



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 58 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF PROHIBITION**

**AND**

**IN THE MATTER OF MERU SOUTH DISTRICT LAND DISPUTES TRIBUNAL CASE**

**NO 8 OF 2002 AND READ IN CHUKA LDT NO 17. OF 2006**

**AND**

**IN THE MATTER OF PERCEL OF UNREGISTERED LAND SITUATED AT KARITHA SUB-  
LOCATION, KAMWIMBI LOCATION, IGAMBA NGO'MBE DIVISION, MERU SOUTH DISTRICT**

**AND IN THE MATTER OF CHUKA PMC LDT NO. 17 OF 2006**

**BETWEEN**

**PATRICK NJOGU KAMAGURU .....EX-PARTE APPLICANT**

**VERSUS**

THE MERU SOUTH DISTRICT LAND

DISPUTES TRIBUNAL.....1ST RESPONDENT

PRINCIPAL MAGISTRATE,

CHUKA LAW COURTS.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

FESTUS NJUE.....INTERESTED PARTY

**J U D G M E N T**

1. The Judicial Review Motion filed in court on 26.08.11 was brought under order 53 of the old civil procedure rules and under section 8 and 9 of the Law Reform Act. The application seeks the following orders;

**(1) THAT this Honourable Court be pleased to grant an order of prohibition to prevent the 1st and 2nd respondents from implementing decisions made in L.D.T Case No. 8 of 2002 and read in Chuka PMCC LDT NO 17 of 2006 and the same be declared as null and void abinitio.**

**(2) THAT the costs of this application be provided for and the same be paid by the respondents and the interested party.**

2. The main motion is supported by the grounds set out in the statement of facts where it is stated that :-

**(1) The Ex-parte applicant is the beneficial owner in possession of land parcel situate in and unregistered at Kiaritha sub-location, Kamwimbi Location, Igamba Ngombe Division, Meru South District.**

**(2) On 5/7/2011 and 12/7/2011 the 2nd respondent issued orders in favour of the interested party pursuant to a decision by the 1st respondent.**

**(3) On the basis of the afore-said decision and/or finding and/or award , the interested party is now seeking inter alia, to evict the ex-parte applicant from the suit land (unregistered).**

**(4) The 1st respondent considered extraneous and irrelevant matters for instance that the interested party resides on the ex-parte applicant's unregistered land when he does not.**

**(5) The 1st respondent acted unreasonably, arbitrarily, capriciously and illegally:-**

**i. In entertaining a dispute when it had no jurisdiction to entertain the same.**

**ii. The decree has the effect of evicting the exparte applicant from his ancestral land which is not registered.**

**iii. The respondent have no jurisdiction to issue the orders of eviction.**

**iv. The 1st respondent usurped the jurisdiction of the High Court and the award is void initio.**

**v. The 1st respondent, at the behest of the interested party, intends to evict the ex-parte applicant, the owner of the unregistered suit land and award the same to the interested party.**

**vi. The decision and/or finding and/or award by the 1st respondent amounts to gross violation of the ex-parte applicant's fundamental rights to protection from deprivation of property without commensurate compensation, and thus unconstitutional.**

**vii. The decision and/or finding and/or award by the 1st respondent is manifestly unreasonable , arbitrary, oppressive, unlawful, unenforceable, null and void ab initio.**

3. The applicant, (PATRICK NJOGU KAMAGURU ) has also sworn an affidavit verifying the facts averring as follows:-

**(1) THAT I am the ex-parte applicant herein well versed with the facts giving rise to these proceedings hence competent to make and swear this affidavit.**

**(2) THAT I am beneficial owner in possession of land unregistered parcel land situate at Kiaritha Sub-Location, Kamwimbi Location, Igamba Ng'ombe, Division Meru South District.**

**(3) THAT I have extensively developed the suit land by constructing dwelling houses, and there are food crops and trees.**

**(4) THAT sometime in the year 2002, the interested party lodged before the 1st respondent a case**

*against me, claiming ownership of the suit land which is unregistered.*

*(5) THAT 1st Respondent summoned the interested party and myself and when we tendered evidence in relation to the said land it issued the award.*

*(6) THAT on 5/7/2011, the 2nd respondent delivered its decision and/or findings and/or award in respect of the said suit land in favour of the interested party.*

