IN REPUBLIC OF KENYA

THE HIGH COURT OF KENYA
AT MOMBASA

MISC. APPLICATION NO. 117 OF 2004

IN THE MATTER OF: AN APPLICATION OF HERBERT MWADHI MULEWA FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PRHIBITION

A N D

IN THE MATTER OF: THE KALOLENI RESIDENT MAGISTRATE COURT, LAND AWARD NO. 33 OF 2003

BETWEEN KITSAO MANGI YAA, SHIDA MANGI YAA AND HERBERT MWADHI MULWA

A N D

IN THE MATTER OF: THE LAND DISPUTE TRIBUNAL ACT OF 1990 AND THE KILIFI LANDS DISPUTES TRIBUNAL, TRIBUNAL SITTING AT KALOLENI

A N D

IN ACCORDANCE WITH ORDER LIII RULES 1, 2, 3, 4 AND 7 OF THE CIVIL PROCEDURE RULES

BETWEEN ……. APPLICANT

Versus

THE RESIDENT MAGISTRATE, KALOLENI ……. RESPONDENT

A N D

1. KITSAO MANGI YAA

2. SHIDA MANGI YAA

R U L I N G

By a Notice of Motion dated the 1st day of March 2004 and brought under the provisions of Order 53 Rules 1 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and the Law Reform Act Herbert Mwadhi Mulewa, the Ex-parte Applicant (the Applicant), seeks orders of Certiorari and Prohibition. The Order of Certiorari is sought to bring to this court and "quash the proceedings of the Land Disputes Tribunal at Kaloleni and the decision and or judgment and or Order and or all proceedings made by the honourable Resident Magistrate at Kaloleni on the 24th day of September 2003 in Land Award No. 33 of 2003". The order of Prohibition on the other hand is sought to prohibit the Resident Magistrate at Kaloleni and/or any other Magistrate as the case may be from proceeding and/or dealing with the said Land Award No. 33 of 2003 in any manner whatsoever.The application is supported by the verifying affidavit and the statement both of which were filed at leave stage in this matter.

The application was served upon the interested parties who have not bothered to defend. The Resident Magistrate at Kaloleni is represented by the Attorney General's Mombasa Office which has filed grounds of opposition which I will advert to later in this ruling.

In the verifying affidavit the Applicant has deposed that sometimes in 1988 he bought a parcel of land known as Title No. Kaloleni/Vishakani/316 (the suit land) in a public auction. It would appear the suit land was sold on instructions of Industrial and Commercial Development Corporation to which it was charged to recover money due to it from the chargor.After the auction sale the land was duly transferred to and registered in the name of the Applicant and he was issued with a title deed. When the interested parties refused to vacate the land he filed Mombasa CMCC No. 4296 of 1999 in which he sought to have them evicted and restrained from trespassing thereon. The suit is still pending.

During the pendency of the said suit the interested parties filed a land dispute at Kaloleni. The Applicant says he was not served with any papers in that dispute. He was only served with a hearing notice informing him that the dispute was scheduled to be heard on 3rd April 2003. He instructed advocates who wrote to the chairman of the Kaloleni Land Disputes Tribunal, the District Officer Kaloleni pointing out that the Tribunal had no jurisdiction to entertain the matter and that the dispute was pending in court – Mombasa CMCC No. 4276 of 1999.The District Officer did not respond and the Applicant says he thought the dispute could not be heard. On the 15th September 2003 he received a letter from the Resident Magistrate Kaloleni informing him that the Land Dispute Tribunal award was to be read on the 24th September 2003. He attended court and the same was delivered. He has now applied to have Tribunal proceedings and its award thereon as well as the decision of the Kaloleni Resident Magistrate quashed for lack of jurisdiction.

Counsel for the Applicant argued that this being a dispute relating to title and the matter being subjudice the Land Disputes Tribunal had no jurisdiction to entertain it.

