



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**JUDICIAL REVIEW NO. 13 OF 2010**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**THE MARAKWET LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**THE SENIOR RESIDENT MAGISTRATES COURT**

**AT ITEN.....2<sup>ND</sup> RESPONDENT**

**THE KEIYO/ MARAKWET DISTRICT REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**JOSEPH K. YEGO.....INTERESTED PARTY**

**KENDAGOR CHELANGA, KIBOR CHELANGA**

**AND MICHAEL CHELANGA.....EX PARTE APPLICANTS**

**JUDGMENT**

1. The *ex parte* applicants pray for an order of *certiorari* to remove into the High Court; and, to quash the proceedings and award of the Marakwet District Land Disputes Tribunal in Land Disputes Tribunal Case No. 22 of 2009 (or No. 21 of 2009). They also seek to quash the subsequent proceedings, judgment and decree of the Senior Resident Magistrates Court at Iten in SRMCC No. 3 of 2010. There is also a prayer for costs.
2. On 24<sup>th</sup> March 2010, the *ex parte* applicants obtained leave to apply for the orders. They subsequently lodged a substantive notice of motion dated 6<sup>th</sup> April 2010 seeking the writ of *certiorari*. It is supported by the earlier statement of facts dated 20<sup>th</sup> March 2010 filed together with the application for leave. There are also three verifying affidavits sworn by each of the *ex parte* applicants.
3. The gravamen of the motion is that the tribunal lacked jurisdiction to hear or determine a matter of land registered under the Registered Land Act (now repealed); and, that the proceedings violated the Law of Succession Act, the Land Control Act and other written laws.
4. Those matters are buttressed at paragraphs 3(a) to (f) of the statement in support of the notice of motion. It is pleaded as follows-

*“3 (a) The registration and the title deed to the land title Cherangany/Korongoi/79 (44Ha) under the Registered Land Act upto, as at, on and from 14.10.2009, 28.10.2009 17.11.2009 1.2.2010,*

9.2.2010, or 10.3.2010 to date is in the name of Chelanga Muritik (deceased) who died on 5.8.2001 whose certificate of Death is available to that effect under the Births and Deaths Registration Act.

(b) *The Law of Succession Act has not been complied with in so far as the estate of the late Chelanga Muritik is concerned and that the land Disputes Tribunal proceedings, award, judgment, order and decree in the respondent's Tribunal Case No. 22 of 2009 in Marakwet District and the Iten SRMCC LDT Case No. 3 of 2010 are null and void abinitio for want of jurisdiction and other legal issues.*

(c) *The claim of the interested party as at October 2009 and/or as at the registered owner's death on 5.8.2001 was 34 years and 26 years old respectively and that the interested party's claim over land Registered under the Registered Land Act (Cap 300) was and still is time barred under the Limitation of Actions Act.*

(d) *The Land Disputes Tribunal in Marakwet District and the Senior Resident Magistrate's Court at Iten have no jurisdiction to entertain and determine the land dispute.*

(e) *The alleged sale of land Cherangany/Korongoi/79 by the late Sitienei Bargechir to the late Johana Yego the interested party's father in 1970's ought to have been dealt with under the Land Adjudication Act and the Registered Land Act between the interested party's late father and the late Chelanga Muritik and that the parties to the land Disputes proceedings in Marakwet District and at the senior Resident Magistrate's Court at Iten have no locus standi and/or have no capacity in law to sue and be sued in the matter.*

(f) *There is no power for the Land Disputes Tribunal to entertain and determine a dispute arising from a sale agreement or contract in respect of the said parcel of land and that the Land Control Act makes the alleged sale agreement or contract relating to the land in dispute null abnatio."*

5. The application is contested by the respondents and interested party. There is a replying affidavit sworn by Joseph Yego (the interested party) on 29<sup>th</sup> June 2011. The case for the interested party is on a four-strand: first, that the tribunal was clothed with jurisdiction because the matter related to the *division* of the suit land; secondly, that the *ex-parte* applicants submitted to the jurisdiction of the tribunal and were accorded a hearing; thirdly, that they are estopped from challenging the decision merely because it was against them; and, fourthly, that they ought to have appealed to the Provincial Appeals Committee. In a word, the interested party submitted that the motion is incompetent and an abuse of court process.

6. The 1<sup>st</sup> to 3<sup>rd</sup> respondents did not file a formal answer to the motion; but learned State Counsel filed written submissions on their behalf. They are dated 2<sup>nd</sup> November 2015. All the other parties have filed written submissions. Those by the *ex parte* applicants were filed on 12<sup>th</sup> May 2015; and, those by the interested parties on 4<sup>th</sup> May 2015. I have considered the pleadings, depositions, documentary evidence, precedents and rival submissions.

7. I am satisfied that the applicants were granted leave on 24<sup>th</sup> March 2010 to apply for judicial review in terms of the substantive notice of motion dated 6<sup>th</sup> April 2010. The notice of motion is thus properly before the court.

8. Like I pointed out, these proceedings are by way of *judicial review*. As a general proposition judicial review proceedings are not concerned with the *merits* but with the decision making process. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with *illegality, irrationality or procedural impropriety*. Those terms were explained well by Odunga J recently in Republic v Inspector General of Police Ex-parte Patrick Nderitu Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR-

*"Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or*

*contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”*

9. Although a lot of materials have been placed before the court, the key question for determination is whether the tribunal’s decision was illegal or irregular. Paraphrased, whether it had *jurisdiction* to entertain the dispute; or, it contravened written laws; or, it violated the rights of the *ex parte* applicants in the process.

10. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated 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.”*

11. The land in dispute in this case was *registered* under the Registered Land Act (now repealed) as *Cherangany/Korongoi/79*. It measured 44 hectares or thereabouts. The land was registered in the names of *Chelanga Muritik* (deceased). Neither the interested party nor the respondents have challenged those facts; or, that the deceased died on 5<sup>th</sup> August 2001.

12. I have then studied the proceedings and decision of the tribunal marked *KKMC3*. It is clear beyond peradventure that the dispute related to *division* of the suit land. It was not about existing boundaries. There were historical grievances over a *contract of sale* of the land between *Sitienei Bargechir* to the late *Johana Yego* (the interested party’s father) dating back to the year 1970. The tribunal awarded the interested party 54 acres and the *ex parte* applicants 56 acres. The tribunal specifically ordered that the portion of 54 acres be “*carved out of*” the suit land for transfer to the interested party.

13. The interested party submitted that the tribunal had jurisdiction over the division of, or, the determination of boundaries to land as well as a claim to occupy or work land and trespass to land. He submitted that the dispute here was over *division* of the land. What the 3<sup>rd</sup> party fails to acknowledge is that the land was *registered* in the name of the deceased; and, that a grant of letters of administration to the estate had not been obtained. That remained a fetter to the jurisdiction of the tribunal under section 3 of the repealed Act.

14. I do not also agree with the submissions of the respondents on that point. Learned State Counsel relied on the decision in *Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & another*, Nairobi, High Court, JR 370 of 2013 [2014] eKLR. In that case, Odunga J held as follows-

*“In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land. Otherwise section 3 of the Land Disputes Tribunals Act did not limit the jurisdiction of the Tribunal to lands outside the regime of registered land. I associate myself with the decision of Khamoni J in Republic vs Chairman Land Disputes Tribunal, Kirinyaga District & Another Exparte Kariuki [2005] 2KLR 10 to the effect that the legislature, and definitely framers of the jurisdiction to adjudicate over all land in Kenya, including land registered under the Registered*

*Land Act and therefore in cases where the dispute fell within section 3 aforesaid, it did not matter whether or not the land in question was registered under the Registered Land Act.*

*The Applicant also contended that since section 32 of the Environment and Land Court Act repealed Act No. 18 of 1990 the Magistrate lacked the jurisdiction to confirm the award of the Tribunal hence the ruling should be reviewed and quashed by this Honourable Court. I have already held that when it came to adoption of awards the Magistrate's Courts had no option but to adopt them. Of course such adoption could still be challenged in the High Court. However the fact that such challenge was available did not bar the Magistrate's Courts from adopting the same."*

15. I think the decision can be distinguished on facts. The tribunal in the present case dealt with *title* to property. It found that the interested party was entitled to part of the *title* of the land registered in the name of the deceased. The tribunal ordered that a portion of 54 acres be hived off the land and be transferred to the interested party. The land in dispute here was not held in common or in trust. The proprietor was clearly stated to be the deceased. There was a land certificate (exhibit KKMC2 issued on 18<sup>th</sup> April 1975 to the deceased under the Registered Land Act (now repealed).

16. The dispute between the parties before the tribunal was essentially a *civil claim to title* over the land. The proprietor was long dead; and, no letters of administration to the estate had been issued. From a legal standpoint one cannot then say that the interests of the *proprietor* or his estate were *represented* at the tribunal. There is also the disturbing question whether the claim by the interested party was statute barred or whether the dispute between his father *Johana Yego* and *Sitienei Bargechir* fell within the ambit of the Land Adjudication Act.

17. For all of those reasons, I have *no* doubt that the proceedings and decision fell well outside the *jurisdiction* of the Marakwet Land Disputes Tribunal. The proceedings *prima facie* violated the Land Disputes Tribunal Act (now repealed) and the Law of Succession Act. The fact that the *ex parte* applicants participated in the proceedings does not cure the defect.

18. Jurisdiction is everything. *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1. In this case, the tribunal meandered beyond its boundaries. In *M'Marete v Republic & 3 others*, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR the court held-

*"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 [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction."*

19. See also *Republic v Chairman Kajiado Central Land Disputes Tribunal Exparte Timaiyo Kirtari*, Machakos, High Court Misc. Appl. 4 of 2012 [2012] eKLR, *Republic v Chairman Matungu Land Disputes Tribunal Exparte Electina Wang'ona* High Court, Bungoma, Misc. Appl. Io7 of 2010 [2012] eKLR, *Samuel Kibara Wainaina v Land Disputes Tribunal Kieni West Division & Another*, High Court, Nairobi, Misc. Appl. 1409 of 2005 [2006] eKLR, *Republic vs Chairman Bumula Land Disputes Exparte Chhrisostim Barasa Sangura & 4 Others*, High Court, Bungoma, Misc. Cause 174 of 2005 [2006] eKLR.

20. In the end, I am satisfied that the impugned decision is tainted with *illegality and procedural impropriety*. It follows as a corollary that the proceedings of the tribunal and the subsequent decree of the subordinate court were a *nullity*. An order of *certiorari* is hereby issued removing into the High Court and quashing the proceedings and award of the Marakwet District Land Disputes Tribunal in Land Disputes Tribunal Case No. 22 of 2009 (or 21 of 2009); and, also quashing the proceedings, judgment, and decree of the Senior Resident Magistrates Court at Iten in SRMCC No. 3 of 2010.

21. Costs follow the event and are at the discretion of the court. I grant the *ex parte* applicants costs to be met by the interested party.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 11<sup>th</sup> day of February 2016.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open Court in the presence of:-**

No appearance for the *ex-parte* applicants.

No appearance for the respondents.

No appearance for the interested party.

Mr. J. Kemboi, Court clerk.