REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC MISC. JUDICIAL REVIEW APPL. NO. 5 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN LAND DISPUTES

TRIBUNAL AT EMBU .....1ST RESPONDENT

THE ATTORNEY GENERAL..... 2ND RESPONDENT

AND

MATHUVA MUKEMBA .....INTERESTED PARTY

AND

MBAIKA KAVITI KYUNGUTI alias MBAIKA KAVITI NYANGE (Suing as the

legal representative of KYUNGUTI MUUKI ..... EX-PARTE APPLICANT

JUDGEMENT

1. By his notice of motion application dated 02nd March, 2004 and filed in court on 03rd March, 2004 the Ex-Parte Applicant prays for: -

(i) THAT the decision of the land disputes appeals committee made on 14/6/2001 be brought up and quashed by this Honourable court.

(ii) Costs be granted.

2. The application is expressed to be brought under Order LIII Rules 3 and 4 of the Civil Procedure Rules. It is supported by the statement of facts dated 14th January, 2002, the verifying and supporting affidavits of Kyunguti Muuki, the deceased Ex-Parte Applicant, who has since been substituted with Mbaika Kaviti Kyunguti alias Kaiti Nyange (hereinafter referred to as the Ex-Parte Applicant).

3. The application is opposed by the Interested Party vide his replying affidavit sworn on 01st February, 2007 and filed in court on even date.

4. The Interested Party has deposed in paragraphs 2, 3, 4 and 5 of his replying affidavit that he has been advised by his Advocates Mr. O. N. Makau which he verily believes to be true that the application is bad in law, without merits and should be dismissed with costs, that the application is based on an incompetent and defective application for leave, that the statement of facts is defective and should be struck out, that the proceedings under review are related to a dispute of which the Tribunal had the necessary jurisdiction to entertain.

5. On the 17th August, 2009, the Respondent filed its notice of preliminary objection where it has stated that: -

1) The suit is statute barred having been filed after the expiry of the time within which Judicial Review orders can be sought.

2) The delay has been extremely long, inordinate and without good reasons.

3) Equity aids the vigilant and not the indolent.

4) The suit as drawn and filed does not warrant the Court to grant the Judicial Review remedies sought.

5) The suit is incurably defective in Law.

6. The Respondent thereafter did not actively participate in the proceedings despite being served with appropriate notices.

7. And on 05th August, 2010, the Interested Party filed his notice of preliminary objection of even date where he contends that: -

a) The application is bad in law as the application for leave to apply for Certiorari was filed out of time.

b) The pleadings filed are forgeries and the court receipts for fees is suspect.

8. The application was disposed off by way of written submissions.

9. In his submissions, the Counsel for the Ex-parte Applicant framed three issues for determination namely: -

a) Whether the Appeals Committee had jurisdiction to hear the matter?

b) Whether the Appeals Committee was properly constituted?

c) Whether leave was properly sought and granted within time?

10. On the other hand, the Counsel for the Interested Party did not frame any issue for determination. The Counsel's submissions dwelt largely on the question of whether or not the application filed by the Ex-Parte Applicant complies with section 9(3) of the Law Reform Act Chapter 26 of the Laws of Kenya and Order 53 Rule 2 (*as it stood then*) of the Civil Procedure Rules. Further, the Counsel touched on the provisions of Article 159 of the Constitution of Kenya, 2010.

11. On the issue of whether or not the Tribunal had jurisdiction to hear disputes over registered land, the Counsel for the Ex-Parte Applicant submitted that jurisdiction to hear appeals of this nature stems from **section 3 of the Land Disputes Tribunal Act Chapter 303 of the Laws of Kenya** *(now repealed).* The section sets out jurisdiction of the Land Disputes Tribunal as follows: -

> *"8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated."*

The Counsel went on to submit that appeals were preferred and heard by the Appeals Committee in terms of **section 8** of the repealed Act which provided as follows: -

> *"3. (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."*

The Counsel pointed out from the proceedings before both Tribunals, the Interested Party (Mathuva Mukemba) claimed that: -

- *He bought a portion of NZAUI/NZIU/592 from the initial Ex-parte Applicant KYUNGUTI MUUKI for Kshs. 8,240/= and a sale agreement entered into.*
- *The land was registered in the name of the Ex-parte Applicant on 14/7/1975 and title issued on 18/10/1976.*
- *The Interested Party was thus entitled to a share of the Ex-parte Applicant's case and the same should be divided.*

He went on to submit that both the Land Disputes Tribunal and the Appeals Committee heard the dispute and upheld the Interested Party's claim and ordered that the land be sub divided and the Interested Party be allocated a portion.

