



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELC MISC CIVIL APPLICATION NO. 33 OF 2015 (JR)

(FORMERLY H.C MISC CIVIL APPLI. NO. 3 OF 2012 (JR) EMBU)

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300

**IN THE MATTER OF GACHOKA DIVISION (MBEERE SOUTH DISTRICT) LAND DISPUTES
TRIBUNAL CASE NUMBER 493 OF 2011**

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT 1990 (NOW REPEALED)

AND

IN THE MATTER OF LAND PARCEL NO. MBEERE/KIRIMA/1087

BETWEEN

REPUBLIC.....

APPLICANT

VERSUS

**THE GACHOKA DIVISION (MBEERE SOUTH DISTRICT) LAND DISPUTES
TRIBUNAL....RESPONDENT**

AND

JOSEPH NTHIGA MUNYI.....1ST INTERESTED

PARTY

KIGORO M'TETU.....2ND INTERESTED

PARTY

EXPARTE NEPHAT GIKINJU KARINGA.....

APPLICANT

JUDGMENT

Having obtained leave on 18th January 2012 from **Justice Ong'udi**, the applicant filed this Notice of Motion on 30th January 2016 seeking the following orders:-

- a. *That an order of certiorari do issue to remove to the High Court and to quash the un-dated decision/finding of the Gachoka Division Land Disputes Tribunal in Case No. 493 of 2011 in respect of land parcel number MBEERE/KIRIMA/1087 which decision/finding/award was adopted as a judgment and a decree dated 23rd December 2011 issued by the Siakago Principal Magistrate's Court in Land Disputes Tribunal Case No. 40 of 2011.*
- b. *That an order of prohibition do issue to prohibit the District Land Registrar, Mbeere District from implementing the un-dated decision/finding of Gachoka Division Land Disputes Tribunal in Case No. 493 of 2011 in respect of land parcel number MBEERE/KIRIMA/1087 which decision/finding was adopted as a judgment and a decree dated 23rd December 2011 issued by the Siakago Principal Magistrate's Court in Land Disputes Tribunal Case No. 40 of 2011.*
- c. *That costs be provided for.*

The brief facts giving rise to this application are that the applicant **NEPHAT GIKUNJU KARINGA** is the absolute proprietor of the land parcel No. MBEERE/KIRIMA/1087 (the suit land) and had requested the 1st interested party who is the Assistant Chief of Kirima Sub-location Mbeere South District to collect it on his behalf after the land adjudication and demarcation process. The 1st interested party then insisted that the applicant sells to him and the 2nd interested party a portion of the suit land and on 22nd May 2009, the applicant entered into an agreement with the interested parties with the intention of transferring to them only five (5) acres out of the suit land but the interested parties, taking advantage of the applicant's advanced age, caused to be drawn an agreement purporting to transfer the whole of the suit land to them. No consent of the Land Control Board was obtained within six months from 22nd May 2009 and therefore the agreement became null and void for lack of consent yet the interested parties purported to obtain, on their own, a consent for the transfer of the suit land to themselves on 29th October 2010 which would not have been possible since the applicant never attended the Land Control Board and further, a caution had been lodged on the suit land by one **PETER MURIUKI NJERU**. Therefore, the consent granted on 29th October 2010 was irregular, unlawful and void. Since the 1st interested party refused to hand over the title to the suit land to the applicant, he filed a claim at the Gachoka Division Land Disputes Tribunal (the Tribunal) seeking its intervention vide Case No. 493 of 2011. The Tribunal ordered that the suit land be transferred to the interested parties and the caution lodged in the register be removed. Those proceedings were irregular, unlawful, null and void as the Tribunal exceeded its jurisdiction. That gave rise to this application.

In resisting this application, the 1st interested party (**JOSEPH NTHIGA MUNYI**) filed a replying affidavit and also on behalf of the 2nd interested party **KIGORU M'TETU** (who the Court was informed is now deceased), in which he deponed, inter alia, that the applicant had filed the Tribunal Case No. 493 of 2011 in respect of the suit land which was determined in favour of the interested parties and a decree was drawn by the Principal Magistrate's Court Siakago in LDT No. 40 of 2011. That they then entered into an agreement with the applicant for the purchase of the suit land and the relevant Land Control Board consent was issued and the applicant executed the transfer forms after which the full purchase price was paid and therefore this application is an afterthought. Annexed to that replying affidavit are the sale agreement, acknowledgment slip for the purchase price, application for Land Control Board consent, letters of consent and transfer form duly executed – annexures **JNM 1 – JNM 3**.

Submissions have been filed both by Mr. Muyodi advocate for the applicant and Mr. Utuku advocate for the interested parties. The respondents did not file any responses to the application.

I have considered the application, the response thereto including the various annexures and the submissions by counsel.

