



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 172 of 1998

**REPUBLIC.....
.....PLAINTIFF**

VERSUS

1. KIRINYAGA LAND DISPUTES TRIBUNAL

2. EX-PARTE – JEREMIAH WANGONDU BUNDI.....DEFENDANTS

R U L I N G

The ex-parte Applicant Jeremiah Magondu Bundi has come to this court under order LIII rule 3 of the Civil Procedure Rules seeking orders of certiorari to quash the proceedings and decision of the Kirinyagah District Land Disputes Tribunal in respect of L.R. Number Kabare/Gachigi/334, and Kerugoya Senior Resident Magistrate's Award Case Number 54 of 1998, and a further order of prohibition against the Kirinyagah Land Disputes Tribunal, Kerugoya Senior Resident Magistrate's court, and the Land Disputes Appeals Committee Central Province or any other subordinate court or tribunal from dealing with any claim or dispute relating to LR Number Kabare/Gachigi/334.

The exparte Applicant's verifying affidavit sworn on 23rd October 1998 was rather short on information. However, taken together with the replying affidavit sworn by Simon Cigiti Bundi (hereinafter referred to as interested party) together with the annexures, the following undisputed facts emerge.

On 15th November 1984 Damaris Waruguru (hereinafter referred to as Damaris) who was the mother to both the exparte Applicant and interested party filed a suit against the ex-parte Applicant at the Embu Principal Magistrate's Court. In that suit Damaris claimed that the exparte Applicant was holding LR. No. Kabare/Gachigi/334 in trust for himself, Damaris, and Damaris' two sons i.e. the interested party and Walter Gathenya. She sought determination of the trust and also for the exparte Applicant to be ordered to sub-divide the land and give each Beneficiary his share.

On the 5th June 1991 the matter was referred by consent of the parties, to the D.O. Kirinyaga for

arbitration. The arbitrator's award which was in favour of the ex-parte Applicant was read on 25th March 1992. Damaris however successfully applied for the award to be set aside and it was ordered that the suit be heard and determined by the court.

Subsequently Damaris was granted leave to amend her plaint. The suit was later heard and judgment delivered by the Resident Magistrate Embu in which He gave judgment for Damaris and declared that the ex-parte Applicant held the suit land in trust for himself and other members of the family. The Resident Magistrate ordered that the suit land be shared into 3 portions, two brothers of the ex-parte applicant getting 2 acres each and the ex-parte Applicant getting 2.8 acres.

Being dissatisfied the ex-parte Applicant appealed to the High Court in High Court (Meru) Civil Appeal Number 18 of 1994. In his judgment Hon. Ongudi J. who heard the appeal found that the ex-parte Applicant had bought the suit land and was the registered proprietor of the suit land holding an indefeasible title. Hon. Ongudi J. therefore allowed the appeal and set aside the judgment and orders of Resident Magistrate Embu.

Subsequently the ex-parte Applicant went back to Embu Principal Magistrate's Court and applied to have the caution lodged by Damaris against Kabare/Gacigi/334 set aside. The Magistrate ruled that the High Court had finally determined the issue of the alleged trust in favour of the ex-parte Applicant. He therefore granted the application to have the caution removed as Damaris and her sons had not filed any other suit raising a different cause of action.

Perhaps taking a cue from the ruling of the magistrate the interested parties moved to the Gichugu Land Disputes Tribunal raising the same dispute over Kabare/Gacigi/334. The matter was heard by the Tribunal on 23rd June 1998 and an award made that Kabare/Gacigi/334 was family land and that the land should be sub-divided for each family member to have a portion. The ex-parte Applicant not being satisfied with the award moved to the Provincial Appeals Tribunal but the Appeals Tribunal ruled that it had no jurisdiction to entertain the matter as the case had already been dealt with by the Resident Magistrate's Court Embu and the High Court.

At this stage the ex-parte applicant sought legal advise from his current counsel and the result was the filing of the current application for Judicial review.

It is the submission of the ex-parte Applicant's advocate that the matter which was dealt with by the tribunal resulting in the award currently pending before the Senior Resident Magistrate's Court for adoption was *res judicata* as there was a final judgment of the High Court over the suit land involving the same parties and section 7 of the Civil Procedure Act was therefore applicable, and the proceedings before the tribunal were an abuse of the court process.