12. The Counsel submitted that sections 3 and 8 of Land Disputes Tribunals Act did not give the Land Disputes Tribunal and the Appeals Committee jurisdiction to hear disputes concerning contracts of sale of land and over registered land which is the sole preserve of the courts. The Counsel pointed out having adjudicated over a claim over contract of sale of land as well as registered land, the Land Disputes Tribunal and the Appeals Committee acted without jurisdiction and the resultant decisions are ultra vires. The Counsel went on to submit that there is no dispute that by the time the Land Disputes Tribunal and the Appeals Committee heard the dispute, the land was already registered and title issued to the Ex-Parte Applicant on 18th October, 1976 as seen in annextures KM1 and 2 to paragraphs 2 and 4 of the Ex-parte Applicant's affidavit in support of documents. The Counsel pointed out that the issue of jurisdiction of these Tribunals has been the subject of determination and quashing by courts in countless decisions such as **M'Marete vs. Republic & 3 others [2004] eKLR** where the Court of

Appeal at page 4 held: -

> *"We have considered the rival submissions in this appeal and it would appear to us that the main issue relates to whether the Land Disputes Tribunal of Central Meru had jurisdiction to determine the dispute before it. We have already set out at the commencement of this judgment the final decision of the Tribunal. It was to the effect that the panel of elders awarded the parcels of land* ***Nos. Nyaki/Mulathankari/1680 and 1681*** *to the claimant (Beatrice) who is the appellant before us. These pieces of land were registered under* ***Registered Land Act (Cap. 300 Laws of Kenya)****. Awarding land to the claimant meant she acquired an interest in it by virtue of that award. In order to put that ruling into effect, the appellant would have to effect it by rectifying or canceling the titles. The issue is whether the Tribunal had jurisdiction to do so. Section 3(1) of the Land Disputes Tribunals Act 1990 provides:*
>
> *"(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."*
>
> *In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.*
>
> *In view of the foregoing, we are in agreement with the ruling of the learned Judge to the effect that the Tribunal went beyond its jurisdiction. It therefore follows that the superior court cannot be faulted for having allowed the application and granting the reliefs sought by that application. Consequently, we find no merit in this appeal and we order that the same be and is hereby dismissed."*

The Counsel further relied on the case of **Republic vs. Chairman Meru Central Land Disputes Tribunal & 4 Other [2018] eKLR** where the Court while relying on the above Court of Appeal decision held in paragraphs 14 to 15 that: -

> *"14. In this case, the Tribunal dealt with registered land and the award reads that the land should be transferred to the claimants in the Tribunal case. This is bound to interfere with the ownership of the land by the applicant and his co-registered owner. In my view the Tribunal gave orders that exceeded its jurisdiction as prescribed in* ***Section 3*** *of the Act. That view is supported by the Court of Appeal decision in the case of* ***M'Marete vs. Republic & 3 Others, [2004] eKLR (Civil Appeal No. 259 of 2000, Court of Appeal*** *sitting at Nyeri****) where*** *the Court of Appeal reiterated as follows:*
>
> > ***"In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction."***
>
> *15. On this ground, I find that the award of the Tribunal should be quashed."*

The Counsel also cited the case of **John Kasimu Kilatya vs. Chairman Machakos Land Disputes Tribunal & 2 others [2017] eKLR** where the Court of Appeal authoritatively held: -

> *"[12] We shall begin with the issue of jurisdiction being the basis of the court's authority to adjudicate on matters litigated before it. The limits of this authority are imposed by statute, or constitution and the extent of the authority may be extended or restricted. If unrestricted the jurisdiction is said to be unlimited as in many instances the High Court has unlimited jurisdiction in civil and criminal matters. On the other hand, the Land Disputes Tribunal's jurisdiction as rightly pointed out by the learned trial Judge was limited specifically as provided for under* ***section 3(1),*** *to determine land disputes regarding; -*
>
> *The division of or the determination of boundaries of land A claim to occupy or work land. Or*
>
> *Trespass to land*
>
> *It was common ground amongst all the parties in this appeal that the tribunal in this case in issuing an award directing the cancellation of the appellant's title was an order that was made without jurisdiction. It was therefore an ultra vires order that exceeded the authority of the tribunal and the Judge found it was a suitable matter to quash through an order of certiorari. However, it was not quashed because the magistrates' court was not made a party to the proceedings.*
>
> *[13] Still on the issue of jurisdiction, many authorities have defined it as the foundation and basis that every court or tribunal must establish before embarking on a matter. Where a court or tribunal takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before a court can issue a valid judgment or order. See the case of* ***The Owners of Motor Vessel 'Lillian "S" " vs Caltex Oil (Kenya) Ltd [1989] KLR 1.*** *It was emphasized that establishing jurisdiction is a condition precedent to the whole case as set out and mandated by statute or the Constitution. Nyarangi J. (as he then was) had this to say;-*

