



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI
Misc Civil appli 129 of 2004

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL CASE NO. 17 OF 2003

AND

IN THE MATTER OF JUDICIAL REVIEW

REPUBLIC APPLICANT

VERSUS

1. THE CHAIRMAN LAND DISPUTES TRIBUNAL KIRINYAGA DISTRICT
2. ALBERT GACHOKI MUROKO..... RESPONDENTS

EX-PARTE

PETER MARU KARIUKI.....APPLICANT

Note:

According to what the court was told, the Second Respondent filed a case in the First Respondent’s Tribunal against the Applicant claiming a portion of the applicant’s parcel of land registered under the registered Land Act. The Second Respondent having succeeded had the decision of the Tribunal adopted as a court judgment as the Applicant appealed to the Land Disputes Appeals Committee, Central Province. While that appeal was pending, the Applicant filed this application for Judicial Review for an order of Certiorari to remove into the High Court for the purposes of its being quashed the decision of the Land Disputes Tribunal on the grounds:

- (a) that the Tribunal acted contrary to law and in excess of its jurisdiction in determining matter relating to title registered under the Registered Land Act Cap. 300 Laws of Kenya;***
- (b) that the Tribunal erred in law in failing to direct itself to the law of limitation as it is enjoined to do by the enabling statute.***

Those two grounds are grounds (b) and (d), respectively, in the Notice of Motion dated 14th July, 2004.

It was held:-

- (i) *A party cannot be said to have acquiesced to the jurisdiction which the court before which the appearance claimed to have constituted the acquiescence was made, did not have.*
- (ii) *The filing of an appeal by a party does not constitute waiver of his right to file proceedings for judicial review, and vice versa.*
- (iii) *Following the enactment of the Land Disputes Tribunals Act 1990, by Parliament, customary law applies to land registered under the Registered Land Act.*
- (iv) *The application of customary law to disputes over land registered under the Registered Land Act results into conflict of, or inconsistency in, laws.*
- (v) *A Land Disputes Tribunal:-*
- (a) *Is a court under the Registered Land Act;*
- (b) *Has jurisdiction over title to land, whether or not the land is registered under the Registered Land Act;*
- (c) *A part from the jurisdiction exercised under Section 3(1) of the Land Disputes Tribunals Act 1990, has power, in appropriate cases, to adjudicate in disputes falling outside Section 3(1) of the Land Disputes Tribunals Act 1990;*
- (d) *Is bound by the law relating to limitation of actions and the principle of res judicata.*
- (vi) *In exercising its appellate jurisdiction under the Land Disputes Tribunals Act, a Provincial Land Disputes Appeals Committee's jurisdiction is confined within the limits of the jurisdiction conferred by Section 3(1) of the Land Disputes tribunals Act;*
- (vii) *A court order or judgment, whether irregular, null and void, or illegal, ought not to be ignored or disobeyed until lawfully discharged.*
- (viii) *Once a decision of a Land Disputes Tribunal or decision of a Provincial Land Disputes Appeals Committee is adopted as a judgment of a court, in law, that decision ceases to exist as an independent decision challengeable separately in an appeal or judicial review.*

JUDGMENT

This Notice of Motion dated 14th July, 2004 and filed under *Order LIII Rule 3(1)* of the Civil Procedure rules prays for:

“An order of Certiorari to remove into the High Court for the purposes of its being quashed the decision of the Land Disputes Tribunal Kirinyaga District dated the 23rd June, 2003 in its Tribunal Case No. 17 of 2003.”

When filed, the Notice of Motion was said to have been based on five grounds. But during the hearing, Mr. Morris Njage, Counsel for the Applicant, told the court that he was relying on grounds (b) and (d) only.

The first ground states that the Tribunal acted contrary to law and in excess of its jurisdiction in determining matter relating to title registered under the Registered Land Act Cap. 300 Laws of Kenya. The second ground states that the Tribunal erred in law in failing to direct itself to the law of limitation as it is enjoined to do by the enabling statute.

Mr. J. Ndana represented the Second Respondent while the First Respondent, though served does not appear to have seen it fit to come to this court.

The background of this case is that Peter Maru Kariuki was the registered proprietor, under the name Peter M. Kariuki Maru, of a parcel of land known as NGARIAMA/MERICHI/4 registered under the Registered Land Act. The Second Respondent went to what the Applicant described as the Land Disputes Tribunal Kirinyaga District and filed a case the Applicant referred to as number 17 of 2003

claiming a portion of that parcel of land from Peter Maru Kariuki. They both appeared before the Land Disputes Tribunal Kirinyaga District (the Tribunal) and after the Tribunal had heard them and their witnesses, decided the case in favour of the Second Respondent giving him a portion of approximately two acres leaving Peter Maru Kariuki with approximately 5.4 acres.

Peter Maru Kariuki, to whom I may also refer for the purpose of this judgment, as the Applicant, was not happy with that decision. He therefore appealed to the Provincial Land Disputes Appeals Committee, Central Province under provisions of the Land Disputes Tribunals Act 1990.

But as that was happening, the Chairman Land Disputes Tribunal, Kirinyaga District had the decision of the Tribunal filed in the Principal Magistrate’s Court at Kerugoya before 21st July, 2003 and on 8th August, 2003 the court adopted the decision of the Tribunal, which was dated 23rd June, 2003, as a judgment of that court. The Applicant, then as the Defendant, was present. The record from the Tribunal shows that the Tribunal’s decision was read to both parties on 23rd June, 2003.

The Applicant, having been involved in all those procedures, subsequently decided to come to this court to seek the court’s leave to file this Notice of Motion for judicial review. He filed the Chamber Summons praying for leave on 8th December, 2003, before six months expired, and obtained the said leave on 30th June, 2004. This Notice of Motion was therefore filed on 15th July, 2004. That evidence is there and there is no doubt that this Notice of Motion was filed after leave to file it had been duly obtained by the Applicant. There is no necessity to extract and file a formal order granting leave as demanded by Mr. Ndana because either the Chamber Summons for leave and the Notice of Motion for judicial review are filed in one case file or where the two are filed in different case files, the files are put together to move together for being subsequently stored together. The Notice of Motion was filed within 21 days from the date of leave as prescribed by Order LIII Rule 3(1) of the Civil Procedure Rules.

Mr. Ndana again demanded that there ought to be a formal extract of the decision of the Tribunal being questioned in this Judicial review. As Mr. Njage rightly pointed out, *Rule 7(1) of Order LIII* talks of an “order, warrant, commitment, conviction, inquisition or record”. It need not be in the form of a formal extract as some of the bodies whose decisions may be questioned are not bodies capable of extracting formal orders. A copy of the record or proceedings complained of is sufficient provided it is verified by affidavit with the Registrar or the applicant accounts for his failure to do so to the satisfaction of the High Court. Mr. Ndana did not claim failure on those lines.

On the issue of the pending appeal filed by the Applicant in the Provincial Land Disputes Appeals Committee, what has been said is rather interesting. According to Mr. Ndana, since the Applicant has got that appeal pending, he should not have filed this Application. He ought to have waited to have that appeal decided before coming to this court with this application. Mr. Njage on the other hand, relying on a passage from a book “**Judicial Review In Kenya**” by **Mr. P. L. O. Lumumba**, page 14 and another book by **Wade**, “**Administrative Law, 3rd Edition**” page 146, told the court that the availability of the remedy of appeal does not remove the right to file an application for judicial review. Citing the case of **Said Bin Seif-----vs Shariff** Mohamed Shatry (1938) KLR 9, Mr. Njage argued that where there is no jurisdiction, the decision made is null and void and therefore there is nothing to appeal from. In other words it should not be said that the Applicant has appealed to the Provincial Land Disputes Appeals Committee, herein also referred to as the Appeals Committee, because the decision the Applicant is appealing from is null and void and there can therefore be no appeal from that decision. That is, you do not have to worry about a null and void decision.

