



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 12 OF 2008

EUSTACE KARURI GITHENYA.....APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

WANGECHI KANYIRI.....2ND RESPONDENT

JUDGMENT

1. The Motion for determination is the one filed on 17/07/2008. It is a Judicial Review Application seeking three substantive prayers. They are, roughly paraphrased as follows:

1. That the Court issues an order of Certiorari to bring up into the High court and quash the Award and proceedings of the Land Dispute Tribunal at ***Bahati Case No. 71 of 2006***.
2. That the Court issues an order of Prohibition to restrain the Chief Magistrate at Nakuru from enforcing the Award in Land Dispute Tribunal Case No. 71 of 2006 pronounced as an order in the said case.
3. That the Court issues an order of Mandamus directed to the Bahati Land Dispute Tribunal and to the Chief Magistrate Court Nakuru to observe the Law and particularly the rules of natural justice.
4. Costs of this Application be provided.

2. The Application had been granted pursuant to leave of the Court which was granted on 04/07/2008. It would appear that the Court file went missing shortly after the filing of the substantive motion. The Court file seems to have re-appeared sometime in 2014 because the *Ex Parte* Applicant was able to make an application for substitution. The orders were granted on 24/12/2014.

3. It was in view of the missing file that the advocates presently on record for the *Ex Parte* Applicant, King'ara & Co. Advocates filed an application for the reconstruction of the court file. The order was duly granted on 13/02/2018. Upon the reconstruction of the court file, the matter was ready for hearing. As such, I gave directions on 28/05/2018 that the parties do file their written submissions and then prepare for oral highlighting.

4. When the matter came up for oral highlighting on 25/07/2018, the Honourable Attorney General indicated that he was conceding to the Application provided that no costs are awarded. The 2nd Respondent appeared in person. She indicated that she had no lawyer. I noted on the Court record that she appeared elderly and did not understand English. I directed that she should bring an intermediary on 18/09/2018 for the Court to explain the procedural posture of the case and what she needed to do to effectively litigate the case.

5. On 18/09/2018, the parties, again, turned up in Court. The 2nd Respondent indicated that her intermediary would be coming later in the morning. However, by 10:30am, no intermediary had come. I therefore took the time to explain to the 2nd Respondent in Kiswahili, a language she understands, the procedural posture of the case. I explained to her that she needed to file her responses to the Written Submissions filed by the *Ex Parte* Applicant's advocates within 21 days. I assigned the case a mention notice of 23/10/2018.

6. On 23/10/2018, the parties appeared before me again. The 2nd Respondent was yet to file any Written Submissions. This time she told me she needed time to appoint a lawyer. Due to the need to be fair to the *Ex Parte* Applicant and the need to conclude this long standing matter, I directed the 2nd Respondent to either in person or through an appointed lawyer file her written submissions within 21 days. I further directed that the judgment will be prepared without her input if she did not adhere to that directive.

7. The 2nd Respondent did not file any written submissions within the 21 days as directed. As such, this judgment was prepared without her input. This is because she was given ample opportunity to be heard but failed to take advantage of them.

8. The brief facts of the case are as follows. The 2nd Respondent filed Land Dispute No. 55 of 2000 before the Bahati Land Disputes Tribunal. That dispute was later re-titled Land Dispute No. 71 of 2006. The case was against the *Ex Parte* Applicant herein. The land in dispute was that parcel known as Dundori/Mugwathi/Block 1/584 (“Suit Property”).

9. Upon hearing the dispute, the Tribunal gave a ruling on 19/10/2007 in the following terms:

1) That parcel of land Dundori/Mugwathi/Block 1/584 belongs to the late Kanyiri Gitau.

2) The panel of elders therefore do hear (sic) order that the land certificate Dundori/Mugwathi/Block 1/584 under the names Eustus Kariuki Githenya cancelled and nullified.

3) The panel recommends that the title deed for Dundori/Mugwathi/Block 1/584 should be issued to Wangeshi Kanyiri on trust.

10. With this favourable ruling, the 2nd Respondent approached the Nakuru Chief Magistrate’s Court vide CMCC No. 5 of 2008 with a view to having the tribunal decision recorded as an order of the Court for purposes of execution. The award was formally given by the Court on 26/05/2008. A month later, the *Ex Parte* Applicant began the present proceedings.

11. Shorn of undue complications, the Application is a simple one: to un-do the decision of the Bahati Land Disputes Tribunal given on 19/10/2007 on the grounds that it was given ultra vires and unprocedurally and is, therefore, a nullity.

12. As stated before, the Honourable Attorney General conceded the Application. It would appear that it was for a good reason that he did so.