This is a Judicial Review application and the broad grounds upon which a Court shall grant Judicial Review remedies were stated in the case of **PASTOLI VS KABALE DISTRICT LOCAL**

GOVERNMENT COUNCIL & OTHERS (2008) 2 E.A 300 as follows:-

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety..... 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 law or its principle, are instances of illegality. It is for example, illegality where a Chief Administrative officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission 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”

Judicial Review is therefore concerned with the decision making process but not with the merits of the decision itself – MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 of 2001

What the applicant in this case is alleging is that the Tribunal had no jurisdiction in ordering that the suit land be transferred to the interested parties or that the caution in the register be removed which decision was adopted by the Principal Magistrate’s Court Siakago in their Case No. LDT No. 40 of 2011. The issue of want of jurisdiction may arise in two ways. Firstly, the Tribunal whose decision is sought to be impugned may be barred by statute from handling the dispute before it or secondly, the Tribunal, though clothed with the requisite jurisdiction to handle the dispute, may, in the course of its proceedings, make a decision that is beyond its powers. Either way, any decision so arrived at is null and void because, as was held in the case of OWNERS OF THE MOTOR VEHICLE “LILLIAN S’ VS CALTEX OIL (KENYA) LIMITED 1989 K.L.R 1, jurisdiction is everything and once a Court or Tribunal or indeed any other body finds that it is not seized of the jurisdiction to determine any dispute before it, then it must down its tools.

In determining the dispute between the applicant and the 1st interested party with respect to the suit land, the Tribunal made the following decision:-

“The Tribunal therefore orders the Land Registrar to remove any caution there could be and transfer parcel MBEERE/KIRIMA/1087 under the names of JOSEPH NTHIGA MUNYI and KIGORO M’TETU”.

That award was adopted as judgment of the Court by the Principal Magistrate’s Court Siakago in their LDT Case No. 40 of 2011 and a decree was issued in the following terms:-

“DECREE

Claim for ownership L.R MBEERE/KIRIMA/1087

This suit coming for reading of Gachoka Land Disputes Tribunal award and upon reading the said award and adopting the award as judgment of this Court

It is hereby decreed

- 1. That the Land Registrar do remove any caution there could be and transfer land parcel No. MBEERE/KIRIMA/1087 to Joseph Nthiga Munyi and Kigoro M’tetu”***

The Tribunal was no doubt hearing the dispute between the parties by virtue of the jurisdiction bestowed upon it by the repealed Land Disputes Tribunal Act. Section 3(1) of the said Act circumscribed the Tribunal's jurisdiction as follows:-

“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”***

It is clear that the Tribunal established under the now repealed Land Disputes Tribunal Act had no power to order the Land Registrar to remove a caution over registered land nor order a party to transfer such land to another. The Court of Appeal in the case of JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL AND ANOTHER C.A CIVIL APPEAL No. 256 of 2002 (KISUMU) made it clear that a Tribunal exercising its powers under the now repealed Land Disputes Tribunal Act had no jurisdiction to determine a dispute regarding ownership of registered land. In M'MARETE VS REPUBLIC & THREE OTHERS C.A CIVIL APPEAL No. 259 of 2000 (2004) e K.L.R., the Court of Appeal at Nyeri repeated the same caution in the following words:-

“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 the Registered Land Act to the appellant. In our view, the Tribunal exceeded its jurisdiction”

That is precisely what happened in this case. The applicant moved to the Tribunal to seek its intervention when he realized that the interested parties were in the process of irregularly transferring his land to themselves. Unfortunately, he did not get the protection he expected and the Tribunal proceeded to grant the orders that it did which were well beyond its jurisdiction. Those orders and the Decree that was subsequently issued by the Principal Magistrate's Court at Siakago were all unlawful, null and void and this Court is obliged to quash them by an order of certiorari.

The applicant also seeks an order of prohibition prohibiting the District Land Registrar Mbeere District from implementing the Tribunal's decision and the Decree of the Principal Magistrate's Court Siakago in their LDT Case No. 40 of 2011. This Court having found that the decision/award of the Tribunal as subsumed in the Decree of the Principal Magistrate's Court Siakago LDT Case No. 40 of 2011 are liable for questioning, it follows that there is nothing to prohibit and therefore any prohibitory orders would be superfluous.

Ultimately therefore, and upon considering all the evidence in this matter, this Court makes the following orders:-

1. ***An order of certiorari is issued to remove into this Court and to quash the Decision/Finding of the Gachoka Land Disputes Tribunal in the Case No. 493 of 2011 in respect of land parcel No. MBEERE/KIRIMA/1087 which was adopted as a judgment and Decree dated 23rd December 2011 issued by the Siakago Principal Magistrate's Court in Land Disputes Tribunal Case No. 40 of 2011.***
2. ***The 1st interested party, an assistant chief who should know better, was the prime mover of this illegality. He will meet the applicant's costs.***

B.N. OLAO

JUDGE

13TH MAY, 2016

Judgment delivered, dated and signed in open Court this 13th day of May 2016.

Mr. Muyodi for the Applicant present

Ms Muthike for 1st Interested party present

No appearance for the Respondent.

Right of appeal explained.

B.N. OLAO

JUDGE

13TH MAY, 2016