If I am getting Mr. Njage’s reasoning correctly, then it follows that he should not have been before me with this Notice of Motion for judicial review because the decision of the Tribunal the Applicant wants to be judicially reviewed is also, according to him, null and void and therefore nobody needs to worry about it. It simply be ignored.

If on the other hand the Applicant is justified to be in this court arguing his notice of Motion for judicial review, then he should also be before the Provincial Land Disputes Appeals Committee arguing his appeal as the two, that is the appeal and this Notice of Motion, are against, or come from, one and the same decision of the Land Disputes Tribunal Kirinyaga District dated 23rd June, 2003 in that Tribunal’s case No. 17 of 2003. That is why it was stated in the case of Sir Ali Bin Salim – Vs – Shariff Mohamed Shatry (**Supra**) at page 10, referring to the case of Rajlakshmi Dasee – V – Katyayani Dasee that:

“if a court has no jurisdiction over the subject matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable: they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction.”

It has also been added that no court can confer jurisdiction upon itself and that if a court never had jurisdiction, a party or parties cannot give it that jurisdiction and that a party cannot be said to have acquiesced to the jurisdiction which the court before which the appearance claimed to have constituted the acquiescence was made, did not have.

To my understanding, the authorities mentioned above are not saying that such decisions be ignored so that nobody appeals against them or nobody asks for them to be judicially reviewed. Those authorities are saying that such decisions be set aside having been declared null and void and indeed it is the appellate authority or the court to do so, and do it on appeal or during judicial review or as otherwise provided by the law. They are not saying that an appeal can be substituted for a judicial review and vice versa. What they are saying is that each serves a different and useful purpose and the two can, as a result, co-exist serving their twin purposes. It is therefore stated at page 14 of “**Judicial Review In Kenya**” (**Supra**) as follows:

“Judicial Review, is not an appeal from a decision, but a review of the manner in which the decision was made-----.

Unlike judicial review, Appeal concerns itself with the merits of a decision. When a matter goes on appeal, the major consideration that will govern the appellate court on whether to confirm or to disturb a decision is whether the decision in question is right or wrong on the basis of the law and facts. Judicial Review on the other hand concerns itself with the legality of the decision and the guiding principle in quashing a decision, is whether that decision is lawful or unlawful.

Another major attribute of Appeal is that it is granted by Statute, that is, unless a statute expressly allows appeal, an aggrieved party cannot lodge an appeal against a decision. Conversely, in matters which are reviewable, the court exercises inherent powers which gives it authority to review unlawful decisions.”

At page 146 in the book “Administrative Law, 3rd Edition,” (*Supra*) it is stated that the exercise of the right to appeal does not amount to a waiver of the right to obtain a judicial review. It is pointed out that while appeal is on the merits of the case, judicial review is on the legality of the whole proceedings. It is concluded:

“These are quite different things, and it would be an illogical trap if they were mutually exclusive. Administrative remedies are highly desirable and people should be encouraged to use them. But to allow unlawful action to stand, merely because it has been appealed against on its merits, is indefensible.”

Here the learned author was talking about an appeal which had been preferred on the merits of an administrative decision. But the point coming out is the same. The difference between an appeal on the merits of a case and a judicial review on the legality of the whole proceedings.

From the foregoing therefore, it is clear in this matter that the fact that the Applicant appealed to the Provincial Land Disputes Appeals Committee did not make him waive his right to file these proceedings for judicial review. He is entitled to use them both, in accordance with the law, to his advantage. It has to be in accordance with the law and the relevant provision of *Order LIII Rule 2* of the Civil Procedure Rules state as follows:

“-----where the proceeding is subject to appeal and 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 word “proceeding” in the passage refers to the questioned proceeding intended to be quashed. That is how this court ought to have handled the issue had both parties been sufficiently open on the issue right from the beginning to let the court know the situation before starting to hear the application instead of the court knowing the position after hearing the Notice of Motion. In fact at the time of hearing the Chamber Summons for leave, the fact that the Applicant had filed a pending appeal before the Provincial Land Disputes Appeals Committee was never drawn to the attention of the learned judge and it was not until the end of hearing the Notice of Motion that the judge handling this Notice of Motion knew the Applicant had filed a pending appeal elsewhere.

In any case, I am now at the stage of writing judgment in the Notice of Motion and that writing is proceeding to the end as the rule

just quoted uses the words:

“the judge may adjourn”,

thus giving the judge the discretion to adjourn or not to adjourn so that even when there has been no such adjournment, proceedings will still be valid.

At the time of writing this judgment therefore, the Applicant has maintained this Application as well as his appeal before the Provincial Land Disputes Appeals Committee. He filed the appeal himself before he filed this application through his advocate. With his advocate in this application they are driving home the point that the Land Disputes Tribunal Kirinyaga District had no jurisdiction to entertain this case and as a result the decision the Tribunal made was null and void. By extension they are also saying the Provincial Land Disputes Appeals Committee, Central Province, has no jurisdiction to entertain the appeal which the Applicant has filed before that committee. But strangely, they have maintained the appeal in the Provincial Commissioner’s office before the Appeals Committee.

That implies that when present before the Appeals Committee, the Appellant is telling them a different story from the story he gives when he comes before this court. When present before the Appeals Committee the Applicant must be telling the Appeals committee that it has jurisdiction and should therefore protect him from the bad decision handed down to him by the Tribunal. He will keep on saying that to the Appeals Committee until he loses the appeal. That is when he will come to this court again to claim he has all along been saying that the Tribunal and the Appeals Committee did not have jurisdiction. Those who do not know him well will agree with him. But those who know him well will know he has been contradicting himself as indeed if he wins the appeal nobody will hear him say the Appeals Committee had no jurisdiction to entertain the appeal.

That explains why he is maintaining both the appeal and this judicial review to-day although in the judicial review he is questioning and denouncing the very regime, that is the Appeals Committee and the Tribunal, he is invoking in the appeal to protect him. He wants to eat his cake and have it, and by that I am not saying that, in this respect, the Second Respondent in this Judicial Review is better than the Applicant. Both are equal. That is why the Second Respondent has told this court that the Tribunal had jurisdiction and I am sure when the Appeals Committee dismisses the applicant's appeal, the Second Respondent is going to say that the Appeals Committee had jurisdiction. But if the appeal succeeds, the Second Respondent will be saying that the Appeals Committee had no jurisdiction. He will be quiet about the Tribunal's jurisdiction.

That further explains why both parties become full participants in proceedings before the Tribunal and before the Appeals Committee without raising objection on ground of lack of jurisdiction until they go to the High Court and in the High Court the party who files an appeal or judicial review and therefore the one who raises the issue of lack of jurisdiction, is always the loser at the Tribunal or at the Appeals Committee. The deciding factor is the result a party gets so that the loser goes out shouting that the Tribunal or Appeals Committee or both had no jurisdiction while the winner goes out shouting the contrary. The conduct of the parties in these proceedings is an example of the conduct of majority of our society and it becomes important that this society be guided by good laws as not only are bad laws, like The Land Disputes Tribunals act 1990, misused but they also create a lot of unnecessary work for Government officials, including courts, especially since Land Disputes Tribunals and Appeals Committees do not recognize and accept limits to their jurisdiction.

