



Republic v Chairman Ikolomani Division Land Dispute Tribunal; Sahani (Interested Party); Mukalani (Exparte Applicant) (Environment and Land Judicial Review Case E004 of 2022) [2023] KEELC 19821 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2022
DO OHUNGO, J
SEPTEMBER 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**THE CHAIRMAN IKOLOMANI DIVISION LAND DISPUTE
TRIBUNAL RESPONDENT**

AND

GEORGE MILIMU SAHANI INTERESTED PARTY

AND

JOSECK MUSOGA MUKALANI EXPARTE APPLICANT

JUDGMENT

1. Having obtained leave to apply for judicial review orders of certiorari, mandamus and prohibition, the ex parte applicant filed Notice of Motion dated December 6, 2022, seeking the following orders:

1. That the honourable court be pleased to remove from (sic) this court the decision made on the 19/3/2019 concerning the ownership of title no. LR No. Isukha/Shitochi/3143 and the said decision be quashed by issuing an order of certiorari.
2. That there issue (sic) an order of Mandamus upholding the decision made by the Shinyalu Division Land Dispute Tribunal concerning LR No. Isukha/Shitochi/3143.
3. Costs of this application be provided for.



2. The application is supported by an affidavit sworn by the ex parte applicant. He deposed that the parcel of land known as LR No. Isukha/Shitochi/3143 (the suit property) was purchased by his late father Charles Mukalani Ashivaga from Fabian Sahani Milimu who was the interested party's father. That his father passed away before acquiring title to the suit property and that his father had Shinyalu Land Dispute Tribunal Case No. 10 of 2002 wherein the tribunal's decision was in favour of his father. That the decision was adopted in Kakamega CM Award No. 226 of 2001 wherein the court empowered the executive officer to sign transfer documents in respect of the suit property on behalf of the interested party's father to transfer the suit property to the ex parte applicant's father.
3. The ex parte applicant further deposed that although a decree was issued, his father passed away before the decree executed. That he took up the matter and on enquiry at the lands office he was advised that for the decree to be effected he had to make an application to have all title arising from the suit property cancelled. He further deposed that although he instructed an advocate to file an application as advised by the land registry, the application was never filed, and that judgement was delivered in Kakamega ELC Case No. 315 of 2015.
4. Although evidence of service upon the Attorney General on behalf of the respondent was availed, the Attorney General neither filed a response nor participated in the proceedings.
5. The interested party opposed the application through a replying affidavit in which he deposed that prior to his death on April 4, 1994, Fabian Sahani Milimu who was his father was the registered proprietor of the suit property and that after his father's death, the suit property was registered in his name following proceedings in Kakamega Succession Cause No. 617 of 2001. That the Shinyalu Land Disputes Tribunal thereafter purported to cancel his title and the decision was adopted by the Chief Magistrate's Court. He further deposed that the ex parte applicant later filed Kakamega ELC Case No. 315 of 2015 seeking among others cancellation of the interested party's title to the suit property but the case was dismissed on the ground that the tribunal lacked jurisdiction to cancel title to land. That the ex-parte applicant has never appealed the decision and is now seeking to do so through this case. He added that this case is therefore res judicata.
6. The application was canvassed through written submissions. Only the ex parte applicant and the interested party filed submissions. The ex parte applicant argued that he is entitled to the suit property in view of the decision of the tribunal and that the judgment of this court (differently constituted) in Kakamega ELC Case No. 315 of 2015 should be set aside. In response, the interested party urged the court to dismiss the case, arguing that the case is both res judicata and an abuse of the court's process.
7. I have considered the application, the affidavits, and the submissions. The issue that arises for determination is whether the orders sought should issue.
8. The ex parte applicant is seeking an order of certiorari to quash "... the decision made on the 19/3/2019 concerning the ownership of title no. LR No. Isukha/Shitochi/3143 ...". He has not annexed any decision dated March 19, 2019, contrary to order 53, rule 7(1) of the *Civil Procedure Rules* 2010 which provides:

In the case of an application for an order of certiorari to remove any 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 has 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.



9. Going by prayer 1 of the application and the ex parte applicant's submissions, it apparent that he is referring to this court's judgment in Kakamega ELC Case No. 315 of 2015, delivered on 9th March 2019. The simple answer to the ex parte applicant's prayer for certiorari is that this court lacks jurisdiction to quash its own judgment through an order of certiorari. The court can only issue certiorari in respect of a decision of an inferior tribunal and not its own decision. See *Halsbury's Laws of England*, Fourth Edition, Reissue volume 1(1) page 202.
10. Pursuant to prayer 2 of the Notice of Motion, the ex parte applicant has urged the court to issue an order of mandamus upholding the decision made by the Shinyalu Division Land Disputes Tribunal purporting to cancel the interested party's title in respect of the suit property. Based on the material placed before the court by both the ex parte applicant and the interested party, it is manifest that the suit property was registered land as at the time the tribunal made its decision purporting to nullify the interested party's title. There are many decisions emphatically stating that the tribunal which was established pursuant to section 4 of the *Land Disputes Tribunals Act*, 1990 (repealed) did not have jurisdiction to determine title to or ownership of registered land. See *Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others* [2014] eKLR.
11. The purpose of an order of mandamus is compel a person, corporation, or inferior tribunal to perform a public duty with a view to attaining the ends of justice. See *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR. It is inconceivable that any justice may be attained by compelling enforcement of the decision of the Shinyalu Division Land Disputes Tribunal which is a nullity since it was made without jurisdiction.
12. In view of the foregoing, find no merit in notice of motion dated December 6, 2022 and I therefore dismiss it with costs to the interested party.

Dated, signed, and delivered at Kakamega this 19th day of September 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ex parte applicant present in person

Mr Osango holding brief for Mr Samba for the Respondent

No appearance for the Interested Party

Court Assistant: E. Juma