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"***

[14] The Court of Appeal also emphasised the importance of a court or tribunal establishing its jurisdiction prior to considering the matter before it in ***Joseph Njuguna Mwaura and 2 others vs Republic,*** *Nairobi Criminal Appeal No. 5 of 2008 when it stated that;*

> ***"It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function"***

[15] Although the tribunal was completely oblivious of the above requirement, as the same was not raised before it, nonetheless before embarking to determine the matter, they ought to have asked themselves three questions, whether the claim was in regard to;-

The division of or the determination of boundaries of land A claim to occupy or work land. Or

Trespass to land

Since the claim touched on issues of transfer of land after a sale transaction, which was not within the jurisdiction given to the tribunal by statute, they ought to have downed their tools and referred the parties to court. Having found the tribunal had no jurisdiction and the award made without jurisdiction was a nullity, was the Judge justified in proceeding further. We think there was nothing to take further as the award made without jurisdiction would not have any legal effect even if adopted by the magistrate's court. Mere adoption of an order that was a nullity would not cure the illegality.

[16] The learned Judge nonetheless went on to dismiss the matter on the grounds of non-joinder of the Senior Resident Magistrates' Court as a party to the proceedings. We are certainly not down playing the importance of joining parties to proceedings who will in one way or another be affected by the decision made by the court as a right to a hearing is one of those fundamental rights that are secured in the Constitution. See ***Article 50 (1)*** *of the Constitution provides as follows:*

> ***(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body."***

The pertinent argument here was, it was imperative to join the magistrate's court in the proceedings and we agree as we did in a recent decision by this same bench in the case of ***Registrar of Trade Unions vs Nick Njuguna & 4 others*** *Civil Appeal No 251 of 2014, that a party who is affected prejudicially by the decision of the court is a necessary party to the case. The aforesaid case involved the interpretation of* ***Article 24 (5)*** *of the Constitution as read with* ***sections 3 (b)*** *of the Labour Relations Act 2007 and 47 (3) of the National Police Act regarding the fundamental rights to associate and in particular, the right to form a trade union for police officers. The Attorney General was not a party to the proceedings before the trial court and we had the following to say in regard to non-joinder thereto:*

> ***"This is not just a matter of misjoinder or non- joinder of parties. The proceedings by which Sections 3(b) of the Labour Relations Act, 2007 and 47(3) of the National Police Service Act, No 11 A of 2011 were declared unconstitutional were matters of great public interest. The orders affected the National Government, the Police Service and the National Assembly. It was imperative the said parties be joined in the proceedings where the court was called upon to give an interpretation of Article 24 (5) of the Constitution in relation to the impugned sections of the law. As it is we think it is not necessary for us to interrogate whether the interpretation given by the learned Judge was sound granted that the views of the affected parties were not considered. It was necessary for the Court to order the application be served upon the necessary parties and consider the opinion, views or submissions by the said parties on their view of the aforesaid provisions of the law. Under Article 156 (6) of the Constitution, the office of the Attorney General is charged with the responsibility of promoting, protecting and upholding the rule of law and to defend public interest. The Inspector General of Police is in charge of the Police Service, and the National Assembly enacted the impugned sections of statutes and was being directed to implement the order by amending the law as per the orders."***

[17] It is trite that if a party has a direct and substantial interest in a matter in which he/she may be affected prejudicially by the judgement of a court or tribunal in the proceedings, that is a necessary party. The question we have asked ourselves regarding the joinder of the magistrates' court is how an ultra vires order made without jurisdiction by the tribunal would affect the magistrate's court that merely adopted the order as an order of the court. Had the learned Judge considered this aspect, that in any case the award that he found was made without jurisdiction was a nullity, we have no doubt he would have arrived at the same conclusion as we have, that the only legal solution was to down his tools and not proceed any further as the award was of no legal effect.

[18] In the upshot, we find merit in this appeal, which we hereby allow with the result that the orders made on 29th November, 2011, and delivered on 30th November, 2011 and all consequential orders are hereby set aside and the appellant's notice of motion is allowed."