Look at what happened in Asman Maloba Wepukhulu And Another – Vs – Francis Wakwabubi Biketi, Civil appeal No. 157 of 2001, Court of Appeal at Kisumu. The Respondent purchased the suit parcel of land and obtained title to it. About eleven years thereafter the Appellants Asman Maloba Wepukhulu and Wycliffe Barasa who variously claimed to be sons of the deceased vendor claimed part of that land. The dispute was taken to a panel of elders acting under the provisions of the now repealed "Magistrates' Jurisdiction (Amendment) Act No. 14 of 1981" and that panel of elders ordered cancellation of the title in favour of the Appellants and ordered that the suit land be sub-divided amongst the sons of the deceased vendor. The Senior Resident Magistrate's Court at Bungoma confirmed the award in its Civil Case No. 33 of 1986 during those days when, unlike today, a party aggrieved by the award of a panel of elders had the opportunity to challenge it in a magistrate's court before the court decided either to adopt or not to adopt the award as a judgment of that court.

Thereafter the Respondent made attempts to lodge an appeal in the superior court but in vain. One of the grounds he intended to rely upon in the intended appeal, most probably, was that the panel of elders lacked jurisdiction and had acted illegally in adjudicating over title to the suit parcel of land No. **BOKOLI/KITUNI/169** then registered in his name under provisions of the Registered Land Act. Facts in Civil Appeal No. 157 of 2001 do not appear to be full, but at that time the Appellant's position on that issue must have been that the panel of elders had jurisdiction to adjudicate over title to that land.

However, when the Respondent failed to lodge appeal and about twelve years thereafter took the dispute back to Misikhu, this time to a Land Disputes Tribunal under the present Land Disputes Tribunals Act, he had effectively interchanged roles. As usual the parties would first go through the full length of the procedure outside there without raising any protest over lack of jurisdiction until they reach the High Court. Otherwise, normally it would have been expected that once the Respondent had seen in 1987 that

the panel of elders had no jurisdiction, in 1999 he would have had doubt in his mind whether a similar body, the Land Disputes Tribunal, would have such jurisdiction over title to land.

But there he was. He went to the Tribunal and the Tribunal found in his favour adjudicating over title to land so that it restored the land to him. The Appellants challenged the award on two grounds. Firstly, that the Tribunal lacked jurisdiction, and secondly, that the matter was *res judicata*. At this point in time in this judgment, I am interested in the lack of jurisdiction and indeed that is the ground on the basis of which that appeal was decided. At that time the Respondent who had a very good Counsel was saying the Tribunal had the jurisdiction and he had to reach the Court of Appeal to be silenced on that issue, although, paradoxically, the Respondent must have been a smiling man when he emerged from the courtroom at Kisumu following the implication of the court's judgment.

It has been argued that while the jurisdiction of Land Disputes Tribunals is limited as set out in *Section 3(1)* of the Land Disputes Tribunals Act 1990, the jurisdiction of Provincial Land Disputes Appeals Committees is not so limited. In cases like Asman Maloba Wepukhulu's (Supra), although the Court of Appeal said that the Land Disputes Tribunal had no jurisdiction in issues relating to land ownership, there was nothing about the Provincial Land Disputes Appeals Committee and I have not been able to find assistance on this issue.

An appeal under provisions of the Land Disputes Tribunals Act falls under *Section 75(1)* and *Section 78* of the Civil Procedure Act and *Order XLI Rule 27* of the Civil Procedure Rules.

By virtue of *Section 75 (1)* paragraph (h) of the Civil Procedure Act,

“An appeal shall lie as of right from-----

(h) ***any order made under rules from which an appeal is expressly allowed by rules.”***

Section 8(1) of the Land Disputes Tribunals Act and *Rule 5(1)* of the Land Disputes Tribunals (Forms And Procedure) Rules 1993 expressly allow appeals.

Under *Subsection (2)* of *Section 78* of the Civil Procedure Act, when handling such an appeal,

“the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

Section 3 of the Civil Procedure Act states:

“In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure, by or under any other law for the time being in force.”

Section 5 of the Civil Procedure Act adds:

“Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.”

Order XLI rule 27 of the Civil Procedure Rules therefore concludes:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require,-----”

Going to relevant provisions of the Land Disputes Tribunals Act, *Section 3(1)* of that Act states as follows:-

“(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.”

Section 4 which establishes the Tribunal including the Tribunal's composition states in subsection (1):-

“There shall be established a tribunal, to be called the land Disputes Tribunal, for every registration district.”

Subsection (2) sets out the composition of the Tribunal.

Section 8(1) is the authority for setting up Appeals committees in provinces. It states:

“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 party who appeals is a party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal. A dispute under Section 3 means a dispute heard and decided under the jurisdiction given by Section 3(1). When an appeal in that dispute is taken to the appeals Committee, it has to be determined by the appeals Committee within the limits of the jurisdiction given by Section 3(1). If that is not done, the Appeals Committee will not have conducted an appeal. It will have done something else and that something else will not be within the mandate given to the Appeals Committee by Section 8(1).

After I have said all the above, it may be asked whether a Land Disputes Tribunal is a “court.” For one to answer that question, one must remember that the subject matter of this suit is a parcel of land registered under the Registered Land Act as NGARIAMA/MERICHI/4. The question as to whether a Land Disputes Tribunal is a “court” has to be answered in terms of the Registered Land Act. The complete question should therefore be whether a Land Disputes is a “court” under Section 3 of the Registered Land Act.

Perhaps it is not realised that further to the jurisdiction conferred by Section 3(1) of the Land Disputes Tribunals Act, a Land Disputes Tribunal gets its jurisdiction in matters relating to land registered under the Registered Land Act by virtue of Section 159 of the Registered Land Act because, without Section 159 of the Registered Land Act, Land Disputes Tribunals could have had all the jurisdiction given to them under Section 3(1) of the Land Disputes Tribunals Act, but those Tribunals would not have had jurisdiction where the land over which the dispute to be resolved using the jurisdiction given by Section 3(1) of the Land Disputes Tribunals Act is land registered under the Registered Land Act. It is Section 159 of the Registered Land Act which permits Land Disputes Tribunals to adjudicate over land registered under the Registered Land Act. The Section states:

“159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunal Act, in accordance with that Act.”

By virtue of what Section 159 of the Registered Land Act is saying (*ibid*), a Land Disputes Tribunal becomes a “court” according to the interpretation of the term a “court” as seen in Section 3 of the Registered Land Act which says that “the court,”

“except as otherwise expressly provided, means the court having jurisdiction in the matter in question by virtue of Section 159;”

To conclude the question of the jurisdiction of a Provincial Land Disputes Appeals Committee therefore, the answer from the foregoing is that, in exercising its appellate jurisdiction under the Land Disputes Tribunals Act, a Provincial Land Disputes Appeals Committee’s jurisdiction is confined within the limits of the jurisdiction conferred to the Land Disputes Tribunal by *Section 3(1)* of the Land Disputes Tribunals Act.

Note should be made of the fact that I am using the words:

“in exercising its appellate jurisdiction under the Land Disputes Tribunals Act.”