*(7) THAT on the premises of the aforesaid decision and/or award the interested party is seeking to enforce CHUKA -S.P.M.C.C LDT NO 17 OF 2006 seeking among other things to evict me from the said land.*

*(8) THAT the 1st Respondent, at the behest of the interested party, intends to evict me from the said land and he has instructed M/S QUICKLINE AUCTIONEERS to carry out the exercise.*

*(9) THAT My advocate on record has advised me and I so verily believe the same, that the decision and/or finding and/or award by the 1st Respondent is legally flawed, erroneous, arbitrary, oppressive, null and void and ab initio for all intents and purposes, the same having been reached unprocedurally and thus its implementation should be prohibited and stopped by this Honourable Court.*

*(10) THAT I conscientiously swear this affidavit to verify the correctness and truth of the matters set out in the statutory statement of facts and grounds herein, most humbly praying that my application be allowed.*

4. The annexures to the aforementioned affidavit of the applicant are;

i. The proceedings from the L.D.T case no. 8 of 2002 ( P.N.K.1 ).

ii. The judgment in L.D.T. case no. 8 of 2002 dated 13/2/2006 (P.N.K.2 ).

iii. The eviction order from Principal Magistrates Court at Chuka L.D.T,no.17 of 2006 dated 5/7/2011 (P.N.K.3).

5. The interested party, (FESTUS NJUE ) filed a Replying Affidavit of 26:09:12 where he states as follows:-

*(1) **THAT** in the year 2002, I lawfully instituted a claim against the exparte applicant in the Land Disputes Tribunal over boundary and trespass to my unregistered parcel of land situate in Igamba Ng'ombe area of the Meru South District.*

*(2) **THAT** my aforesaid claim against the ex-parte applicant was registered by the tribunal as Land Disputes Tribunal Case No. 8 of 2002 (hereinafter referred to as "the L.D.T Case").*

*(3) **THAT** on 13:02:2006, the L.D.T Case was determined consequential whereof the chairman of the members comprising the tribunal lawfully pronounced the decision and/or finding of the tribunal to me and the ex parte applicant and thereby advised any party aggrieved by the decision and/or finding of the tribunal to appeal to the Provincial land Disputes Committee (hereinafter referred to as " the PLDAC ") within 30 days.*

*(4) **THAT** consequent to matters stated herein-above , the award/decision and/or finding of the tribunal delivered and dated 13:02:2006 was lawfully forwarded to Chuka Principal Magistrate's Court for inter alia adoption as judgment of the said court whereby it was registered as the Chuka Principal Magistrate's Court Land Disputes Tribunal Case No. 17 of 2006 (hereinafter referred to as "the Chuka L.D.T Case").*

(5) **THAT** on 25.10.2006 and in the Chuka L.D.T Case in the presence of inter alia myself and the ex parte applicant, the Honourable Resident Magistrate re-read to us the award/finding and/or decision of the tribunal read to us on 13.02.2006 in the L.D.T Case.

(6) **THAT** upon reading of the decision of the tribunal dated 13:02:2006 to the concerned parties by the chairman of the tribunal and/or Honourable Resident Magistrate, the ex parte applicant preferred an appeal to the Eastern PLDAC, to wit Appeal No. 98 of 2007 which appeal was lawfully heard and determined on 07.01:2008.

(7) **THAT** on 07.01.2008 the chairperson of the Eastern PLDAC in the presence of inter alia myself and the ex-parte applicant read out or delivered the finding/ruling of the committee in the Appeal No. 98 of 2007 and further informed us that any party aggrieved by the said ruling /finding ought to appeal to the High Court within 30 days from 07.01.2008 .

(8) **THAT** on 05.03.2008 in the Chuka L.D.T Case, the then Honourable Senior Resident Magistrate Mr. Ngare Gesora re-read to me and the ex parte applicant the finding/ruling of the Eastern PLDAC made on 07:01:2008 in the Appeal No. 98 of 2007 and thereby adopted the said finding/ruling as judgment of the court.

(9) **THAT** from 07:01:2008 or 05:03:2008 to date, the ex parte applicant has not lawfully challenged in the High Court and by way of an appeal or judicial review the finding /ruling of the Eastern PLDAC made in the Appeal No. 98 of 2007 .