13. On the issue of the Tribunal being improperly constituted, the Counsel cited section 9 of the repealed Act which set out the composition of the Land Disputes Appeals Committee as follows: -

> *"9(1) The Minister shall establish for each Province a Land Disputes Appeals Committee which shall consist of—*
>
> *(a) a chairman appointed from time to time by the Provincial Commissioner from the panel of elders appointed by the Minister by notice published in the Gazette for purposes of appeals under this Act; and*
>
> *(b) such persons, not being less than five, appointed by the Minister.*
>
> *(2) For the purpose of hearing appeals from Tribunals in the Province for which the Committee is constituted the Committee shall sit in a panel of three members and in such places as may be determined by the Provincial Commissioner."*

The Counsel went on to submit that from the provision of section 9 of the repealed Act, the composition of the Appeals Committee should be;

i) Not less than five (5) members

ii) For purposes of hearing committee shall sit in a panel of three (3) members.

He pointed out that a perusal of the proceedings of the Appeals Committee shows that during the hearing, the Committee was constituted as follows: -

Panel of elders

Gedion M'ithali Mwambia …… Chairman

Festus Muruki M'tuaruchiu ……. Member

Benard Marondo …… Member

Kaari Japhet - Secretary

The Counsel added that the panel was improperly constituted as it comprised two (2) members instead of three (3) or five (5) provided for by the Act and thus is was incapable of passing any binding legal judgement and/or ruling. The Counsel added that courts have not shied away in declaring the resulting judgement and rulings flowing from illegal and improperly constituted judgement as null and void.

14. In support of his submissions, the Counsel cited the case of **Peter Mmini Shaka vs. James Shaka Martin [2006] eKLR** where the Court held;

> *"While the Land Disputes Tribunal is required to have a panel of three or five members pursuant to section 4(1) of the Land Disputes Tribunals Act No.18 of 1990, the Appeals Committee is enjoined to have a panel of three members pursuant to section 8 (5) of the said Act.*
>
> *Under section 8(7) of the said Act, the decision of the Appeals Committee is required to be reasoned. But more fundamental, the jurisdiction in both the Tribunal and the Appeals Committee does not include adjudication of title to or interest in title to land.*
>
> *Mrs. Osodo, learned counsel for the Appellant urged me to allow the appeal as the Appeals Committee was not properly constituted and as it acted beyond its jurisdiction. The appeal was not opposed. The Respondent was served as evidenced by the affidavit of service sworn on 6.3.06 by Zablon Ochieng Senge, a process server.*
>
> *I have perused the record of appeal and given due consideration to the submissions of Mrs. Osodo. It is my finding that both the Land Disputes Tribunal and the Appeals Committee were not properly constituted. It is also my finding that both acted outside the purview of their jurisdiction."*

The Counsel further cited the case of **Republic vs. Chairman Kandara District Land Disputes Tribunal & Another Interested Party John Gachoka Charagu Exparte Godfrey Mungai [2013] eKLR** where the Court held that the Tribunal was improperly constituted and thus the decision was a nullity.

15. On the issue of whether the leave to file judicial review was properly sought and granted, the Counsel submitted that although the Interested Party has deposed in paragraph 3 of his replying affidavit sworn on 01st February, 2007 and filed in court on 06th February, 2007 that the application is based on an incompetent and defective application, the Interested Party has not elaborated on the issue. The Counsel went on to submit that the ruling of the Appeals Committee does not state when the decision was delivered to the parties and if they were present. That on the last page, the decision shows that it was signed on 14th June, 2001 by three people listed as elders but no signatures appear. The three were: -

Gedion M'ithali Mwambia …… 14/06/2001

Festus Muruki M'tuaruchiu ……. 14/06/2001

Benard Marondo …… 14/06/2001

The Counsel was of the view that the judgement was not signed as required by the Act. The Counsel went on to submit that assuming that the judgement was properly signed, it does not state if the parties in dispute were present when it was delivered and whether they signed or declined to sign it. He pointed out that there was no notice that judgement would be delivered on a particular date. In short, the Counsel submitted that from the proceedings of the Tribunal, it is not clear when the decision was read to the parties. The Counsel pointed out that the judgement shows that it was filed in court on 11th February, 2002. He added that the extracted order granting leave to file the judicial review was granted on 11th February, 2004 over an amended chamber summons dated 11th February, 2004. The Counsel went on to submit that the decision of the Appeals Committee was read in court on 26th February, 2004 after the filing of the judicial review proceedings and as such, the application for leave was filed within time and before expiry of six months. It was submitted that time started running from 10th January, 2002 when the decision was brought to the attention of the parties.