That means there may be instances when a Provincial Land Disputes Appeals Committee, just like a Land Disputes Tribunal, may be called upon to exercise powers or jurisdiction not derived from the Land Disputes Tribunals Act.

Framers of the Land Disputes Tribunals Act foresaw that possibility and as a result the Land Disputes Tribunals (Forms And Procedure) Rules, 1993, also herein referred to as, The Land Tribunals Rules, make provisions facilitating the use of a Land Disputes Tribunal in the two different capacities.

The first capacity is when proceedings are undertaken under provisions of the Land Disputes Tribunals Act. They are governed by *Rule 3(1)* of the Land Tribunals Rules which states:

“(1) An application for determination of a dispute under Section 3(1) of the Act by a Tribunal shall be in Form A set out in the First Schedule.”

Rule 7 of the same Rules amplifies that by stating:

“Where any dispute exists, the party desirous of referring such dispute to a Tribunal shall make an application to the appropriate Tribunal established under Section 4 of the Act in the appropriate form in the First Schedule and the Tribunal shall thereupon take cognizance of the dispute and register the dispute in the register.”

The second capacity in which a Land Disputes Tribunal is used is when proceedings are undertaken outside provisions of the Land Disputes Tribunals Act. They are governed by *Rule 3(4)* of the Land Tribunals Rules which states as follows:

“(4) Where a court either on its own

initiative or on a request by a party in a suit before it, refers a dispute for determination by a Tribunal, the reference shall be in Form D set out in the First Schedule.”

Rule 8 of the same rules amplifies that by stating as follows:

“Notwithstanding the provisions of rule 7, a court may on its own motion or on an application by a party in a civil suit before it, refer any dispute for determination by the appropriate Tribunal and where such dispute is referred the Tribunal shall follow the procedure provided for in these rules.”

Comparison of Form A used under *Rule 3(1)* and *Rule 7* with Form D used under *Rule 3(4)* and *Rule 8* brings out more differences between the two modes of operation. First, the two forms are different. Secondly, under *Rules 3(1)* and *7*, the first capacity in which a Land Disputes Tribunal is used, or the first mode of operation, the dispute between the parties is determined by the Tribunal; while under *Rules 3(4)* and *8*, the second capacity in which a Land Disputes Tribunal is used, or the second mode of operation, the dispute between the parties is arbitrated or settled. The third difference is that while in the mode of operation under *Rules 3(1)* and *7* nothing is said as to what should happen to the decision of the Tribunal,

in the mode of operation under Rules 3(4) and 8, there is emphasis at the end that the arbitration award or settlement be returned to the court from which the case originated within a prescribed period of time. Although the printed Form D mentions “the Resident Magistrate,” the form can, with very little effort, be modified for use by the High Court or even Court of Appeal – and indeed that has been done several times, the title “Deputy Registrar” replacing the title “Resident Magistrate” so that the award or settlement from the Tribunal is filed in the originating court for that court to adopt it or not to adopt it as a judgment of the court following the necessary court scrutiny of what the Tribunal would have done following the reference.

The process is officially termed “COURT REFERENCE TO TRIBUNAL FOR DETERMINATION.” It could also be termed “COURT REFERENCE TO TRIBUNAL FOR ARBITRATION” as the said reference is done under *Section 3A* of the Civil Procedure Act and or *Order XLV* of the Civil Procedure Rules without which provisions; Rules 3(4) and 8 of the Land Tribunals Rules would be rendered barren.

According to Rule 8 such reference can be of any dispute. The court can “refer any dispute for determination by the appropriate Tribunal.” That is any dispute then before the referring court. It may be a dispute over title to land or a dispute over succession to property or a dispute over any other matter or thing. Provisions of *Order XLV* of the Civil Procedure Rules are more restrictive than Rule 8 of the Land Tribunals Rules. Under *Order XLV* there should be an agreement by the parties and there is no room for the court’s own motion for the reference to take place. Rule 1 of *Order XLV* therefore states:

“Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”

Rule 2:

“The arbitrator shall be appointed in such manner as may be agreed upon between the parties.”

Rule 3(1):

“The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.”

Section 3A of the Civil Procedure Act, which is more generous than Rule 3(4) and Rule 8 of the Land Disputes Tribunal Rules as well as Rules 1, 2 and 3(1) of *Order XLV* of the Civil Procedure Rules, states as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Before such a dispute is referred to the Tribunal, that Tribunal will not be having the jurisdiction to adjudicate over such dispute. But once the dispute is referred to the Tribunal, that Tribunal becomes vested with the power, the jurisdiction conferred upon the Tribunal through the referring court order which may have been initiated by a party or parties who did not have such jurisdiction. But the court making the referene order must, in the first place, have the jurisdiction to determine that dispute. That way the Tribunal gets the jurisdiction just as an individual arbitrator or a group of individual arbitrators or an arbitrating Agricultural Officer or arbitrating District Commissioner or arbitrating Provincial Commissioner would get that jurisdiction though only on that temporary basis. In that respect, nobody would properly say the arbitrator had no jurisdiction to determine that dispute, and the same can be said of a Land Disputes Appeals Committee at a province. I must clarify here that when such a reference to arbitration is made, there is no question of an appeal from a Tribunal to an appeal’s committee where the reference was made to a Tribunal, or an appeal from an appeals committee to the High Court where the reference was made to an appeals committee. It becomes a matter between the referring court and the

Tribunal or the appeals committee to which the reference is made.

The third capacity in which a Land Disputes Tribunal could have been used, that is in settlement of disputes by arbitration under The Arbitration Act, Cap. 49 Laws of Kenya, is not provided for by The Land Disputes Tribunals Act.

What then do we mean when we say that a Land Disputes Tribunal has no jurisdiction to adjudicate in a dispute relating to title to, or ownership of land? No statute or regulation has so far stated so. All there is, is case authority and the case of Asman Maloba Wepukhulu, (***Supra***), is an example of these cases. In that case it was held that the Land Disputes Tribunal had no jurisdiction because:

“The Courts have never determined the issue relating to ownership of the land-----”

But the matter is not as simple as that when words employed in *Section 159* of the Registered Land Act and *Section 3(1)* of the Land Disputes Tribunal’s Act are looked at more closely. Excluding leases and charges, *Section 159* talks of “Civil Suits and proceedings relating to the title to, or the possession of, land” registered under the Registered Land Act, or any other interest in the land being an interest registered or registrable under the Act or which the Act says requires no registration. Singling out the words:

“the title to, or the possession of,”

to compare with the words used in *Section 3(1)* of the Land Disputes Tribunals Act like:

“the division of, land, including land held in common,”

and

“a claim to occupy or work land,”

some questions may be asked. For instance, how can one do “the division of land” without one putting the beneficiary of that division into possession and giving that beneficiary a title to land from one of the resulting portions of the division? How can the beneficiary from “a claim to occupy or work land,” not be in possession?

The reality here is that two people, one in *Section 159* of the Registered Land Act and the other in *Section 3(1)* of the Land Disputes Tribunal Act, are using different words to say the same thing and perhaps that is one of the explanations why Land Disputes Tribunals and Provincial Land Disputes Appeals Committees country-wide have never learned a thing from the numerous lamentations by advocates accompanied by numerous declarations by courts that Land Disputes Tribunals and Appeals Committees have no jurisdiction to adjudicate in disputes over title to land.