(10) **THAT** on 18/03/2008 the Honourable trial Magistrate in the Chuka L.D.T Case lawfully issued a decree pursuant to the judgment entered in the said case on 05:03:2008 .

(11) **THAT** I brought my applications dated 27:10:2010 and 24: 06: 2011 in the Chuka L.D.T Case with view to facilitate and expedite execution of the decree lawfully issued in the said case by the court.

(12) **THAT** I am advised by Mr. Arimba Advocate, which advice I verily believe to be correct that the orders sought by the ex parte applicant in prayer 1 of the application and more specifically in the prayer 1 of the Notice of Motion dated 20:08:2011 and filed herein on 26:08:2011 are ambiguous, uncertain, not precise and incapable of being granted in law because :-

**(a) The date(s) of the 1st and 2nd respondents' purported decision are not respectively stated thereon:**

**(b) Legally, the 1st and 2nd respondents are not charged with the responsibility of implementing their decisions as alleged in the application but are only legally obligated to make the alleged decisions: and**

**(c) Legally, no declaratory orders can issue in an application for judicial review.**

(13) **THAT** the 1st respondent had requisite jurisdiction to entertain my dispute as lodged and/or instituted in the L.D.T Case.

(14) **THAT** the issue of whether or not the respondents have the jurisdiction to issue orders of eviction was addressed and extensively determined by the court on 08:12:2010 and 12:01:2011 in the Chuka L.D.T case consequential whereof the ex parte applicant is now estopped from raising in this appeal the issue of the respondents' jurisdiction to make the orders of eviction when indeed the said applicant failed and/or refused and/or neglected to appeal against the ruling delivered on or about 12:01:2011 in the Chuka L.D.T case.

(15) **THAT** the 1st respondent has not at all usurped the jurisdiction of the High Court as

*alleged in the application.*

(16) ***THAT*** the *ex parte* applicant ought to have challenged the decision of the 1st respondent in the Eastern PLDAC, that is Appeal No. 98 of 2007 and not in this matter as he is attempting to do.

(17) ***THAT*** the application is frivolous , vexatious, legally incompetent and an abuse of process of Court and it ought to be disallowed with costs.

6. The supporting documents of the interested party are;

***i. Judgment in L.D.T Case no. 8/02 (FN1).***

***ii. Proceedings in Chuka PM'S court case no. LDT 17 of 2006 (FN2).***

***iii. The findings/ ruling in case no. 8 of 2008 from Eastern Provincial Land Dispute Appeals Committee (FN3).***

***iv. Decree in Chuka PM'S case no.17 of 2006 (FN4).***

7. When the matter came up before this Court on 17:07:13, the applicant was represented by Ayub Anampiu h/b for Kiogora , the Respondent was represented by Mogaka where as Omari was for the Interested Party. Directions were then taken for the J.R Motion to be disposed off by way of Written Submission.

8. Mr. Mogaka had told the court (on that day 17/7/13 ), “we have not responded. The Tribunal had exceeded its jurisdiction. We shall not be filing any submissions”. However Respondents did proceed to file their submissions opposing the motion. It is hence not clear where Mr. Mogaka had gotten his instructions from .

9. **Submissions.**

***Submissions of the applicant were filed on 19.08. 13.***

It has been submitted for the applicant that the application has not been challenged by the interested party as the proceedings before the elders and the lower court were a nullity abinitio.

10. It was also argued that the elders in the Land dispute tribunal had no jurisdiction to deliberate on the matter as the alleged land in dispute is not demarcated or registered under any known law in Kenya.

11. Further, it is also submitted that the award of the Land Dispute Tribunal was not signed by all the members.

12. In support of his case applicant has cited the following authorities.

**a. M'TIMITU M' MITHIRWA V/S DIOCESE OF MERU & ROMANO KOBIA MERU-HCCC NO. 52 OF 1988.**

**b. BEATRICE M'MARETE V/S THE REPUBLIC & OTHERS CA NO. 259 OF 2000.**

**c. NTIKA MUNORU & ANOR V/S ISAAC KABERIA ETIMIA CA NO. 278 OF 2007.**

13. Finally, the Applicant prays that he be awarded the costs of this motion.

14. **The Submission of Interested Party were filed on 02.09.13.**

the interested party has retaliated what is captured in his Replying affidavit but has added that;

15. The applicant is guilty of inordinate, unexplained and inexcusable delay in bringing this application hence the application is legally incompetent and an abuse of process of court.