16. The Counsel went on to submit that in such instances where it is impossible to ascertain when the judgement was read, the court uses the date when it was filed in court as that is the only certain date available. The counsel added that it would be prejudicial to use the date when the judgement was purportedly delivered when there is no evidence that parties were aware.

17. In support of his submissions the Counsel relied on the case of **Pelesia Atieno Onyango vs. Republic & Another [2016] eKLR** where it was held: -

> *"That a party to a dispute before the Tribunal was required by Section 8(1) to file an appeal with the Appeals Committee within 30 days of the decision. The Tribunal decision is dated 9th October 2008. The lower court proceedings in Siaya PMC Land Case No.102 of 2008 which are attached to the Memorandum of appeal indicates that the Tribunals award was filed with the court on 5th December 2008 and adopted by the court on 20th January 2009. This court will take that date as the one on which the Tribunals award was brought to the attention of the parties. The running of the 30 days within which to file the appeal started on that date. The appeal with the Appeals Committee was registered as case number 6 of 2009. The Respondent did not avail evidence to proof or support her claim that the appeal was filed outside the 30 days' window."*

The Counsel further cited the case of **Republic –vs- Funyula Land Disputes Tribunal & Another [2014] eKLR** where at paragraphs 5 to 6 of its judgement, the Court stated thus: -

> *"5. That the copy of tribunal proceedings does not indicate whether and when the award was read to the parties. The space provided for the parties to sign is blank, making the court to conclude that they were never asked to append their signatures or that they declined or were absent. It would therefore be unfair to say that the time for filing an appeal or judicial review application started to run against the parties from the date of the award without evidence that it was on the same date that parties got to know the contents of the award. Time will therefore be taken to have started running from the date disclosed to the court to be the date the award was brought to the attention of the parties. None of the parties have been clear on this and the court will take that date to be 9th March, 2011 when the award was read over and adopted as judgment of the court.*
>
> *6. That the Applicant filed the application for leave to file the substantive application on 19th July, 2011. The Applicant was therefore within the six months' period prescribed under Order 53 Rule 2 of the Civil Procedure Rules as the court has taken 9th March, 2011 to be the date time started running."*

The Counsel pointed out the same position obtained in the case of **Peter Atambo Magoya vs. Stella Osebe [2019] eKLR** where the Court while adopting a similar approach held at paragraphs 9 and 11 of its judgement that: -

> *"9. On the issue whether or not the appeal before the Appeals Committee was filed out of time, I have carefully reviewed the record and regrettably the record is not definite as to whether or when the Tribunals decision was read out to the parties. Time would have started to run from the date the award was read to the parties. Though it is evident the award/decision of the Tribunal was prepared after the parties and their witnesses were heard, it is not clear when the decision was communicated to the parties. The date of 22nd June 2011 indicated at the end of the award appears to have been super imposed on some other date. The award does not indicate it was read to the parties on that date.*
>
> *11. The proceedings taken before the Magistrates Court save the decree issued on 16th September 2011 are not included. Given the circumstances, I am not able to hold that the appeal before the Provincial Appeals Committee was filed out of time as it is not definite when the verdict was pronounced to the parties."*

18. Arising from the above, the Counsel reiterated that time started running when the judgement of the Appeals Committee was brought to the attention of the parties on 10th January, 2002 when it was filed in court. That on that strength, the application for leave dated 11th February, 2002 was filed within time.

19. The Counsel concluded by urging the Court to find that the application has merit, allow it, and proceed to quash the decision of the Embu Provincial Appeals Committee.

20. On the other hand, the Counsel for the Interested Party cited **section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules** as amongst the statutory and constitutional provisions that guide parties with regard to judicial review.