That is one of the reasons why in this application Mr. Njage was saying the Tribunal had no jurisdiction because the dispute was over title to land, while Mr. Ndana was saying the Tribunal had jurisdiction because the Respondent’s claim in the matter was “a claim to occupy or work land.” The latter did not disclose why he was afraid of saying that his client’s claim included “the division of land.” It is just a matter of semantics. The words a party chooses to use.

That scenario becomes more refined when it is realized that in adjudicating over these disputes, under *Section 3(1)* of the Land Disputes Tribunals Act, Land Disputes Tribunals apply Customary law even where the land affected is governed by statute like the Registered Land Act. *Subsections (6) and (7)* of *Section 3* of the Land Disputes Tribunals Act state as follows:

“(6) Within thirty days after the answer has been filed under subsection(5) the claim shall be set down for hearing by the Tribunal.

(7) The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law,-----”

As can be seen, *Subsection (7)* is in mandatory terms that the Tribunal “shall adjudicate upon the claim and reach a decision in accordance with recognized Customary law.”

The Legislature, and definitely, framers of the Land Disputes Tribunals Act, knew the Act was intended to give Land Disputes Tribunals jurisdiction to adjudicate over all land in Kenya, including land registered under the Registered Land Act. That was why the Land Disputes Tribunals Act contains *Section 12* which amends *Section 159* of the Registered Land Act by deleting the words

“-----where the dispute comes within the provisions of Part IIIA of the Magistrate’s Courts Act, in accordance with Part-----”,

and replacing them with the words

“-----where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunals Act, in accordance with that Act.”

As I have stated elsewhere, a dispute “comes within the provisions of *Section 3(1)* of the Land Disputes Tribunals Act” simply by virtue of the words a party, more often the Plaintiff or Complainant before the Tribunal, chooses to use in his plaint or complaint.

It means the days when decisions such as the one in Murai –v- Wainaina (No.5), (1982) KLR 51 were useful on the issue of non applicability of Customary law where the suit parcel of land is registered under the Registered Land Act, like the parcel of land in the present proceedings, are no longer with us. In **Murai –v- Wainaina**, the Court of Appeal held that written law prevails over Customary law even where parties are subject to that Customary law; that rights under Customary law are not overriding interests where the land is registered under the Registered Land Act; and that no other law or practice can apply to land registered under the Registered Land Act if it is inconsistent with its provisions and further that Customary law could not therefore apply although it could be relied on for guidance in accordance with the Judicature Act (Cap. 8) *Section 3(2)* – which states:

“The High Court, the Court of Appeal and all Subordinate Courts shall be guided by African Customary law in Civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

In another case, Elizabeth Wangari Wanjohi And Other -v- Official Receiver An Interim Liquidator (Continental Credit Finance Limited), Civil Application No. 140 of 1988, at Nairobi, the Court of Appeal held that rights under Customary law are extinguished upon registration of land under the Registered Land Act. The same was said in Esiroyo –v- Esiroyo And Another (1973) E.A. 388.

There are several other such decisions and they came on the basis of proper foundation because one of the things the Registered Land Act was intended to do was to extinguish the application of Customary law to land registered under the Registered Land Act. But that was to come after Customary law had been fully applied under the Land Adjudication Act (Cap. 284) or Land Consolidation Act (Cap. 283) which contained specific provisions like *Sections 20* and *23* of the Land Adjudication Act and *Sections 11* and *13* of the Land Consolidation Act making it mandatory for the ascertainment and adjudication of rights and interests of persons in land to be done in accordance with recognized (African) Customary law. All that having been done during land adjudication and land consolidation, it was felt undesirable for Customary law to continue governing same land once that land had subsequently become registered under the Registered Land Act. Sections such as 159, 143(1), 27, 28 and 30 were therefore put in the

Registered Land Act to safeguard the position of the registered proprietor.

In its original form, *Section 159* did not have any authority, other than the court, to handle disputes affecting land registered under the Registered Land Act. *Section 143(1)* states:

“-----the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

Section 27

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 28

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register:

provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Section 30 is the one setting out overriding interests and these, as already stated earlier, do not include Customary law and proper construction of provisions of the Registered Land Act would lead to the notion that overriding interests are interests inferior not only to ownership or proprietorship but also to interests like leases and charges and are interests that can also be terminated by either party or both following the correct law and legal procedure.

Previously succession proceedings affecting land under the Registered Land Act were being governed by *Section 120 and Section 121* of the Registered Land Act which clearly and specifically provided that Customary law of the deceased person was to apply.

Section 120 and Section 121 of the Registered Land Act were repealed by Act No. 14 of 1972, the predecessor of the present Law of Succession Act. From that time until the time of the judgment in the case of **Murai –v- Wainaina** and judgment in the case of **Elizabeth Wangari Wanjohi And Others (Supra)**, there was no provision of the Registered Land Act allowing the application of Customary law to defeat the absolute ownership of a registered proprietor of a piece of land or even to be as an encumbrance to the absolute ownership of a registered proprietor of land. The repeal of *Section 120 and Section 121* had removed the only provision of the law allowing the application of customary law on land registered under the Registered Land Act. The decision in those two cases concerning inapplicability of customary law to land registered under the Registered Land Act were no doubt, sound decisions as according to *Section 28* of the Registered Land Act again;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall be rights not liable to be defeated except as provided in this Act.”

In that Act, at the time of decisions in aforesaid cases, Customary law was not applicable. Unfortunately, or should I say fortunately, there subsequently came a time when the people of Kenya were told that courts were not doing a good job in adjudicating over land disputes. That was said in public rallies and they came up with the now repealed Magistrates Jurisdiction (Amendment) Act No. 14 of 1981. **The truth is that, if indeed there had been a bad job, the situation became worse by the entry of Panels of Elders into land disputes resolution by virtue of that new Act of Parliament. The result was the replacement of the Magistrates Jurisdiction (Amendment) Act No. 14 of 1981 by the Land Disputes Tribunals Act 1990 currently in force.**

While in some respect the jurisdiction or power a Panel of Elders was permitted to exercise under Part III A of the Magistrates Courts Act, that is the Magistrates Jurisdiction (Amendment) Act, was the same as the jurisdiction or power being exercised by a Land Disputes Tribunal under the present Land Disputes Tribunal Act, in other respects they were different. A Panel of Elders had, under Section 9A Subsection(1) of the Magistrates Jurisdiction (Amendment) Act, all the jurisdiction given to a Land Disputes Tribunal under Section 3 Subsection (1) of the Land Disputes Tribunals Act. A minor difference is that a section of that jurisdiction dealing with “*the beneficial ownership of land*” which a Panel of Elders had, has been omitted from the jurisdiction given to a Land Disputes Tribunal.

Apart from that minor difference, however, there are three major differences:

Firstly, a Panel of Elders in exercising its prescribed jurisdiction was specifically stopped or prevented from determining disputes over title to land. Section 9A Subsection (2) of the Magistrates Jurisdiction (Amendment) Act when referring to the Panel of Elders’ jurisdiction or power as set out in subsection (1) of that Section stated:

“(2) An issue relating to any matter set out in paragraph (a) to (d) of Subsection (1) shall be referred to a panel of elders to be resolved; but nothing in that Subsection shall be construed as conferring jurisdiction or powers on a panel of elders to determine title to land.”

No provision like that is found in the Land Disputes Tribunals Act. That is a limitation to jurisdiction, which is not imposed upon Land Disputes Tribunals.

