



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**JUDICIAL REVIEW MISC. APPLICATION NO. 15 OF 2012**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**THE PROVINCIAL APPEALS**  
**TRIBUNAL, NYERI.....1<sup>ST</sup> RESPONDENT**  
**DISTRICT LAND DISPUTES**  
**TRIBUNAL, KANDARA.....2<sup>ND</sup> RESPONDENT**  
**THE CHIEF MAGISTRATES**  
**COURT, THIKA.....3<sup>RD</sup> RESPONDENT**  
**THE HON. ATTORNEY, GENERAL.....4<sup>TH</sup> RESPONDENT**  
*ex parte*  
**SAMUEL GICHERU NDIRANGU**  
**AND**  
**DAVID MWANGI NJOROGE.....INTERESTED PARTY**

**JUDGMENT**

In a notice of motion dated 8<sup>th</sup> February, 2014, brought to court under **section 3** of the **Civil Procedure Act, Order 51 Rule 3** of the **Civil Procedure Rules**, the applicant sought from this honourable court judicial review orders of *certiorari* and prohibition; the prayers for these orders are framed on the face of the motion in this manner:

1. *This honourable court be pleased to issue an order for certiorari to quash the decision of the 2<sup>nd</sup> respondent issued on 3<sup>rd</sup> August, 2009 and affirmed on appeal by the 2<sup>nd</sup> respondent on 29<sup>th</sup> August, 2011, purporting to adjudicate on the ownership of all that parcel of land known as Title No. Loc. 3/Mukuria/224 and the eviction orders by the 3<sup>rd</sup> respondent against the applicant purporting to evict from the aforesaid parcel of land known as Title No. Loc. 3/Mukuria/224 and the decision of the 1<sup>st</sup> and the 2<sup>nd</sup> respondents declaring the interested*

*party David Mwangi Njoroge the interested party herein the owner thereof.*

- 2. The honourable court be pleased to issue an order of prohibition against the 3<sup>rd</sup> respondent prohibiting the adoption of the ruling of the 2<sup>nd</sup> respondent's ruling dated 3<sup>rd</sup> August 2009 and that of the 1<sup>st</sup> respondent dated 29<sup>th</sup> August, 2011 on appeal, affirming the decision of the 2<sup>nd</sup> respondent.*

Apart from these main prayers the applicant also sought for an order on costs of his motion.

According to the applicant's statutory statement and the verifying affidavit which were filed together with the chamber summons seeking for leave to file the substantive motion, the genesis of the dispute which eventually ended in the suit herein is the ownership of a land parcel which has been described as **Title No. Loc. 3/Mukuria/224** (hereinafter "the suit land").

The applicant, who has sued as the personal representative of one Ndirangu Thiongo alias Daniel Ndirangu Thiongo (hereinafter "the deceased"), contends that in 2009, the "respondent" filed a dispute against the deceased at Kandara District Land Disputes Tribunal claiming ownership of the suit land. The dispute is said to have been set down for hearing on 22<sup>nd</sup> June, 2009 when the tribunal is alleged to have taken the "respondent's" evidence and adjourned the *ex parte* applicant's case to 6<sup>th</sup> July, 2009. The "respondent" being referred to here must be the interested party as none of the respondents in this application could possibly file a land dispute at any of the two tribunals.

Although the applicant referred to proceedings at the Land Disputes Tribunal a copy of which is alleged to be annexed to the applicant's verifying affidavit and marked as "SGN2", it is noted, however, that the document marked as "SGN2" on the applicant's affidavit reflects the proceedings at the Appeal's Committee and not at the District Land Disputes Tribunal; and even so, it is not clear from that copy of the proceedings when the tribunal was convened though there is an endorsement, by hand, on either side of the two-page document a date of 29<sup>th</sup> August, 2011. Perhaps realising this omission, the applicant filed a supplementary affidavit filed in court on 7<sup>th</sup> October, 2011 and annexed thereon a copy of the proceedings of the District Land Disputes Tribunal in issue.

The applicant has deposed further that on 6<sup>th</sup> July, 2009, when the tribunal reconvened to hear the deceased's case the hearing could not proceed because the deceased had been taken ill and was hospitalised; the case was therefore adjourned for further hearing on 3<sup>rd</sup> August, 2009. On that date the tribunal is said to have finalised the dispute in the absence of the deceased and ruled in favour of the plaintiff, who is the interested party herein.

The applicant's complaint against the tribunal and its decision is that the deceased died on 25<sup>th</sup> July, 2009 and therefore as at 3<sup>rd</sup> August, 2009 when the tribunal went ahead with its sittings and made an award against him, it effectively condemned the deceased unheard or as some would say, he was condemned posthumously.