21. **Section 9(3) of the Law Reform Act** as quoted by the Counsel provides: -

> *"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

As for **Order 53 Rule 2 of the Civil Procedure Rules**, it is provided that: -

> *"Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

The Counsel submitted that it is apparent from the notice of motion dated 02nd March, 2004, the decision that is being challenged was rendered on 14th June, 2001 thus the application was filed more than two years later. The Counsel went on to submit that the Ex-parte Applicant has not filed an application to extend the statutory limit provided under Section 9(3) of the Law Reform Act which is six months. The Counsel was of the view that the notice of motion application must fail solely on this point of law. In support of his submissions, the Counsel cited the case of **Ako vs. Special District Commissioner & another [1989] eKLR** where the Court of Appeal sitting at Kisumu held that: -

> *"It is plain that under sub-section (3) of section 9 of the Law Reform Act Cap 26 leave shall not be granted unless application for leave is made inside six months after the date of the judgment. The prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, more specifically order 49 rule 5 which permits for enlargement of time. That is the basis of the contention that the prohibitive nature of sub-section (3) of section 9 of the Act is capable of bearing such a liberal interpretation as would make it permissible for the court to enlarge time beyond the period of six months. We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provision of subsection (3) of section 9 of the Law Reform Act."*

22. Though the Counsel cited two more authorities, he did not provide copies of the same nor did he make proper citation. As such, I shall ignore the two authorities.

23. The Counsel further submitted that although it is appreciated that Article 159 of the Constitution provides for justice to be administered without undue regard to procedural technicalities, it is essential to note that in certain circumstances, statutory procedures are paramount and ought to be followed as they form the substantive part of the law. The Counsel added that this is what the Court should hold since the Ex-parte Applicant chose not to file an application for enlargement of time. The Counsel urged the Court to dismiss the notice of motion application with costs.

24. Having read the notice of motion application, the replying affidavit and the rival submissions by the Counsel for the parties on record, I am of the view that the only issues for determination are, firstly whether or not the Appeals Tribunal had jurisdiction to hear a dispute over a registered land and, secondly whether the panel was properly constituted.

25. I will start by addressing the second issue. Section 9 of the repealed Act, provided that for purposes of hearing the Appeals Committee ought to have sat in a panel of three (3) members. A perusal of the proceedings of the Appeals Committee in Appeal case number 90 of 2000 shows that the panel that sat comprised of the chairman and two (2) members thus offending the mandatory provisions of the said section 9. I do agree with the Counsel for the Ex-parte Applicant that the Appeals Committee was improperly constituted.

26. From the undisputed facts, land parcel number Nzavi/Nziu/592 which was the subject Appeals Committee case number 90 of 2000 was registered under the repealed Registered Land Act Chapter 300 of the Laws of Kenya on 18th October, 1976 as can be seen from annexture KM1 to the Ex-parte Applicant's affidavit in support of documents. From the authorities that were referred to me by the Counsel for the Ex-Parte Applicant, the Land Disputes Tribunal and Appeals Committee's jurisdiction was provided for under Section 3(1) and 8(1) of the repealed Land Disputes Tribunal Act. It is clear that the jurisdiction of both the Land Disputes Tribunal and the Appeals Committee did not extend to claims of ownership. Neither the Land Disputes Tribunal in Makueni LDTC No/5 of 2000 nor did the Appeals Committee have jurisdiction to order that land parcel number Nzavi/Nziu/592 be subdivided between the Ex-Parte Applicant and the Interested Party. It seems to me therefore that the Appeals Committee exceeded its jurisdiction and its decision was a nullity. I would agree with the Counsel for the Ex-Parte Applicant that the decision of the Appeals Committee was ultra vires and therefore null and void ab initio.

27. In the case of **Stephen Kibowen vs. The Chief Magistrate's Court Nakuru and 2 Others in Civil Appeal No.211 of 2013**, (unreported) the Court of Appeal sitting at Nyeri held thus: -

> *"Did the learned Judge so wrongly exercise his discretion as to warrant our interference? We are afraid so. It is clear from the brief ruling that the learned Judge took a strict approach to the 6-month limitation period and concluded that the application before him was incompetent. Ordinarily, such a conclusion would be unimpeachable but, in the matter before the learned Judge, what was*

being challenged was not a decision properly made within jurisdiction against which time could run. Rather it was a nullity which amounted to nothingness."

28. In the application before me, the Interested Party cannot be heard to say that the application to impugn the decision of the Appeals Committee made on 14th June, 2001 was filed more than two years outside the 6-month limitation period. Time could not run for such decision made without jurisdiction.

29. The upshot of the foregoing is that the Ex-Parte Applicant's Notice of Motion application has merits and I will proceed to allow it and issue the following orders: -

i) THAT the decision of the Land Disputes Appeals Committee made on 14/6/2001 is hereby brought up and quashed.

ii) Costs are granted.

Signed, dated and delivered at Makueni via email this **18th** day of **June, 2020.**

MBOGO C.G.,

JUDGE.

Court Assistant: Ms. C. Nzioka