Secondly, while the Land Disputes Tribunals Act requires and mandates a Land Disputes Tribunal to apply customary law, and customary law only, when determining disputes over land, Part IIIA of the Magistrates Courts Act did not have such provision. Panels of Elders were not specifically told the law to apply and in relation to land registered under the Registered Land Act therefore, there was no question of a Panel of Elders lawfully applying customary law since the Magistrates Jurisdiction (Amendment) Act had said nothing about customary law and its applicability. Under the Registered Land Act therefore Panels of Elders were, by implication restricted or limited to the application of provisions of the Registered Land Act, in obedience to Section 28 of the Registered Land Act, if they intended to take measures, which would defeat or tend to encroach on any rights of a registered proprietor of land. Otherwise they had to use other applicable written law. Not Customary law. For Land Disputes Tribunals, on the other hand, the reverse is the position. They are expressly empowered to apply Customary law and Customary law only. No provisions of any statute or legislation other than the Land Disputes Tribunals Act and its rules. They have to apply Customary law only even where the land over which the dispute is, is land registered under the Registered Land Act.

But in applying Customary law, Land Disputes Tribunals have no jurisdiction to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court. This is the third major difference when comparing the jurisdiction given to a Panel of Elders and the jurisdiction given to a Land Disputes Tribunal. Land Disputes Tribunals are expressly required to observe the law of limitation of actions and the doctrine of *res judicata*. That restriction is found in Section 13(3) of the Land Disputes Tribunals Act which states:

“For avoidance of doubt it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which had been heard and determined by any court.”

Panels of Elders were not so expressly restricted under the Magistrates Jurisdiction (Amendment) Act, which, as noted earlier, did not expressly tell Panels of Elders the law to apply.

With regard to Panels of Elders, therefore, the dictum that a Panel of Elders had no jurisdiction to adjudicate in disputes over title to land registered under the Registered Land Act was perfect, provided a clause was added to say:

“-----when determining a dispute within the provisions of Part IIIA of the Magistrates courts Act.”

Today that position has changed and the case authorities I have said were sound decisions are no longer useful in disputes over land registered under the Registered Land Act. But many of us have not realized that fact. When we look at Land Disputes Tribunals, we think they have the same jurisdiction as what Panels of Elders used to have in all respects and use the same law as what Panels of Elders used. By thinking that way, we make a mistake and therefore also say of them that Land Disputes Tribunals have no jurisdiction to adjudicate in disputes over title to land registered under the Registered Land Act. Even if the dictum is set out in a more complete way by stating that:

a Land Disputes Tribunal has no jurisdiction to adjudicate in a dispute over title to land registered under the Registered Land Act where the dispute comes within provisions of Section 3(1) of the Land Disputes Tribunals Act,

the law today in relation to the Registered Land Act is that the rights of a proprietor, *Section 28* of the Registered Land Act says: “shall be rights not liable to be defeated except as provided in this Act.” In 1990, “this Act” that is the Registered Land Act, was amended in *Section 159* by the Land Disputes Tribunals Act 1990 to state that where the dispute comes within provisions of *Section 3(1)* of the Land Disputes Tribunals Act, that dispute be determined in accordance with the Land Disputes Tribunals Act. Since that is being stated in *Section 159* of the Registered Land Act, thereby complying with the requirements of *Section 28* of the Registered Land Act, and since the Land Disputes Tribunals Act makes it mandatory for Land Disputes Tribunals to apply Customary law, then the application of Customary law is back in the provisions of the Registered Land Act and Customary law now applies to land registered under that Act.

Today therefore a Land Disputes Tribunal lawfully applies customary law to land registered under the Registered Land Act, not only in disputes relating to succession as used to happen before repeal of *Section 120* and *Section 121* but in land disputes generally so that instead of advancing forward, the country has gone backward several decades – into the era of commencement of land adjudication and land consolidation processes when a title deed was an unascertainable and unreliable security – document – in the business world and indeed Authorities are presently making the matter worse by public pronouncements, contradicting the law, to the effect that a title deed is a worthless piece of paper to be ignored and be changed at will without recourse to judicial process. To-day, disorder or confusion in legal procedure and legal dicta in disputes over land registered under the Registered Land Act live with us. Once more the case of **Asman Maloba Wepukhulu**, seen earlier, comes in handy being one of the recent ones. It was decided on 13th June, 2003 and has been relied upon by Mr. Njage to press home the point that the Land Disputes Tribunal in the instant case had no jurisdiction to determine the dispute in this suit. Mr. Ndana disagrees completely with Mr. Njage.

I have already stated part of what happened in the case of **Asman Maloba Wepukhulu**. Part of what I did not say, and which with profound due respect, adds to illustrate the disorder and confusion I am talking about is that when parties in that case were first before elders at Misikhu, those elders were acting under the Magistrates Jurisdiction (Amendment) Act No. 14 of 1981 when they ordered the sub-division of the suit parcel of land and transfers thereof. Their decision was confirmed by the Senior Resident

Magistrate's Court at Bungoma in 1987. In October 1999 when the Respondent went back to Misikhu with the same dispute, he went before a Land Disputes Tribunal, a different body under a different law, the Land Disputes Tribunals Act 1990. The case was entertained by a Tribunal expected to observe the principle of *res judicata*, and was adjudicated upon as No. 6 of 1999; with nobody considering what had happened in the previous case. The Tribunal decided the new case in favour of the Respondent and that decision was adopted as judgment by the Webuye Court of Senior Resident Magistrate in Civil Case No. 20 of 2000 and as he was struggling to execute it, the Appellants filed appeal No. 225 of 2000 in the High Court Bungoma.

It means there existed two parallel and contradictory decisions at Misikhu elders level giving rise to two parallel and contradictory court judgments one from Bungoma Magistrate's Court and the other from Webuye Magistrate's Court. From the Court of Appeal judgment No. 157 of 2001 cited by Mr. Njage, it is not clear the case from which that appeal arose. Was the appeal from Webuye Court's judgment or was it from Bungoma court's judgment or from both or from neither? From what is happening today, each of those alternatives can happen. Like in the case before me. It is only decision of Kirinyaga District Land Disputes Tribunal which is being challenged. Nothing has been said about the existing court judgment adopting the challenged decision.

In any case, what emerges further from the case of **Asman Maloba Wepukhulu** is still of interest. The appeal to the High Court at Bungoma appears to have been from the Second Misikhu case. The one which was handled by the Land Disputes Tribunal as the Appellants were Asman Maloba Wepukhulu and his brother Wycliffe Barasa.

If that appeal was against the judgment of the Magistrate at Webuye, there was no problem with regard to that case. But if that appeal was against the decision of Misikhu Land Disputes Tribunal only, there were procedural and legal problems.

Then comes the way proceedings were handled in the High Court. Appeal concerning Land Misikhu Disputes Tribunal Case No. 6 of 1999 only. It may have been an application for judicial review. The learned judge held:

“The courts have never determined the issues relating to ownership of the land----- . In view of the above, I find that all the orders giving rise to sub-division of the original parcel and the current one were null and void and hereby set them aside and/or quashed. In place thereof I order that the sub-division be cancelled and the land be reverted to the original parcel No. BOKOLI/KITUNI/169 and registered in the names of the interested party. The appellant is hereby given liberty to bring a claim for the land in a court with jurisdiction.”

That decision of the High Court was confirmed by the Court of Appeal.

