**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Misc Civ Appli 108 of 2005**

**IN THE MATTER OF AN APPLICATION BY GITAU GICHURE FOR AN ORDER OF CERTIORAR**

**REPUBLIC……..……..APPLICANT**

**VERSUS**

**NYANDARUA DISTRICT LAND DISPUTES TRIBUNAL …..**
**…….1ST RESPONDENT**

**JUSTUS CHEGE KIMANI & LAWRENCE**

**NDUNGU KAMOTHO For and on behalf**

**of MANUNGA WATER PROJECT As the**

**Chairman and Secretary Respectively……..…2ND RESPONDENT**

**AND**

**GITAU GICHURE……...…….……SUBJECT**

**RULING**

The applicant, Gitau Gichure, applied by way of a Notice of Motion brought under Order LIII Rule 3 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act Cap 26 for an order of certiorari to remove into this court the proceedings and award of the Nyandarua District Land Disputes Tribunal in Case No. 7 of 2003 for purposes of quashing the same. The application was made on the grounds that:-

(i) The said tribunal exceeded its jurisdiction and acted in excess of the powers conferred to it under Section 3(1) of the Land Disputes Tribunals Act No. 18 of 1990.

(ii) The applicant was registered as the absolute proprietor of the suit land and his title is indefeasible.

(iii) That the tribunal failed to appreciate that there was no dispute before it in terms of the powers conferred to it under the Land Disputes Act.

(iv) That the tribunal's proceedings were bad in law, incompetent and illegal **ab initio** and went contrary to the provisions of the Registered Land Act Cap 300 and the Land Control Act Cap 302.

In his affidavit which he swore at the time of seeking leave to file the said application, the applicant stated that he was the registered proprietor of a parcel of land known as **Nyandarua/Malewa/1** measuring approximately 3.7 hectares. The said title was issued in 1994. Sometimes in 1972, he entered into an oral agreement with Manunga Water Project (the second respondent) wherein the applicant was to donate ¼ acre of the said parcel of land at a token consideration. He said that he surrendered the ¼ acre portion of land and a water tank was built thereon but the second respondent failed to honour its part of the oral agreement. Consequently, he offered to surrender a portion measuring 40 feet by 40 feet only where the tank had been built if the interested party paid the survey fees of Kshs.13,700/- and other costs of excision of the portion of land.

Thereafter, the second respondent filed a dispute in the Nyandarua Land Disputes Tribunal in Case No. **7 of 2003** claiming to have a right of ¼ acre from the suit land and further claiming damages due to cracks to the tank by roots of the applicant's trees. On 16/11/2004, the tribunal ordered the applicant to transfer a portion of ¼ acre to the second respondent, pay damages for the destroyed water tank at 16 bags of cement and pay Kshs.4,600/- as costs.

The applicant stated that the tribunal had no jurisdiction to deal with the said dispute as it involved a registered parcel of land. He also said that the said transaction was null and void since consent of the area Land Control Board had not been obtained.

Mr. Ndegwa Wahome for the applicant cited, **inter alia, MBOGO MWATHI VS JOHN CHEGE MBOGO** HCC A No. 531 of 2000 at Nairobi (unreported) where the court held that a land dispute tribunal had no power to adjudicate over the issue of title to land. He submitted that Section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990 gave jurisdiction to such tribunals to deal with cases of a civil nature involving disputes to:-

(a) The division of, or the determination of boundaries to land, including land held in common.

(b) A claim to occupy or work land.

(c) Trespass to land.

The Chairman of Manunga Water Project (the second respondent) Mr. Justus Chege Kimani swore a replying affidavit for and on behalf of the second respondent. He said that the applicant gave to them ¼ acre in 1972 to build a water tank but later on after 17 years the applicant changed his mind and wanted to be paid Kshs.10,000/- for a parcel of land measuring 40 by 40 feet. The second respondent had in 1972 paid him a token sum of Kshs.536/. The said sum of Kshs.10,000/- was paid to the applicant in two instalments of Kshs.5,000/- each in 1989 and 1990 but the applicant refused to go to the Land Control Board for the grant of the appropriate letter of consent to the said transaction.