16. The orders sought by the ex-parte applicant in the application and more specifically in prayer 1 of the notice of motion dated 20.08.2011 and filed herein on 26.08.2011 are ambiguous, uncertain, not precise and incapable of being granted in law.

17. ***The Submission of 1,2rd & 3rd Respondent were filed jointly on 09:09:13.***

It has been submitted that the L.D.T had jurisdiction over the matter citing the case of **REPUBLIC VS CHAIRMAN LANDS DISTRICT TRIBUNAL KIRINYAGA DISTRICT & ANOTHER EXPARTE PETER MARU KARIUKI [2005]** Eklr High Court of Kenya at Nakuru where it was held that

***“ a Land Disputes Tribunal has Jurisdiction to adjudicate in disputes over title to land whether or not the piece of land affected is registered under the Registered Land Act”.***

18. **issues for determination**

***(1) JURISDICTION; Whether L.D.T in case No. 8 of 2002 and the court in Chuka P.M C no.17/2006 had jurisdiction in the matter.***

***(2) Whether the decision in L.D.T no.8 of 2002 was illegal,unreasonable and arbitrary and whether the said decision was arrived at unprocedurally.***

***(3) Whether the application is properly before this court.***

19. ***Jurisdiction: -***

Jurisdiction is everything. Applicant has submitted that much. In his grounds in support of the application, Applicant avers that 1st Respondent had usurped the jurisdiction of the High Court. The basis upon which the applicant advances this argument is that ***“the area where the alleged land is situated has not been declared a registration area”***. Can this argument hold?. Certainly not going by the provisions of **S. 3** of the now repealed **L.D.T.** where it is provided that;

***“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”.***

20. The issue raised in LDT case No. 8 of 2002 concerns a boundary dispute. he **ISSUES SUMARISED** in the judgment in L.D.T CASE NO. 8/02 are;

**a. Trespass to land.**

**b. Illegal settlement.**

21. No where in the repealed Act is it shown that the L.D.T Could not handle such a disputes. If anything the issues that the original tribunal was dealing with fall in the ambit of the repealed L.D.T

ACT. It follows then that the L.D.T had jurisdiction to hear the case.

22. Did the P.M s court at Chuka have jurisdiction to handle the matter?.

Again recourse is to be found in the repealed **L.D.T.ACT** which provides in **Section 7** that;

***“ (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.***

***(3) 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”***

23. There is not the slightest ambiguity in the wording of the Act. The magistrate court is the one which was empowered to implement the decision of the L.D.T.

24. I also find that when the matter was before the P.M s court at Chuka for execution proceedings, the present applicant filed a Preliminary Objection dated 22/11/2010 stating that the court did not have jurisdiction to entertain the matter. The magistrate seized of the case delivered a well grounded ruling on 12/1/2011 whereby the P.O was dismissed. No appeal was ever lodged regarding that ruling.

25. Case law on issue of jurisdiction is quite in abundance starting with the celebrated case of **“OWNERS OF MOTOR VESSEL LILLIAN S VRS CALTEX OIL (KENYA) LTD (1989)”** .However, The cases cited by the applicant do not salvage his situation .In the Meru HCC.NO.52 of 1998 (supra) ,the court was basically dealing with the issue of fraud. In civil appeal no.259 Of 2000 in Nyeri ,the court was dealing with an issue of claim to land and not boundary or claim to occupy land. In civil appeal no.278 of 2007 at the court of appeal in Nyeri, the court was dealing with the issue of land ownership in respect of adjudication processes.

26. The Misc. App. No.129 of 2004 (supra) cited by the Respondents does capture the issues at hand .In that case it was stated that;

***“the legislature and definitely the framers of the land dispute tribunal Act knew the act was intended to give Land Dispute Tribunals jurisdiction to adjudicate over all land in Kenya.....”***.

27. It is quite clear that both the tribunal and the magistrates court had jurisdiction to handle the matter. The application therefore fails on the ground of jurisdiction.

28. Was the decision of LDT in case No 8 of 2002 tainted with illegality, was it unreasonable and/or was it arbitrary?.Was the decision arrived at unprocedurally?