All the orders and decisions made by the two courts and the two bodies at Misikhu may have been null and void but, with all due respect, proper and lawful procedure must be employed to quash or set aside or discharge those orders. The orders made pursuant to provisions of the Magistrates Jurisdiction (Amendment) Act some eleven years earlier had not been appealed from. There was no appeal against those orders at the time H.C. Misc. Civil Application 225 of 2000 was being heard. As to Tribunal Case No. 6 of 1999, it is not clear whether what was being challenged in the High Court was the Tribunal's decision alone or was the magistrate's adoption judgment. I said disorder and confusion exist. The result of a bad law. The Land Disputes Tribunals Act 1990.

From what I have been discussing above therefore, today a Land Disputes Tribunal has jurisdiction to adjudicate in or determine disputes over title to land and will do so applying Customary law inside and outside the sphere of the Registered Land Act – unless the case has been referred to the Tribunal outside the Land Disputes Tribunal Act when Customary law may not apply. But when courts adjudicate in disputes over title to land within the sphere of the Registered Land Act, only statutes including legislation and the Common Law of England as modified by the doctrines of equity will apply as courts have not been permitted to apply Customary law within the sphere of the Registered Land Act, although Courts

may, by virtue of *Section 3(2)* of the Judicature Act 1967, be guided by Customary law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law. Those conditions are not imposed and therefore do not count when Land Disputes Tribunals are applying (not being guided by) Customary law. In my view, by enacting the Land Disputes Tribunals Act 1990, Parliament created two parallel jurisdictions to adjudicate over Civil suits and proceedings relating to the title to, or the possession of, or the division of, land, including land held in common; and a claim to occupy or work land. One jurisdiction is in courts while the other jurisdiction is in Land Disputes Tribunals, the two merging at the top through judicial reviews or appeals.

The resulting procedural and legal disorder or confusion are clear manifestations of the fact that the two parallel jurisdictions are in conflict or inconsistent resulting from conflicting or inconsistent laws, the conflict or inconsistency in laws being caused by the application of Customary law which should therefore give way to written law as the Customary law being applied does not satisfy all the conditions set out in *Section 3(2)* of the Judicature Act particularly with regard to consistency. It is inconsistent with written law.

In any case, the legal position emerging from my surveying of the law as set out above is 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. That demolishes ground (a) supporting the Applicant's Notice of Motion dated 14th July, 200, and therefore leaves the Applicant with ground (b). The law of limitation.

Section 13(3) of the Land Disputes Tribunals Act has been quoted elsewhere in this judgment. Mr. Ndana did not agree that there was contravention of that section by the Respondent. He argued that limitation cannot arise because the Respondent has been living on the suit parcel of land and still resides there. Mr. Njage on the other hand insisted that the case was filed after the limitation period. He said the action was time-barred under *Section 13(3)* of the Land Disputes Tribunals Act as read with *Section 7* of the Limitation of Actions Act (Cap. 22) which states:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

That section does not talk of “living on the suit parcel of land. It talks about the date on which the right of action accrued.

Evidence is that the two cousins settled on the land in 1963 when it was registered in the name of the Applicant. The Respondent told the Tribunal that in 1984 the Applicant chased him away although the Applicant denied that he chased away the Respondent as the Applicant maintained that the Respondent went away by himself.

In any case the Respondent had in 1975 lodged a caution on the land register of the suit parcel of land claiming ownership. That was nine years before the year 1984. If anything, the year of the lodging of the caution constitutes clear evidence of the accruing of the cause of action as the interest the Respondent was claiming by then was adverse to that of the Applicant.

The dispute was filed in the Land Disputes Tribunal Kirinyaga in the year 2003. If the cause of action arose in 1975, that was 28 years. If the cause of action arose in 1984, that is 19 years. If the cause of action arose in the year 1969, that is more years. In each case, the period is more than 12 years. The Respondent claims to have been in possession even if at one time he was chased away by the Applicant.

The parties were not keen in establishing what actually happened. But on the balance of probabilities I am satisfied that ground (b) in support of the applicant's Notice of Motion dated 14th July 2004 would stand.

But that is subject to another aspect of this Notice of Motion to be considered. That is what went on

in the court following the decision of the so called Kirinyaga Land Disputes Tribunal. That decision was filed in the Principal Magistrate's Court at Kerugoya and on 8th August, 2003 was adopted as that court's judgment. To-date, that court judgment exists and nobody is questioning it even in this application. As a result the extent to which execution of that judgment has progressed has not been revealed to this court thereby precipitating conditions in which this court is liable to making an inconsistent or useless court order.

That court judgment having been entered by a court, in law, not only was it improper but was also irregular for this Notice of Motion to have been filed praying for an order of Certiorari to quash the decision of the Land Disputes Tribunal since under *Section 7(2)* of the Land Disputes Tribunals Act the court enters

“judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree”

issues and is

“enforceable in the manner provided for under the Civil Procedure Act”.

Once such a decision is adopted by a court, it becomes a judgment of the court thereby ceasing to exist as a decision which can separately be quashed as contemplated in this Notice of Motion. What has to be dealt with now is a judgment of a court and not a decision of a Tribunal just as a party would have appealed against the decision of the Provincial Land Disputes Appeals Committee and not against the decision of Kirinyaga Land Disputes Tribunal had the Applicant's appeal in the Provincial Land Disputes Appeals Committee been heard and determined without the existence of an intervening court judgment adopting the Kirinyaga Tribunal's decision.

As I gather from Mr. Njage and Mr. Ndana, the view is that there is no need to bring in these proceedings the record of what has gone on in the Principal Magistrate's Court at Kerugoya because these proceedings have nothing to do with what went on in the court as no provision of the Land Disputes Tribunals Act says anything about what goes on in a magistrate's court with regard to appeal or review. That way of thinking is not uncommon and parties will always go to the High Court on judicial review or on appeal ignoring to put before the High Court, in addition to the other relevant record filed, proceedings which may have gone on in a magistrate's court where the decision of either the Tribunal or the Appeals Committee may have been subsequently filed; and surprisingly some parties will try to suppress any such information so that it does not reach the High Court. They want to keep the information out of the High Court.

If it is a question of the Land Disputes Tribunals Act not saying whether or not there should be judicial review or an appeal against the adopting judgment of a magistrate, then how is it that I am now dealing with judicial review in these proceedings yet that Act does not mention judicial review anywhere? If it were rightly felt that notwithstanding powers of this court under *Section 3A* of the Civil Procedure Act, no appeal can be filed, then definitely judicial review is available.

It has been further argued that since the decision of the Tribunal is null and void, then parties do not have to worry about the adopting judgment of the court. The judgment should be ignored because it is also null and void. There is nothing to worry about. But if that is so, why is someone worried about the decision of the Tribunal which is also null and void? Why come to this court to have it reviewed or to appeal against it?

I have, in my discussion above, come to the conclusion that a Land Disputes Tribunal has jurisdiction. But even if I were to accept that it has no jurisdiction, as I said in Wamwea -v- Catholic Diocese of Muranga Registered Trustees (2003) KLR 389, let all that information come before the High Court as it is part of the decision of the Tribunal or Appeals committee, for where such a decision has been adopted by a magistrate's court in accordance with provisions of the Land Disputes Tribunals Act, that adoption makes the decision of the Tribunal or decision of the Appeals Committee, be a decision of the Magistrate's Court. As a result, the decision of the Tribunal or Appeals Committee, in law, ceases to

exist as an independent decision challengeable separately in an appeal or judicial review. Where such a court judgment exists therefore, what is the propriety of challenging the mother decision of the Tribunal or Appeals Committee alone when, in law, that decision has been overtaken by, and has become, a decision of the Magistrate's Court? Does that not result into inconsistent court decisions, one from a magistrate's court not being challenged and therefore existing, and the other from the High court as a result of the appeal or judicial review? Is a magistrate's court decision not a decision of a court of law? Is it to be ignored?