Mr. Kimani stated that in 1994, the second respondent filed the case in the Principal Magistrate's Court at Nyahururu, a Civil Case No. 290 of 1994 and the applicant filed a counter claim but on 3/9/2002 the plaint and the counter claim were withdrawn by consent and the parties agreed to resolve the matter amicably. The parties went to the Land Control Board and consent for sub-division of the applicant's land was given on 25th June, 2003. A copy of the same was annexed to the said affidavit and it shows that the land was to be sub-divided into two portions of 0.015 hectares and 3.68 hectares.Thereafter the Government stopped the operations of all Land Control Boards and when they were reconstituted, they requested the applicant to allow a surveyor to excise out the parcel of land but he refused. The second respondent then moved to the area Land Disputes Tribunal and the dispute was resolved in favour of the second respondent. The applicant had a right of appeal for a period of 30 days from the date of the ruling which was 16th November, 2004 but he did not appeal, Mr. Kimani stated.

Thereafter the second respondent applied to court for adoption of the award but his advocate told the

magistrate's court that this judicial review application had already been filed. Mr. Kimani deposed that the matter revolved around trespass to their land by the applicant and so the tribunal had jurisdiction to deal with it. He added that the second respondent had built the water tank on the said parcel of land many years ago and the applicant had been enjoying free supply of water.

Mr. Mutinda, litigation counsel of the Attorney General's Chambers appeared for the first respondent and he raised several legal issues in opposition to the applicant's application.He had filed a notice of preliminary objection dated 28th July, 2005. He said that the application was incompetent because no notice had been given to the registrar before the application was filed as required under Order LIII Rule 1(3) of the Civil Procedure Rules.The leave that was granted was therefore irregular, he argued.

Further, he stated that the application for leave was brought in the name of the Republic as the applicant which was wrong. He also submitted that the application was incompetent because the applicant brought the application for leave and swore an affidavit in support thereof on the 19th January, 2005 and there were no documents annexed to it, including the decision that was sought to be quashed. He said that the applicant filed a verifying affidavit on 10th February, 2005 and annexed the documents that were required to be annexed at the time when leave was being obtained. There was therefore nothing that the court could rely upon in granting leave. He cited the Court of Appeal decision in **COMMISSIONER GENERAL KENYA REVENUE AUTHORITY VS SILVANO ONEMA OWAKI T/A MARENGA FILLING STATION** Civil Appeal No. 45 of 2000 where it was held that it was the verifying affidavit and not the statement which was of evidential value in an application for judicial review. Since there were no documents that were annexed to the original affidavit, the application was bare and unsupported, he submitted. No leave had been sought before the affidavit of 10th February, 2005 was filed and therefore he urged the court to strike out the said affidavit.

Mr. Mutinda further submitted that the dispute before the land tribunal was proper because the applicant had given land to the second respondent for purposes of building a water tank and the same had been built. The second respondent, having been in possession of the land, the tribunal had jurisdiction to hear the matter. The dispute was over the 40 by 40 feet piece of land, not the entire parcel of land, then registered as Nyandarua/Malewa/1. He cited the case of **WAMWEA VS CATHOLIC DIOCESE OF MURANG'A REGISTERED TRUSTEES [2003]** KLR 389 where the High Court upheld a decision by a Land Disputes Tribunal which ordered a person to vacate from a registered parcel of land after it established that he was a trespasser thereon.

Having summarised the main arguments that were raised in this matter, the first issue which I have to determine is whether Nyandarua District Lands Tribunal (the tribunal) had jurisdiction to hear the dispute that gave rise to the present application.

Section 3(1) of the Land Disputes Tribunal Act, 1990 states as follows:-

> **"Subject to this Act, all cases of a civil nature involving a dispute as to – (a) the division of, or the determination of boundaries to land, including land held in common.**
>
> **(b) A claim to occupy or work land; or**
>
> **(c) trespass to land**

shall be heard and determined by a Tribunal established under Section 4"

And what kind of land can be subjected to the kind of disputes as aforesaid? It is any agricultural land as defined in Section 2 of the Land Control Act, whether it is registered or unregistered under the Registered Land Act but does not include land situated within an adjudication section. This is as per Section 2 of the Act.

