REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIV. CAUSE 431 OF 2003

IN THE MATTER OF AN APPLICATION FOR LEAVE TO

APPLY FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE KAJIADO LAND DISPUTES TRIBUNAL CASE NO 162 OF 2001

AND

IN THE MATTER OF THE KAJIADO SENIOR RESIDENT MAGISTRATE'S

COURT LAND TRIBUNAL APPL NO 24 OF 2002

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO 18 OF 1990

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

AND

KAJIADO LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

KAJIADO SENIOR RESIDENT MAGISTRATE'S COURT....2ND RESPONDENT

EX-PARTE:

SAMUEL S MUYAA

KIREU SONTO MUYAA

AND

NYAKIANDA GITHARA MUREITHI.....1ST INTERSTED PARTY

PAULINA WANJIRU KINYANJUI.....2ND INTERESTED PARTY

JUDGMENT

The Ex-parte applicants by an application dated 6th June 2003 pray for an order of certiorari to issue from this court to remove into the court and quash the ruling made by the Kajiado Land Disputes Tribunal on 29th October 2001 which ruling was adopted as an award and issued as a further order by the Kajiado Senior Resident Magistrates court on 30th October, 2002 in Land disputes Case No 24 of 2002. The main grounds are that both the Tribunal and the Senior Resident Magistrate court in making the award and the further order respectively acted in excess of jurisdiction and further that both the Tribunal and the Senior Magistrates court were functus officio and finally that the applicants were not given a hearing before the purported further order was made.

The applicants have cited several authorities. The respondents contend that the challenged order concerned boundary and therefore within the Tribunals jurisdiction under s 3 of the Land Disputes Act. They contend that the further order was in execution of the earlier ruling of the Tribunal which ruling had been accepted by the applicants. They contend that the marking of boundaries according to the survey records is a matter within the Tribunal's jurisdiction. I wish to observe that if and where a Tribunal has no jurisdiction neither the acquiescence nor the express consent of the parties can confer jurisdiction upon it. I have considered the issues raised and the arguments presented to the court including the grounds set out in the Amended Statement and the Verifying Affidavit. My findings are that although the ruling of 15th May 2002 did scrutinize the documents of title in respect of parcel 1546 all that the Tribunal did was to declare that the documents were genuine government documents. The Tribunal did not adjudicate on ownership at all. It is also manifest from the ruling that the Tribunal did make a finding that the respondents were entitled to continue occupying the land. Under s 3 (b) of the Act the Tribunal has the power to deal with a claim of occupation and its finding on occupation is well within its jurisdiction. It is also important to observe that the applicants were the claimants in the Tribunal case No 162 of 2001 and they acknowledge that they were content with the findings except the further order of the Tribunal.

Turning to the further order all the Tribunal did was to refer to the ruling of 15th August 2002 and requested the Hon Senior Resident Magistrate court to order the District Surveyor to visit the disputed land and to mark its boundaries according to RIM see Ex C and the Senior Resident Magistrate did make an order as per the Tribunal's request. The applicants claim that they were not invited to attend both the Tribunal and the Senior Resident Magistrate's court when the request to have the land surveyed was given and the order made and this was contrary to the rules of natural justice. The counsel for the respondents have all argued that the Tribunal was only executing its earlier ruling and no hearing was necessary or anticipated by the parties. The applicants claim that the boundary as established by the surveyor has encroached on their land although no proof of encroachment was established in the affidavit in support of the application. The prejudice suffered by the applicants has therefore not been established. Under the Land Disputes Tribunal a Tribunal cannot originate a claim as they did in this case. All claims are supposed to be registered and dealt with in accordance with s 3 of the Act. While I have no doubt that it is within the Tribunals jurisdiction to handle issues of boundaries they can only entertain claims on the basis of what is received from the parties and in the presence of the parties affected. In addition they have a duty to ascertain issues and to make determinations on the issues and to give reasons for the determinations – see s 3(8) of the Land Disputes Tribunal Act. It is clear that they did not do so as regards the further direction to the Senior Resident Magistrate. They appear to have just written a letter because the subsequent order by the Senior Resident Magistrate does make reference to a letter. Similarly the magistrate made the order without any prompting by the affected parties and only on the basis of a letter from the

Tribunal. I find both acts procedurally incorrect and improper because proceedings before the tribunals although conducted by non lawyers and also required to apply the recognized customary law s 3 does anticipate some formal proceedings especially the presence of parties at crucial stages of the proceedings. Adjudicating in the absence of the parties is improper. For this reason the court would have been entitled to quash the further order as prayed but for the reasons which will become apparent shortly. Firstly the applicant at least before the ruling did content that the respondents were occupying the land, as trespassers hence the afterthought by the Tribunal to have the boundaries marked in order to complete their work. Secondly, the boundaries have already been marked and had been so marked before these proceedings were instituted. It follows therefore even if the court were to call up and quash the decision to survey – nothing would change on the ground because the District Surveyor has already done his work. Thirdly under s 3(8) of the Land Dispute Tribunals Act the Tribunals may be assisted by the Registrar of Lands in adjudicating claims. The significance of this provision is that there appears to be an overlap of jurisdiction between the Land Registrar and the Land Tribunals on the issue of boundaries under the Registered Land Act regime. Thus s 21(2) of the Registered Land Act cap 300 under which the parcels in question are registered the Land Registrar may on application of any Interested party determine and indicate the position of an uncertain or disputed boundary. In addition under s 22 he may also fix boundaries upon application by any Interested party.

The applicants have not shown to this court that they have invoked s 21 or 22 of the Registered Land Act and failed to find a satisfactory remedy or that that remedy is less beneficial to them than the one they are seeking by way of Judicial review. I think it is important to observe that Judicial review remedies are discretionary and not automatic and in exercising that discretion the availability of an alternative remedy should in my view constitute a major factor. In the special circumstances of this case s 21 and s 22 as outlined above do provide satisfactory remedies and it would be unjust for the court to undo the survey work already done where the law does provide an alternative challenge to faulty or erroneous surveys or uncertainties in respect of boundaries. For the above reasons I dismiss the application and I further decline to give an order for costs because neither party appears to have prompted the survey. It was an act of the Tribunal and the court. It is so ordered.

DATED and delivered at Nairobi this 24th day of June 2005.

J G NYAMU

JUDGE