I add that what Lord Denning said in the case of MACFOY –vs – UNITED AFRICA Ltd. (1961) 3 ALL E.R. 1169 that there is no need for an order of the court to set aside a court order which is void should not be misunderstood. That statement should be read together with the rest of what he said. He stated:

“If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

As the next authorities will show, it is not just sometimes convenient to have the court declare it void. It is always desirable, it is important and it is mandatory if confusion or disorder is to be avoided.

A passage in the judgment of Romer, L. J. in Hadkinson –vs – Hadkinson, (1952) 2 ALL E. R. 567 at page 569 which was quoted with approval by the House of Lords in the judgment of Lord Diplock, in Isaacs – vs Roberston, (1984) 3 ALL E.R. 140 at page 142 states:

“it is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

Lord Diplock, with approval, quoted Lord Cottenham, L. C., in Chuck –v- Cremer (1846) 1 Coop temp Cott 338 at 342; 47 E.R. 884 AT 885 stating:

“A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it-----It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.”

Lord Diplock added:

“Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court-----is in contempt and may be punished by committal or attachment or otherwise.”

Lord Diplock went on to say at page 143 in the same case Isaacs –v- Robertson:

“there is a category of orders of such a court which a person affected by the order is entitled to apply to have it set aside ex debito justitiae (a remedy which the applicant gets as of right) in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex-debito justitiae the right to have it set aside, save that

specifically it includes orders that have been obtained in breach of rules of natural justice.”

Those case authorities are clear as to what should be done with irregular or null and void court orders or judgments. The first officials of the Kenya Constitutional Review Commission had a different idea. They started to put it in practice and told Kenyans to follow suit. To ignore court orders or judgments. To disobey court orders having judged by themselves that the orders or judgments were unlawful. A number of people listened, and are following the example, especially Ministers and other high ranking Government officials in Kenya, a country professing the Rule of Law. The ordinary citizen is keenly watching anxiously to join. If those in the legal system of the country, those in the legal profession like advocates, fall pray to ignoring court orders like those other people have started doing, the Rule of Law in this country will be no more. A court judgment or court order is a court judgment or court order whether lawful or unlawful, regular or irregular, null or valid, void or legal. Once in existence that judgment or order must be respected and obeyed by all until lawfully discharged if it has to go. Correct and lawful procedure has to be employed in the process as mere exhibiting of relevant copies of proceedings without more will not do. Court orders or judgments are sacrosanct and must be respected by all consumers of justice regardless of their standing in the society.

As I am saying these things to-day, signs are that this country has entered an era in which the powers that be have decided to disregard the people's wishes; the Executive dictatorship has been effectively supplemented, in its naked contempt for the Rule of Law, by Parliamentary dictatorship and law making, including constitutional making, has become either a tool for achieving selfish ends or for encouraging impunity in disobeying the existing laws including the existing constitution of the land which the Executive and the Legislature swore to defend. Even when there is a sizeable number of lawyer parliamentarians and other very highly educated and variously experienced Legislatures, there is no escape from the tragedy of law-making. The selfishness, the carelessness, the callousness and arrogance of the lawmakers – reveal the contempt with which the governors look upon the governed – as the ruling elite, the politicians and those who occupy high ranks in the Public Service, treat State power as their personal possession for exclusive personal good in complete disregard of the public good. In those circumstances, courts, with advocates as positive companions, must be torch bearers to shine the good light that shows the country where the right path to follow is, for a return to the Rule of Law, not only in theory and lip service, but also in real and full practice visible by every member of the public now and evermore, provided we are not ill behaved and can therefore change for the public good when we become courts, advocates or other national leaders with power of the people to exercise over the people with the people for the people.

In conclusion, I would say to the Applicant that he is questioning in this judicial review, a decision which ought not be questioned independently, in a court of law, as in law, that decision no longer exists independently to be challengeable or quashed independently in proceedings of this nature. That decision ceased to exist independently when it was adopted on 8th August 2003 as a judgment of the Principal Magistrate's Court at Kerugoya in that court's Land Disputes Tribunal Case No. 17 of 2003 and it is the said Principal Magistrate's judgment which may have been properly sought to be quashed. To-date there is no application to quash that judgment neither is there an appeal against the judgment which therefore remains existing. It follows that this Notice of Motion dated 14th July, 2004 has not been properly brought and is therefore incompetent. It ought not have been maintained in the first place.

Other short comings in the Applicant's Notice of Motion are as follows: Firstly, looking at the prayer intended to be granted in the light of documents filed in support, I entertain no doubt that "Case No. 17 of 2003 attributed to the Land Disputes Tribunal whose decision it is intended to be quashed does not exist in this matter.

"Case No. 17 of 2003" is a Kerugoya Principal Magistrate's Court Case number, the judgment of which, this court has been told, should be ignored because it is null and void. That case number is not therefore a Tribunal case number and should not be in these proceedings. Secondly, "the Land Disputes Tribunal Kirinyaga District," does not exist in this matter as no such a Tribunal handled this matter. In other words, the First Respondent does not exist in this matter. That may explain why nobody appeared in response to the Summons alleged served upon the first Respondent. Thirdly, the Tribunal from which

proceedings have been filed in support of the Notice of Motion herein is Gichugu Land Disputes Tribunal as can be seen in the area District Officer's letter at page 3 of the record and the Provincial Commissioner's letter at page 8 of the record. That tribunal's proceedings have no case number although dated 23rd June, 2003. A "Land Disputes Tribunal Gichugu Division" cannot be the same tribunal as a "Land Disputes Tribunal Kirinyaga District". Although the Legislature in *Section 4(1)* of the Act seem to have intended to have one Tribunal for each administrative district – see also *Section 2* - Tribunals are Divisional bodies and not District bodies according to the set up existing to-day and that is why the Applicant has not filed in this application, proceedings from the "Land Disputes Tribunal Kirinyaga District." Consequently,

“the decision of the Land Disputes Tribunal Kirinyaga District dated the 23rd June, 2003 in its Tribunal Case No. 17 of 2003”

which this court is being asked to quash does not exist in this matter. This court is being asked to make a useless quashing order. An order against a body which does not exist in relation to this matter; against a decision which does not exist and in a Tribunal Case No. 17 of 2003 which does not exist. An order which cannot be lawfully executed anywhere in the world. No doubt this Notice of Motion must be and is misconceived. No only incompetent but also vexatious, scandalous and should never have been entertained in the first place.

From the foregoing, it follows that the ground of limitation of actions as set to in paragraph (b) in this judgment, or paragraph (d) in the Notice of Motion, does not salvage the applicant's said Notice of Motion. Accordingly, the said Notice of Motion dated 14th July, 2004 be and is hereby dismissed with costs to the 2nd Respondent.

Dated, delivered and signed at Nyeri this

5th day of July, 2005.

J. M. KHAMONI

JUDGE

Present:

Mr. Nderi for Mr. Njage for the Applicant

Mr. Mbao Gitahi for Mr. Ndana for the Respondent