It is also submitted that Section 3 of the Land Disputes Tribunal Act which sets out the jurisdiction of the Tribunal, does not give the Land Disputes Tribunal jurisdiction over issues of trust. The Land Disputes tribunal had therefore no jurisdiction to hear and determine the matter and the award was therefore a nullity and not capable of enforcement by the Senior Resident Magistrate's Court. It was submitted that the interested parties were vexations litigants and that it was necessary for the court to issue the orders of certiorari and prohibition so as to put the matter to rest.

For the interested parties, it was submitted that the application before the court was incompetent as it did not contain the Land Disputes Tribunal Award as required by order 53 rule 4 (1) of the Civil Procedure Rules, and that order 50 rule 4 of the Civil Procedure Rules had not been complied with.

It was further submitted that the order of prohibition was no longer available as the award had already been made and read. On the issue of *res judicata*, it was submitted that the parties before the Land Disputes tribunal were not the same as those in the previous suit, and that the interested parties were only included in the Embu court matter after the High Court appeal case for purposes of removal of the caution. It was submitted that the High Court appeal did not determine the matter but merely set aside the judgment of the lower court and that the issue before the tribunal was sub-division of land held by one

brother on behalf of the others. Finally it was submitted that the interested parties were in occupation of the suit land.

In response, it was submitted on behalf of the ex-parte Applicant that order 50 rule 4 of the Civil Procedure Rules was not applicable and that order 53 rule 4 of the Civil Procedure Rules had also no relevance to the application. As concerns the failure to annex the proceedings and award of the Land Disputes Tribunal which are sought to be quashed, it was submitted that this was cured by the annexing of the relevant proceedings to the replying affidavit sworn by the interested party.

First and foremost as regards the competence of the application, it is evident that the proceedings and award of the Kirinyaga District Land Disputes Tribunal and Kerugoya Senior Resident Magistrate's Award Case Number 54 of 1998 in respect of which an order of *certiorari* were sought were not annexed to the applicant's notice of motion. The Applicant's advocate has dismissed this failure contending that the same was cured by the documents being annexed to the interested parties replying affidavit. However, order LIII rule 7 (1) of the Civil Procedure Rules states as follows: -

“7 (1) In the case of an application for certiorari to remove proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he had lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.”

The above provision makes it mandatory unless otherwise excused by the court for the applicant to lodge a copy of the Award of the Kirinyagah District Tribunal and Kerugoya Senior Resident Magistrate's Award Case Number 54 of 1998 verified by affidavit with the Registrar. I have perused the record but have not come across any evidence of compliance with this provision. The Applicant instead annexed to his motion the Tribunal Award made in 1992 which has already been set aside and was irrelevant to his application. Moreover the Applicant did not give any explanation of this failure. This means that it was not open to the ex-parte applicant to question the validity of the award of the Tribunal which He sought to have quashed by order of *certiorari*.

Secondly the Applicant sought to have the proceedings and decision of the Kirinyagah District Land Disputes Tribunal in respect of Kabare/Gachigi/334 quashed. No proceedings or decision of the Kirinyagah Land Disputes Tribunal were availed to the court either by the ex-parte Applicant or by the interested party. What was annexed to the replying affidavit sworn by the interested party were proceedings and Award of Gichugu Land Disputes Tribunal. Now although my geography of Kirinyagah District tells me that Gichugu is a division in Kirinyagah District, I cannot assume nor do I believe that the Kirinyagah Land Disputes Tribunal is the same as Gichugu Land Disputes Tribunal. Without any amendment to the ex-parte Applicant's application, it cannot be assumed that the orders sought by the ex-parte applicant relate to the same proceedings and award annexed to the interested party's application. The application is therefore defective as it is not clear which tribunal proceedings the ex-parte applicant seeks to have quashed through the order sought.