The second issue that the applicant has taken with the two tribunals is that, in his view, the Land Disputes Tribunal purported to adjudicate on the ownership of the suit land when it had no jurisdiction to do so. It is the applicant's case that the tribunal's adjudication and decision on the ownership of the suit land was *ultra vires* the **Land Disputes Tribunals Act, Chapter 303A Laws of Kenya**. Without such jurisdiction to adjudicate and determine disputes concerning ownership of land, the Appeals Committee, so argued the applicant, could not be heard to uphold a decision of a tribunal which had overran its jurisdiction and to the extent that its decision was equally tainted and ought to be quashed.

Since there was no valid decision by either the Disputes Tribunal or the Appeals Committee, the applicant sought to prohibit the Chief Magistrate's court from adopting and enforcing the Tribunal's award.

The interested party, David Mwangi Njoroge, in his replying affidavit sworn on 30<sup>th</sup> August, 2013

confirmed that indeed he did file the **Kandara Land Dispute Tribunal Case No. 45 of 2009** in respect of the suit land; however, contrary to the applicant's allegations, the dispute was about trespass and not ownership of the suit land. In support of his case the interested party exhibited on his affidavit a land certificate showing that he was registered as the absolute proprietor of the suit land as early as 23<sup>rd</sup> April, 1971.

As the registered owner of the suit land, the interested party filed a civil suit in at Nyeri being **High Court Civil Case No. 31 of 2004** in which he sued the deceased seeking for an order for vacant possession and also an injunction to restrain the deceased from interfering with the suit land. In its judgment delivered on 19<sup>th</sup> March, 2009, the court dismissed the suit and held that since the plaintiff's suit was mainly founded on trespass, the dispute could only be resolved by the Land Disputes Tribunal under **section 3(1) of the Land Disputes Tribunals Act, Chapter 303 Laws of Kenya. Section 3(1)** of the Act provides:

***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 determined by a Tribunal established under section 4.***

The tribunal established under **section 4** of the Act is the Land Disputes Tribunal which is established for every registration district. It is presumed that Kandara Land Disputes Tribunal was established under this provision of the law.

The court agreed with the argument advanced by the deceased's counsel that basically the interested party's cause of action was founded on trespass and therefore in view of **section 3(1)** of the **Land Disputes Tribunal Act**, it lacked jurisdiction to entertain the dispute filed against his client by the interested party. A copy of the judgment was exhibited on the interested party's affidavit, and marked as "DNM2."

It is the interested party's case that the initiation of the **Kandara Land Disputes Tribunal Case No. 45 of 2009** was informed by the decision of the High Court that basically upheld the deceased's counsel's arguments that the forum best suited to handle the dispute, in view of its nature, was the Land Disputes Tribunal. It is therefore intriguing that the *ex parte* applicant should be heard questioning the jurisdiction of the very tribunal which his deceased father rooted for as the proper forum to determine the dispute between him and interested party.

The Attorney General appeared for the respondents and filed grounds of opposition on their behalf. The Attorney General argued that the application before court is inept, incompetent and a gross abuse of the court process. He further argued that the interested party holds title to the suit land and that the tribunal was well within its powers not to interfere with the ownership of the property. The fact that the tribunal reiterated that the interested party holds the title to the suit land, so argued the Attorney General, did not by itself amount to the tribunal adjudicating on the issue of ownership of the suit land. The Attorney General was emphatic that the tribunal acted *intra vires*. In any event, the application itself was defective on its face as it called for the court to consider and evaluate matters of fact which would require witnesses for proof which process is outside the purview of judicial review proceedings. He sought that the application be dismissed with costs.

After considering the pleadings and the submissions by the respective parties in these proceedings one issue that stands out in this application and which is usually pivotal in the exercise of the discretion by the court to grant or to decline to grant judicial review orders is the disclosure of facts material to the application. An applicant who deliberately suppresses material facts in an application for judicial review

orders does not merit the exercise of discretion in his favour and whenever such a case arises the court is not under any obligation to consider the merits or lack thereof of the application but to dismiss it forthwith. Although none of the counsel submitted on this issue this court cannot pretend to turn a blind eye on it.

When the applicant appeared in court *ex parte*, he did not disclose that the interested party is the absolute registered proprietor of the suit land. There is no doubt that he was aware of the ownership status of the suit land and therefore was under obligation to disclose this fact when he appeared before court *ex parte* because this information came out clearly in the judgment of a suit which had earlier been heard and determined as between his deceased father whom he now legally represents and the interested party.