What was the dispute before the tribunal about? According to the proceedings of the tribunal, a copy whereof was annexed to the applicant's affidavit and marked "GG2" the second respondent's claim was

as follows:-

(a) Subdivision and transfer of the ¼ acre of the said land.

(b) Kshs.7,000/- on account of labour for the years 1972 to 2000.

(c) Further labour costs of Kshs.5,000/- plus a further Kshs.7,000/- for registration as a new member from the year 2000.

(d) Compensation for malicious damage caused by trees.

(e) Costs of the suit.

The applicant did not deny that he had initially offered ¼ acre of his land to the second respondent and that he later changed his mind and sold to the water project only a small parcel of the land measuring 40 by 40 feet at a consideration of Kshs.10,000/-. All he wanted was payment of Kshs.13,700/- for the surveyor and other costs. He said that he was ready to part with that portion of land measuring 40 by 40 feet. From the foregoing, the dispute before the tribunal was not regarding ownership or title to the parcel of land. It was over division of the applicant's parcel of land so as to enable the second respondent acquire a separate title to the parcel of land on which its water tank stood. The water tank had been constructed since 1974. In my view therefore the tribunal had jurisdiction to hear the dispute. The applicant had, upon receipt of Kshs.10,000/- from the second respondent undertaken to unconditionally transfer that portion of land to the second respondent. The agreement he signed on 21st February, 1990 partially stated:-

> ***"Further to the agreement of 22/12/89, I Peter Gitau Gichure ID No. 2882320/65 have received Kshs.5,000/- (five thousand only) the balance as per above agreement. I now confirm that I will transfer a portion of 40ft x 40ft to Manunga Water Project from my Plot No. 495 Malewa Scheme".***

By that time he had not yet been issued with a title deed for his bigger parcel of land. If the dispute had been on ownership of the land in question and the tribunal proceeded to determine the same, then it would have acted in excess of its jurisdiction. In my view, the dispute could be classified as either relating to division of land or a claim to occupy the land in question and therefore I hold that the tribunal had jurisdiction to deal with the matter.

Another argument that was raised by the applicant was that his title was indefeasible since he had been registered as the absolute proprietor of the entire parcel of land known as **Nyandarua/Malewa/1** measuring 3.7 hectares or thereabouts. He also argued that the tribunal's proceedings went contrary to the provisions of the Registered Land Act Cap 300 and Land Control Act Cap 302.

As I have already found, the tribunal had jurisdiction to deal with the dispute that was before it as provided by Section 3(1) of the Land Disputes Tribunal Act but as to whether its findings were correct or not, this is not an issue for consideration in a judicial review application, but could have been made the subject of an appeal. In **CHIEF CONSTABLE OF THE NORTH WALES POLICE VS EVANS** [1982] 1 WLR 1155 Lord Brightman held that:-

> ***"Judicial Review is not an appeal from a decision, but a review of the manner in which the decision was made."***

An appeal concerns itself with the merits of a decision but judicial review proceedings concern themselves with the process in which a decision was made and its legality. The Land Disputes Tribunal Act provides for a right of appeal to the High Court and the decision of the tribunal also gave the parties 30 days right of appeal but no appeal was preferred by either party. I believe that the aforesaid issues ought to have been raised in an appeal but not in these proceedings. That notwithstanding, there was evidence that the applicant had refused to attend the Land Control Board for purposes of getting consent

of the board to facilitate transfer of the portion of land which he had sold to the second respondent. Also, prior to the issuance of the title deed to the applicant, he had already sold the 40 by 40 feet plot to the second respondent who was in occupation thereof and therefore the applicant's rights over the land were subject to the overriding interests of the purchaser in occupation as stated in Section 30 of the Registered Land Act.