13. The Bahati Land Disputes Tribunal which gave the impugned ruling was set up pursuant to the repealed Land Disputes Tribunal Act (Act. No. 18 of 1990). The Tribunal’s jurisdiction was circumscribed in section 3 of that Act in the following terms:

(1) 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.

14. It is, therefore, plain and clear that the jurisdiction of the Tribunal extended only to the three categories of disputes listed in section 3(1) of the repealed Act. It follows, consequently, that any attempt by the Tribunal to trammel outside those three areas would be without jurisdiction; beyond its powers; ultra vires.

15. In the present case, as the ruling of the Tribunal makes clear, the Tribunal made three consequential decisions on ownership and title to the Suit Property: It held that the Suit Property belongs to Kanyiri Gitau; that the title held by the *Ex Parte* Applicant should be nullified; and that a new title should be issued to the 2nd Respondent.

16. There is no question that all those three rulings deal with ownership of registered land. The Tribunal itself noted that the Suit Property was registered in the name of the *Ex Parte* Applicant and that it had seen a copy of that title.

17. In that case, like Nyamu J. (as he then was) in ***R v Kajiado Disputes Tribunal and Others Ex Parte Joyce Wambui [2006] 1 EA 318***, I have no hesitation in holding that the Bahati Land Disputes Tribunal had no jurisdiction to adjudicate on ownership of registered land. The award dated 19/10/2007 is, therefore, ultra vires the Act. As several of our cases have held, the Land Disputes Tribunal had no jurisdiction to determine questions of ownership and title to land registered under the repealed Registered Land Act (See, for example, ***R v Kajiado Disputes Tribunal and Others Ex Parte Joyce Wambui [2006] 1 EA 318***; ***Peter Okiring Sausau v Chairman, Amagoro Land Disputes Tribunal [2013] eKLR***; ***Republic vs. The Chairman Keiyo Division L. D. T & Another Ex Parte Tabyotin Kabon Ego Eldoret HCMA No. 43 of 2005***; ***Mbogo Mwathi v John Chege Mbogo, Civil Appeal No.531 of 2000***; ***James Alukoye Were v Lurambi Division Land Disputes Tribunal, Misc. Civil Appl. No.165 of 2005***). *In all these cases, our decisional law is clear that once a Tribunal purports to determine questions of ownership and title, it acts ultra vires and the entire proceedings become a nullity. And, as Nyamu J. (as he then was) said in the Kajiado Disputes Tribunal Case (supra), out of nothing comes nothing: a nullity coming out of the Tribunal cannot give rise to a legitimate entry of judgment in the Chief Magistrate’s Court. Any entering of judgment based on the Tribunal’s exercise of jurisdiction ultra vires is equally a nullity. And so it is here.*

18. I have read the Grounds of Opposition filed by the 1st Respondent (which are considered abandoned since the Honourable Attorney General conceded to the Application) and Replying Affidavit of the 2nd Respondent. I have not found anything in either to dissuade me from the view that the Tribunal acted ultra vires and its decision is ripe for quashing for acting in excess of jurisdiction. I am not persuaded that the Application is fatally defective; and neither am I persuaded that it was filed out of time. I note that it was filed on 04/07/2008 while the

entry of judgment by the Learned Magistrate was on 26/05/2008. In any event, even if the Application had been filed outside the 6 months period stipulated in Order 53 Rule 2, I would have followed our decisional law in holding that the time period does not apply to such cases where the basis for impugning a tribunal's decision is excess of jurisdiction. *See R v Land Disputes Tribunal, Central Division & Another [2006] 1 KLR 475 and R v Kenyatta University [2009] eKLR.*

19. There unavoidable conclusion, therefore, having found that the Bahati Land Disputes Tribunal herein acted in excess of its jurisdiction in *Bahati Land Dispute No. 71 of 2006* and having found that the decision emanating from the said proceedings is *null and void*, the Court finds that the Applicant herein deserves all the orders sought. The orders, then, shall be as follows:

a. An order of Certiorari hereby issues bringing up into the High Court and quashing the award and proceedings of the Land Dispute Tribunal at Bahati Land Dispute No. 71 of 2006.

b. An order of Prohibition hereby issues restraining the Chief Magistrate's Court at Nakuru from enforcing the Award in Bahati Land Dispute Tribunal Case No. 71 of 2006 and from pronouncing the same as an order in the said case.

c. The costs of this Application are awarded to the *Ex Parte* Applicant to be paid by the 2nd Respondent only.

5. Orders accordingly.

Dated and delivered at Nakuru this 21st day of January, 2019

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JOEL NGUGI

JUDGE