Mr. Mutungi, learned state counsel, on behalf of the Kaloleni Resident Magistrate opposed the application on three main grounds. Firstly, he argued that the Tribunal proceedings having been heard and concluded on the 17th May 2003 certiorari applied for in March 2004, a period of more than six months, cannot lie to quash them. Secondly, that Certiorari cannot lie to quash a judgment. It can only lie to quash proceedings. The Kaloleni Resident Magistrate's judgment entered in terms of the award on the 24th September 2003 cannot therefore be quashed. The third and final ground that Mr. Mutungi argued was that there being an alternative remedy of appeal under the Land Disputes Tribunals Act which the Applicant did not avail himself of Certiorari does not lie.For this last proposition he relied on the decision of the English Court of Appeal in **Republic Vs Epping and Harlow [1983] 3 ALL ER 257** and the Kenyan High Court decision in **David Mugo t/a Manyatta Auctioneers Vs The Court Brokers**

I wish to first deal with the last argument that Certiorari or judicial review does not lie where there is an alternative remedy. I have read the judgments in the two authorities cited by Mr. Mutungi. In neither of them is judicial review ousted where there is an alternative remedy what those cases decided and I respectively agree is that where there is an alternative remedy the courts would be reluctant to grant judicial review orders except in special cases. That is not the same as saying that judicial review does not lie where there is an alternative remedy.

I suppose the exceptional circumstances the courts consider before granting the judicial review orders in such situation include the expeditious disposal of the matter and cutting down on expenses.

In this case as I have already stated the dispute was heard ex-parte before the Tribunal, the Applicant having not been served. An appeal would therefore not be an appropriate remedy in the circumstances. The option the Applicant was left with was to apply to the Tribunal to set aside the ex-parte proceedings. Assuming that was done, the Tribunal would then hear the dispute inter-partes notwithstanding the fact that it has no jurisdiction in the matter as will be seen later in this ruling. That would not only be labourious but also quite expensive to the Applicant. I therefore hold that judicial review is the most convenient and less expensive remedy open to the Applicant.

The second point taken by Mr. Mutungi is that Certiorari does not lie to quash the judgment entered by the Resident Magistrate in this case. With respect I think that argument is misconceived. Certiorari lies to quash decisions reached, *inter alia,* in excess or lack of jurisdiction. The judgment entered by the Kaloleni court is the final decision of the Tribunal. It is therefore amenable to judicial review.

The first point raised by Mr. Mutungi is that the Tribunal having heard the dispute on 17th May 2003 Certiorari cannot lie to quash the proceedings more than six months later. The Applicant has applied to have quashed the Tribunal proceedings including the judgment entered by the District Magistrate.The judgment was entered on the 24th September 2003 and this application was filed on 1st March 2004 leave having been granted on 24th February 2004. So in as far as the judgment of the court is concerned the application was filed in time. But as regards the Tribunal proceedings it is out of time according to Mr. Mutungi. But is it really out of time?

Section 7 of the Land Disputes Tribunal Act provides as follows:-

> **"7(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.**
>
> **(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act".**

It is clear from this section that the proceedings before the Tribunal are concluded when its decision has been made a judgment of the court. Before that is done, no decree can issue and the Tribunal decision is not enforceable. The six months' period provided for the making of applications for Certiorari in the case of the Land Disputes Tribunal proceedings in my view therefore starts to run from the date of entry of judgment by the court. This application is therefore not time barred and is properly before court.

The Tribunal decision is inter alia in the following terms:-

> **"… The procedure in loan defaulting was not followed, the land certificate went to wrong hands who had bad intentions to victimize the innocent family. The sell of the said land parcel No. 316/Kaloleni/Vishakani was unfairly done …"**

It goes on to say that the property of one Kalume Nuri should be sold to refund the Applicant, apparently

the purchase price he paid for the land. That is a clear challenge of the auction sale and the Applicant's title to the piece of land. The Tribunals under the Land Disputes Tribunal Act have no jurisdiction to deal with matters of Title. Section 3 of that Act is quite clear on the kind of disputes they can handle. Besides this, as I have already stated, the Applicant was not served with any pleadings or any documents containing the complaint before the Tribunal and he was therefore condemned unheard against rules of natural justice.

For these reasons I allow this application and grant the order of Certiorari to quash the Kaloleni Land Disputes proceedings of 17th May 2003 and the award thereon as well as the Kaloleni District Magistrate Courts judgment entered in accordance with that award. I do not see what purpose the order of Prohibition will serve once the proceedings and the decision of the Tribunal have been quashed and I therefore refuse to grant it. The interested parties were the prime movers of the whole process. Although they have not defended these proceedings I order that they pay of the costs of this application.

DATED this 26th day of July 2004.

D.K. Maraga

Ag. **JUDGE**