Again in questioning the jurisdiction of the Land Disputes Tribunal, the applicant did not disclose to court when he appeared before it *ex parte* that indeed there existed a judgment by the High Court in which the court held that the dispute between the parties could only be determined by the Land Disputes Tribunal. For avoidance of doubt this is what the court said in its judgment at pages 6 and 7 of thereof, in **High Court Civil Case No. 31 of 2004 Mwangi Njoroge versus Daniel Ndirangu Thiongo**:

*Does this court have jurisdiction to hear and determine this suit? I do not think so. The plaintiff's claim is solely based on trespass much as the plaintiff has also sought a permanent injunction. However it is quite clear to me that in the main the plaintiff is seeking for eviction of the defendant from the suit premises. Indeed at the hearing of the suit the plaintiff was at pains to persuade this court to hold that the defendant was a trespasser to his suit premises and ought to be evicted. Indeed prayers A&B of the plaint cannot be any clearer. It seeks delivery of vacant possession of the suit premises to the plaintiff by way of eviction of the defendant therefrom. That being the case and as correctly submitted by Mr Mburu (counsel for the applicant's deceased father), this court lacks jurisdiction to entertain this suit in view of the express provisions of section 3(1) of the Land Disputes Tribunals Act which make it mandatory that a dispute involving trespass over land as in this case should be referred to and heard by an appropriate Land Disputes Tribunal. This is what the plaintiff ought to have done. Indeed it is instructive to note that in the amended defence, jurisdiction of this honourable court to hear and determine the dispute is not admitted. (Underlining mine).*

There is no doubt that the court's holding was crucial and material to the applicant's application and ought to have been disclosed at the earliest opportunity possible; the only inference that one can draw from the applicant's non-disclosure of these material facts is that had he brought out those facts it would have been difficult for him to make out a case for dispute over ownership rather than trespass in respect of the suit land and therefore it would have been difficult for him to lay a basis for questioning the jurisdiction of the Land Disputes Tribunal in the application herein.

Much as the applicant has strained to paint a picture of a dispute over ownership of the suit land in the dispute before the tribunal, there is no evidence that the applicant has at any previous occasion sought to challenge interested party's title to the suit land; it follows therefore ownership of or title over that land could not have been an issue for determination before the tribunal. If, for any reason, the tribunal purported delve into any deliberations or make determination on the ownership of land, and there is no evidence it did, its deliberations or determination would have been superfluous and in any event such a determination would not prejudice or affect the interested party's proprietorship of the suit land. In my view, the farthest the tribunal can go, is to establish that there has been trespass and therefore order eviction because the issue of ownership of the land in issue is, as it were, *fait accompli* and not a subject for determination before it.

As noted an applicant who does not disclose material facts in an application such as the one before court does not deserve orders for judicial review. The importance of disclosure of material facts in an application particularly where obtains an *ex parte* order has been emphasised in several court decisions; one of these cases is **In the Andria (Vasso) 1984 1QB 477** which was cited with approval by our own Court of Appeal in the case of **Owners of Motor Vessel "Lilian S" versus Caltex Oil (Kenya) Ltd (1989) KLR 1**; in that case it was held at page 491 that:-

***It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon ex parte application, even though the facts were such that, with the full disclosure the order would have been justified.***

I doubt the order for grant of leave which was made *ex parte* would have been justified had full disclosures been made; however, according to the **Andria (Vasso) case** (supra), as long as the applicant suppressed material facts, it does not make any difference that the order could possibly be made even if those facts were disclosed.

Even if it were not for non-disclosure of material facts I doubt the applicant's application would have succeeded in its present form. The first prayer in his motion sought to have the decision by the 2<sup>nd</sup> respondent issued on 3<sup>rd</sup> August, 2009 quashed; however, the copy of proceedings attached and marked "SGN3" to his supplementary affidavit sworn on 3<sup>rd</sup> October, 2013 shows that the decision was made on 31<sup>st</sup> August, 2009. It is apparent from the applicant's own pleadings that the award which he sought to have quashed was made on 31<sup>st</sup> August, 2009 and not on 3<sup>rd</sup> August, 2009 and therefore even if the court was to exercise its discretion and grant this prayer it would be in vain.

In the same first prayer the applicant sought to have the eviction orders by the third respondent quashed; there is no order of any type that the applicant attached to any of his affidavits demonstrating that the 3<sup>rd</sup> respondent had ordered that the applicant vacates or that he be evicted from the suit land. In an application for an order for certiorari, the decision or the order sought to be quashed must be exhibited in the application. This is a requirement under **Order 53 Rule 7(1)** of the **Civil Procedure Rules** which states:

***In the case of an application for an order for certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the court.***

Still on the prayers in the applicant's motion, while the applicant is asking the court to quash the orders of eviction purportedly issued by the 3<sup>rd</sup> respondent, he is in the same breath seeking the 3<sup>rd</sup> respondent be prohibited from adopting the tribunal's award allegedly issued on 3<sup>rd</sup> August, 2009; this is apparent from the second prayer of his notice of motion. The question that follows is how possible would it be for the court to quash the 3<sup>rd</sup> respondent's decision and at the same time prohibit it from making the same decision? There is an obvious case of ambiguity or inconsistency in the prayers sought by the applicant and this court would have been hesitant to grant them in their current form.

I am in agreement with the Attorney General that the applicants' motion is defective, incompetent and bad in law; inevitably, the applicant's notice of motion dated 8<sup>th</sup> February 2013 is dismissed with costs.

**Dated signed and delivered in open court this 9th day of May 2014**

Ngaah Jairus

**JUDGE**