But the matter does not end there as the Applicant specifically identified Kerugoya Senior Resident Magistrate's Award Case Number 54 of 1998 and sought an order of prohibition against the Senior Resident Magistrate Kerugoya and the Land Disputes Appeals Committee Central Province prohibiting them from dealing with any claim and or dispute relating to LR Number Kabare/Gachigi/334. Order LIII rule 7 (1) of the Civil Procedure Rules only applies where an applicant is seeking an order of *certiorari*. The failure by the applicant to annex a copy of the award and the relevant proceedings does not therefore affect his prayer for an order of prohibition.

It is evident from the undisputed facts outlined above that the dispute relating to ownership of Kabare/Gachigi/334 was initiated by Damaris against the ex-parte applicant in Embu Principal Magistrate's Civil Case Number 156 of 1984 on the grounds that the ex-parte applicant was holding the land in trust for himself and his two brothers.

The judgment of the High Court in High Court (Meru) Civil Appeal Number 18 of 1994 settled the

dispute when Hon. Ongudi J. made the following finding: -

The learned Magistrate applied wrong standards of proof when considering the evidence of the Appellant and came to wrong conclusion. There was irrefutable evidence that the Appellant had bought the suit land. His registration as proprietor therefore gave him indefeasible right sections 27 and 28 Registered Land Act. There was no trust either express or implied or constructive.”

It was submitted by Mr. Wachira that the High Court did not in fact determine the case but merely set aside the judgment of the lower court. That however is far from the truth. As is evident from the above extract of the High Court judgment, the judge clearly found that there was no trust over the suit land and that the ex-parte applicant was holding an indefeasible title. Those basically were the issues in question. Notwithstanding the fact that the Hon. Ongudi J. did not make a specific order dismissing the suit filed in the lower court the Hon. Judge made a clear finding on the issue as to whether the ex-parte applicant was holding L.R. Number Kabare/Gachigi/334 in trust. Such a finding could only be challenged on appeal and the issue could not be re-opened before an inferior tribunal. Moreover explanation number 5 to Section 7 of the Civil Procedure Act provides that: -

“Any relief claimed in a suit which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.”

Although the Hon. Judge in High Court (Meru) Appeal Number 18 of 1994 did not specifically dismiss the suit filed in the lower court in terms of section 7 the relief sought by the Plaintiff in the lower court must be regarded as having been rejected.

It was further submitted that the parties in the recent matter dealt with by the tribunal were not the same as those in Embu Principal Magistrate’s Court Civil Case Number 156 of 1984 and High Court (Meru) Civil Appeal Number 18 of 1994. However a perusal of the proceedings of the Embu Principal Magistrate’s Court Civil Case Number 156 of 1984 show that although the initial Plaintiff was Damaris, the plaint was subsequently amended. Damaris then became the 1st Plaintiff and her two sons i.e. the interested party and another were the 2nd and 3rd Plaintiffs whilst the ex-parte applicant remained the Defendant. The suit therefore involved the same parties who are before the court today.

I do therefore concur with the submission that the issue relating to ownership of LR Number Kabare/Gachigi/334 and in particular whether the exparte applicant was holding the same in trust for his brothers was *res judicata* and could not be re-opened again before the Land Disputes Tribunal. Further, the Land Disputes Tribunal lacked jurisdiction to consider a claim founded on a trust.

It is evident that both the tribunal and the Appeals Committee have already dealt with the matter and are now functus officio. The court cannot therefore issue a prohibitory order to restrain what has already taken place. This court can however prohibit the adoption and enforcement of the award as the award is an abuse of the process of the court, the same having been made without jurisdiction on a matter which was *res judicata*. The Applicant sought a general order prohibits not only the Kerugoya Senior Resident’s Court “*but any other subordinate court or tribunal from dealing with any claim or dispute relating to LR Number Kabare/Gachigi/334.*” Such an order would be too wide and would also prohibit the dealing with claim which may not have been dealt with before. I would therefore only grant this application to the extent of issuing an order of prohibition restraining the Senior Resident Magistrate Kerugoya in Award Case Number 54 of 1998 from enforcing the award relating to LR Kabare/Gachigi/334. Costs of the application to the applicant.

Dated, signed and delivered this 6th day of June 2006.

H. M. OKWENGU

JUDGE