It is trite law that Judicial Review does not deal with the MERITS OF THE DECISION but by **THE DECISION MAKING PROCESS** see **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & UMOJA CONSULTANTS LTD. CIVIL APPEAL NO. 185 OF 2001** where the Court of Appeal held:-

***“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction,whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision”***.

29. In the instant case the Interested Party has captured the minute details of the processes concerning the case. The decision of LDT NO. 8 of 02 was adopted as a Judgment of the Court before the Chuka PM's Court on 25:10:06. The present applicant was dissatisfied with that decision and he lodged an appeal No. 98 of 2007 before the Eastern Provincial

L.D.A.C . A decision was arrived at and read to parties on 07:01:08. The decision was again re read before the Chuka PM's Court. The Applicant has not filed any response to these averments.

30. Applicant has not demonstrated that the decision of the L.D.T was unreasonable, illegal or arbitrary in any way or that the decision was un procedurally arrived at. The proceedings in L.D.T case no.8/2002 indicate that the applicant gave evidence and he had a chance to ask questions so did the interested party. The decision in L.D.T.case no 8/2002 was signed by all the three members on 13/2/2006. The right of appeal was pronounced at every stage. What is quite apparent is that as the interested party was lodging his claim at the tribunal, the applicant was building a new house ( see the content of the judgment in the aforementioned decision). The award from the tribunal required him(Applicant) to **REMOVE ALL HIS DEVELOPMENTS** .This is definitely the basis of the eviction orders.

31. Applicant was certainly dissatisfied with the decision in L.D.T no.8/2002 hence his appeal to the P.LD.A.C where he again lost. The next step that he could have taken was to lodge an appeal at the high court. He didn't. It is however not lost to this court that Applicant has avoided mentioning the proceedings before the Eastern P.L.D.A.C.

32. The application fails on ground of the decision being illegal, unreasonable, arbitrary or un procedural.

**33. Is the application properly before this court?**

The JR Motion is supposed to be brought forth within six months from the time the decision was made. The orders given on 05.07.11 were orders of eviction whereby the magistrates court was executing the decision of the tribunals. The decision making orders are those of L.D.T. No 8 of 02 given on 13:02:06 and the one by the Eastern P.L.D.A.C of 07.01.2008.

34. The leave granted on 10/8/11 was hence irregularly obtained as the applicant had cited the date the eviction orders were issued as the date the decision was read in Court. See prayer 3 of the applicants chamber summons of 1/8/2011 where it is stated that ; **“the leave so granted do operate as a stay of further proceedings or implementation of the land 1st Respondent in L.D.T NO.8 OF 2002 and read in court on 5/7/11.** Similar averments are to be found in paragraph 6 of the applicant's supporting affidavit dated 1/8/2011.

35. It is clear that the applicant has not been candid before this court. It follows then that the substantive motion is not properly in court .

36. Before making a final conclusion, i find it necessary to mention the long period this matter has taken in the litigation arena. The complaint was lodged before the L.D.T sometime in year 2002. The decision was made four years later on 13/2/2006 ( date of judgment). The judgment was adopted by the magistrates court several months later on 25/10/2006 . The appeal before the P.L.D.A.C. was not concluded until two years later. It was adopted as a judgment by the magistrates court on 5/3/2008. The execution proceedings ensued before the Chuka PMs court for about 3 years that is until 5/7/2011. And now the J.R motion has been before this court for a record 6 years and still counting. In total the dispute has been in court for 15 years!!. These are shocking time lines. Justice delayed is justice denied. Pursuant to provisions of **Article 159 (2) (b) “justice shall not be delayed”**. It would be unjust for this court to prolong the dispute further.

37. The final orders of the court are as follows;

***a) The Judicial Review Motion of 26/8/11 is hereby dismissed.***

*b) Applicant to pay to the interested party and the Respondents the costs of this suit.*

**DELIVERED IN OPEN COURT AT MERU THIS 2ND DAY OF MARCH, 2017**

**IN THE PRESENCE OF:-**

CA: Kanunu

Murango Mwenda h/b for Kiogora for Exparte Applicant

Omari for Interested Party

Kiango for Respondents

**L.N. MBUGUA**

**JUDGE**