



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

**Misc Case 43 of 2005**

**REPUBLIC OF KENYA.....APPLICANT**

**VERSUS**

**1. MARY NJERI**

**2. NJOKI**

**3. WANJIRU MACHARIA.....RESPONDENTS**

**EX-PARTE .....BENSON MACHARIA GATHIAKA**

**RULING**

By a notice of motion filed on 25<sup>th</sup> April 2005, Benson Macharia Gathiaka (*hereinafter referred to as the ex-parte applicant*) seeks an order of certiorari to quash the decision of the Muranga District Land Disputes Tribunal Case Number 199 of 2004 (Kigumo) in respect of LR NO. Loc. 2/Mariira/295 (*hereinafter referred to as suit land*) and the proceedings of Kigumo SRMCC Tribunal Case Number 6 of 2005. The applicant also seeks an order for costs.

A statement of facts and verifying affidavit has been availed from which the ex-parte applicant maintains that He is the registered proprietor of the suit land, but that the Muranga Land Dispute's Tribunal has ordered the land to be sub-divided into two and one of the sub-divisions to be registered in the name of Mary Njeri, Njoki and Wanjiru Macharia (*hereinafter referred to as the Respondents*). The ex-parte applicant contends that the tribunal award was made without jurisdiction as the Tribunal has no powers to deal with issues of trust or title to land. It is also submitted on behalf of the ex-parte applicant that the Respondents being children of the ex-parte applicant could not force him to transfer land to them during his life-time. The case of *Muruiki Marigi v/s Richard Marigi C. A. No. 189 of 1996* (unreported) was relied upon as authority for this preposition.

It is further submitted that the Tribunal failed to read the award or to give the ex-parte applicant an opportunity to appeal to the Provincial Land Disputes Appeals Committee, but instead an irregular procedure was adopted whereby the award, was read by the Resident Magistrate's Court at Kigumo. It was submitted that the proceedings of the Resident Magistrate's Court were a nullity as the court acted *ultra vires* its powers.

The Respondent objected to the application and filed a replying affidavit sworn by Mary Njeri Njoroge. It was contended that the application before the court was incompetent and fatally defective. It

was maintained that the tribunal award having been filed in the lower court the same became a judgment of the court and could only be disturbed or varied through an appeal. It was maintained that the applicant was not the absolute owner of the suit property as the same was subject to a trust created over it. It was also maintained that the tribunal award was read to the parties by the tribunal chairman.

Mr. Mwangi who appeared for the Respondents also submitted that there was no body in law known as Muranga District Land Tribunal, since the Tribunal which adjudicated on this matter was at Kigumo which falls under Maragwa which became a separate district from Muranga District vide Gazette Notice Number 9143 of 16<sup>th</sup> November 2005.

It was further submitted that contrary to the facts given by the applicant the Respondents were not the applicants married daughters but were daughters of the applicant's cousin. Mr. Mwangi further maintained that the verifying affidavit was defective as the jurat appears on a separate page.

In response Mr. Wahome referred to Section 2 of the Land Disputes Tribunal Act which defines a registration District as the administrative district in which the land subject of the dispute is situated. Relying on section 3 (1) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya and Section 4 (1) of the District and Provinces Act 1982 (as amended) and the 2<sup>nd</sup> and 3<sup>rd</sup> schedules to the Act, He submitted that Maragwa District is not in existence in accordance with the constitution and that Gazette notice Number 9143 of 16<sup>th</sup> November 2005 only published the intention of the government to legalize the Districts created which included Maragwa District, but that appropriate legislation not having been promulgated L.N. No. 298 of 23<sup>rd</sup> September 1996 and L. N. 57 of 1997 could not supercede the specific Acts of Parliament. Mr. Wahome also relied on: -

**High Court (Nairobi) No. 698 of 2001. *Republic v/s Kajiado***

***Land Disputes Tribunal & Another Exparte Joyce Wambui,***

***Lilian Muranga.***

Mr. Mwangi however sought to distinguish this authority maintaining that the issues were different as the case dealt with both orders of *certiorari* and prohibition whilst in the current case the only order sought was that of *certiorari* whereas the proceedings sought to be quashed are not completed but are still pending before the magistrate.

**Section 4 (1)** of the Land Dispute Tribunal Act Number 18 of 1990 provides for the establishment of Land Dispute Tribunal for every "registration District."

**Section 2** defines a "registration district" as the administrative district in which the land subject of a dispute is situated.

In this case the suit land is Loc. 2 Mariira/295. From the proceedings of the land Dispute Tribunal which have been annexed to the verifying affidavit of the applicant, it is evident that the subject of this suit is land Dispute Tribunal Case Number 199 of 2004 Kigumo. It is apparent that there is a dispute as to whether there is an administrative district of Maragwa in existence and whether, the tribunal which handled this case is within the administrative district of Muranga or the administrative district of Maragwa. That however is a red herring that I will not fall for. It is clear that the proceedings which the applicant wants quashed is the decision in respect of Tribunal Case Number 199 of 2004 (Kigumo). It is immaterial whether that Tribunal is in Maragwa or Muranga as the court is clear as to which proceedings it is dealing with.

The Award shows that the Tribunal ordered the suit land to be sub-divided into two portions and that one of the portions be registered according to the wishes of the Respondents. It is evident that in dealing with the dispute the Tribunal did not deal with the division of or the determination of boundaries to land or a claim to occupy or work land or trespass to land which is the jurisdiction given to the tribunal vide

section 3 (1) of the *Land Dispute Tribunal Act, Number 18 of 1990* instead the Tribunal overstepped its jurisdiction by interfering with the title of the ex-parte applicant.

The tribunal acted outside its jurisdiction by ordering the sub-division of the ex-parte applicant's land and the transfer of the land to the Respondents. Even assuming that the Respondent had a good claim under trust, such a claim was still outside the jurisdiction of the tribunal.

I have considered the objection that the award could only be challenged through an appeal since it had already been made a judgment of the Kigumo court. That argument cannot however hold as this court has not only powers through an order of *certiorari* to call into this court and quash any proceedings or orders that are made in excess of jurisdiction or without jurisdiction, but also powers to quash the proceedings of any inferior tribunal or body purporting to act on such orders. A party does not have to invoke this courts appellate jurisdiction only but has the choice of moving this court through an order of Judicial review which is what the ex-parte applicant has done.

The Respondent's advocate raised certain procedural defects in the application such as the fact that the verifying affidavit was defective and the jurat being on a separate page. However the court has to look at the larger picture and that is the substantive issues which are that the Tribunal acted not only beyond its jurisdiction but also without jurisdiction. I am satisfied that this is an appropriate case which calls for orders of judicial review.

Accordingly I issue the order of *certiorari* sought quash the Award issued by the Land Tribunal in Tribunal Case Number 199 of 2004 in respect of LR. No. Loc.2/Mariira/295 and also quash the proceedings in Kigumo SRMCC Tribunal Case Number 6 of 2005.

Costs to the ex-parte applicant.

Orders accordingly.

***Dated, signed and delivered this 12<sup>th</sup> day of October 2006.***

**H. M. OKWENGU**

**JUDGE**