act only that part of the jurisdiction which the Magistrate had. That Act does not say it limits the jurisdiction of the High Court. It says it limits the jurisdiction of the Magistrate only.

We submit therefore that the jurisdiction of the High Court to hear cases of trespass has not been taken away.

Moreover section 60 of the current constitution of Kenya says it all. It should not be forgotten.

Section 9A (2) of the Magistrates Courts Act.

It prevents Magistrate from handling cases of title to land.

The Applicant in this case has title to land.

See the case authority *Wamwea v Catholic Diocese of Murang'a Registered Trustees* where it was held that a Land Disputes Tribunal had no jurisdiction over the issue of title to land.

Judge Mbogholi Masagha in *Samuel Kibe v Benson Murigi Njuguna & Another*. See page 2 second paragraph. Once land is registered, trespass can only be challenge to title.

That fact was not revealed to the Court. If the Court had been told that, the Court could not have said that was matter for the Tribunal.

The Tribunal does not have jurisdiction to deal with all trespass cases as that is what a careful study of the Magistrate's Act, the Land Disputes Tribunal's Act and Section 159 of the Registered Land Act would show that the High Court's jurisdiction in trespass matter was not taken away by the Land Disputes Tribunals Act.

The Applicant Plaintiff therefore seeks review of the decision in question so that the Plaintiff's suit is reinstated.

This is land matter. Land matter in Kenya is important. I ask the decision be reviewed.

Taking into account all those statements, I note that a copy of the Magistrate's Court Act (Cap.10) Mr. Nabutete is relying upon and therefore produced during the hearing is a Revised Edition 1989 (1985) containing provisions of the Magistrates Jurisdiction (Amendment) Act which were repealed. The learned counsel does not therefore seem to have been addressing me on the basis of full information from the contests of the Land Disputes Tribunal Act No.18 of 1990 which came into effect on 1st July 1993.

Moreover, the mistakes or errors of law and facts on account of which the Application is brought are not in reality apparent on the face of the record as claimed by the Applicant. The only apparent thing is that the Applicant has had an after thought which he is now claiming to be mistakes and errors of law in order to get the review sought in what has come out before me to be a disguised appeal thereby succeeding in making me sit on an appeal against my own ruling/order dated 19th March 2007 when I have no jurisdiction to do so. Errors or mistakes must be errors and mistakes conceived by the Applicant thereby entitling him to appeal and ought to have appealed instead of filing this Notice of Motion.

Otherwise I am of the view that what the Applicant has told me in this application are matters or evidence which, after the exercise of due diligence, was within his knowledge or could have been produced by him at the time when the ruling/order dated 19th March 2007 was made I could even have granted him an adjournment to go and have a better preparation had he complained (which he did note) that he was being ambushed.

In fact although the Applicant's Counsel talks of ambush, the position is that on that day 6th March 2007, the Objection I heard was in a Notice of Preliminary Objection dated 26th February 2007 and already filed on 1st March 2007 and served.

I started hearing it without any complaint from the Plaintiff's Counsel. At the close of submissions by Mr. Kanyi, the then Defendant's Counsel, Mr. Nabutete applied for adjournment to the next day partly to go and do better preparation because of the depth into which Mr. Kanyi had gone into his submissions and partly because he was bereaved. I granted that adjournment and when the parties returned the following morning 7th March 2007, further hearing started with Mr. Nabutete making his submissions on the Preliminary Objection up to the end without showing he was disadvantaged in any way.

For those reasons, this Notice of Motion dated 21st May 2007 be and is hereby dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 7th day of December 2007.

J.M. KHAMONI

JUDGE