However, in making its decision, I believe the tribunal exceeded its jurisdiction by ordering the applicant to transfer to the second respondent a bigger portion of land than that which the parties had agreed upon. The applicant had agreed to sell a plot measuring 40 feet by 40 feet and the agreements that were produced in court showed that but the tribunal ordered the applicant to transfer ¼ an acre. On 25th June, 2003 the parties had appeared before Kipipiri Land Control Board and consent to excise off the aforesaid 40 by 40 feet plot from the applicant's parcel of land had been granted. The tribunal therefore erred in awarding a bigger size of the land and to that extent, its decision was not correct. The tribunal also exceeded its jurisdiction by making an award of compensation to the second respondent against the applicant by way of payment of 16 bags of cement for repair of the water tank. Such a claim for compensation should ordinarily have been filed in a court of law.

In view of what I have stated hereinabove, the decision of the tribunal has to be varied by quashing the order regarding payment of compensation for damage to the water tank and also transfer of the ¼ acre of the applicant's land instead of the plot measuring 40 by 40 feet.

That would have been sufficient in disposing of this application but I have to briefly consider some issues that were raised by Mr. Mutinda for and on behalf of the first respondent. He argued that the application was incompetent because no notice had been given to the registrar as required under Order LIII Rule 1(3) of the Civil Procedure Rules.That was not so. **I perused the file Miscellaneous Civil Application Number 633 of 2004** wherein leave to file this application was granted and the appropriate notice was there. Likewise, the same file contains the affidavit with all the relevant annextures and statement in support of the application for leave. The affidavit of verification sworn on 10th February, 2005 made reference to the affidavit and statement that had been filed earlier on 19th January, 2005 when the application for leave was filed. The copies of the statement accompanying the application for leave together with the affidavit should have been served together with the notice of motion.

Regarding the format of the application for leave, the same should not have been made in the name of the Republic. It should have been as follows:-

I**N THE MATTER OF: AN APPLICATION BY GITAU**

**GICHURE FOR LEAVE TO APPLY**

**FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF: NYANDARUA DISTRICT LAND DISPUTES TRIBUNAL**

**AND JUSTUS CHEGE KIMANI AND LAWRENCE NDUNGU KAMOTHO FOR AND**

**ON BEHALF OF MANUNGA WATER PROJEC**T as Chairman and Secretary respectively

**CHAMBER SUMMONS (EX-PARTE)**

***(Under Order LIII Rule 1 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya).***

Once leave had been granted, the application for the prerogative order itself is the one which should have been instituted by way of a notice of motion in the name of the Republic **ex-parte** the actual party who was moving the court. In this particular case it would have been as follows:-

***REPUBLIC…….APPLICANT***

V***ERSUS***

***NYANDARUA DISTRICT LAND DISPUTES***

***TRIBUNAL……...1ST RESPONDENT***

**JUSTUS CHEGE KIMANI AND LAWRENCE**

**NDUNGU KIMOTHO for and on behalf of MANUNGA WATER PROJECT as Chairman**

**and Secretary respectively…….…..….2ND RESPONDENT**

**EX-PARTE: GITAU GICHURE**

**NOTICE OF MOTION**

(Under Order…….)

Strict compliance in the form in which these applications are brought is required, see **FARMERS BUS SERVICE AND OTHERS VS THE TRANSPORT LICENSING APPEAL TRIBUNAL [**1959] E.A. 779 and also **WELAMONDI VS THE CHAIRMAN ELECTORAL COMMISSION OF KENYA** [2002] 1 KLR 486.

Having come to the conclusion that the tribunal had jurisdiction to determine the dispute that was before it but at the same time having realised that there was an error apparent on the face of the record in ordering transfer of a bigger portion of land than was lawful and having exceeded its mandate as by law given by overriding compensation on account of damage to the second respondent's water tank, the decision of the tribunal has to be called into this court and quash, which I hereby do the aforesaid two orders. I substitute therefor an order that the applicant do forthwith transfer to the second respondent the parcel of land on which its water tank stands measuring 40 feet by 40 feet and being a portion of land title number **NYANDARUA/MALEWA/1**. Each party shall bear its own costs for this application.

DATED, SIGNED AND DELIVERED at Nakuru this 30th day of September, 2005.

**D. MUSINGA**

**JUDGE**

**30/9/2005**

**Ruling delivered in open court.**

**In the absence of Mr. Wahome for the subject**

**Subject present**

**Justus Chege Kimani present**

**N/A for the first respondent**

**D. MUSINGA**

**JUDGE**

**30/9/2005**