



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 204 OF 2010**

**REPUBLIC .....APPLICANT**

**AND**

**EX PARTE**

**MUKAI KATAMA.....APPLICANT**

**VERSUS**

**THE LAND DISPUTES TRIBUNAL,**

**KITUI DISTRICT.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATE,**

**KITUI LAW COURTS.....2<sup>ND</sup> RESPONDENT**

**AND**

**NGOTHO NDELU.....INTERESTED PARTY**

**JUDGMENT**

1. In the Notice of Motion dated 26<sup>th</sup> October, 2010, the Ex-parte Applicant (*the Applicant*) is seeking for the following orders of Judicial Review:

***a. That the Judicial Review Order of certiorari be issued to remove into this court for purpose of quashing the proceedings and decisions of Kitui District Land Disputes Tribunal Case No. 90 of 208 read on 12<sup>th</sup> May, 2010 and adopted as Judgment of the court on the 27<sup>th</sup> day of September, 2010 Kitui Civil Case No. 13 of 2010.***

***b. That an order of prohibition prohibiting the Principal Magistrate's court at Kitui from enforcing the decision of the Kitui Land Disputes Tribunal Case No. 90 of 2008 read on 12<sup>th</sup> May, 2010 and adopted as Judgment of the court on the 27<sup>th</sup> day of September, 2010 at the Principal Magistrate's Court at Kitui in Civil Case No 13 of 2010.***

2. The Application is supported by the Applicant's Statement of Facts and the Verifying Affidavit. It is the Applicant's case that the Interested Party instituted a claim No. L.D.T. 90 of 2018 before the Kitui Land Disputes Tribunal in respect of a parcel of land known as Mutonguni/Mithini/573 (*the suit land*); that the suit land is registered in favour of her deceased husband and that she is not the administrator of the Estate of her deceased husband.

3. The Applicant deponed that the Tribunal ordered her to Transfer the suit land to the Interested Party; that the Tribunal did not have the jurisdiction to make the order that it made and that the Tribunal did take clear proceedings neither did it give reasons for its Ruling.

4. It is the Applicant's case that other than not having the requisite jurisdiction, the Tribunal did not hear her and that the Award of the Tribunal should be quashed by this court.

5. In his response, the Interested Party deponed that the decision of the Land Disputes Tribunal that is being sought to be quashed is dated 18<sup>th</sup> March, 2009; that the Application for leave to commence these proceedings was filed after the expiration of six (6) months of the date of

the decision and that as at the time of filing the dispute, no Grant had been filed in respect of the Estate of the deceased.

6. The Interested Party deponed that the Applicant was properly summoned to appear before the Tribunal and that the Tribunal's decision having been adopted by the lower court on 27<sup>th</sup> September, 2010, the decision of the Tribunal ceased to exist.

7. The Applicant's advocate submitted that the Tribunal's mandate to hear and determine land disputes is very specific; that the Tribunal's findings and decision that the suit land be apportioned and registered in the name of the Interested Party is a nullity and that the Applicant being not the Administratrix of the Estate of her deceased husband lacked capacity to be sued in relation to the deceased's Estate.

8. The Interested Party's advocate submitted that under the Law Reform Act, proceedings for Judicial Review orders of certiorari must be commenced within six (6) months of the date of the decision that is sought to impugned; that the Application to commence Judicial Review proceedings was filed outside the six (6) months period and that the Applicant had thirty (30) days to appeal against the decision of the Tribunal that was adopted by the lower court.

9. The Interested Party's advocate finally submitted that the claim by the Interested Party before the Tribunal was a claim to occupy and work on the land and that the Tribunal acted within its mandate.

10. The Applicant is seeking to quash the proceedings and decisions of the Kitui District Land Disputes Tribunal Case No. 90 of 2008. According to the proceedings annexed on the Applicant's Affidavit, the dispute that was before the Tribunal was for parcel number "L/R No. 573." The proceedings shows that the Tribunal made its Award on 18<sup>th</sup> March, 2009 in which they directed that the Interested Party should get his portion which he bought from Katama Nzambu.

11. Katama Nzambu is the husband of the Applicant. According to the Grant of Letters of Administration dated 19<sup>th</sup> December, 2008, Mr. Katama died on 2<sup>nd</sup> October, 1984. However it was not until 19<sup>th</sup> October, 2008 that Zecharia Ngala Katama was appointed as the administrator of the Estate of Katama Nzambu.

12. The Interested Party's advocate has argued that the Chamber Summons seeking for the leave of court was filed outside the requisite period of six (6) months and should be dismissed on that basis alone. Section 9(3) of the Law Reform Act provides as follows:

***"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."***

13. The requirement that an Application seeking for an order of certiorari must be filed within six (6) months in respect of any Judgment, order, decree, conviction or other proceeding for the purpose of it being quashed is also provided for under Order 53 Rule 2 of the Civil Procedure Rules.

14. The Applicant has not denied that the impugned decision of the Tribunal was made on 18<sup>th</sup> March, 2009. The said decision was adopted by the lower court on 27<sup>th</sup> September, 2010 pursuant to the provisions of the Land Disputes Tribunal Act (*repealed*).

15. Although the decision of the Tribunal was made on 18<sup>th</sup> May, 2009, it was not until 7<sup>th</sup> October, 2010 that the Applicant filed the Chamber Summons seeking the leave of the court to commence these proceedings. The said Application was filed way outside the requisite period of six (6) months.

16. Although there are many decisions of this court and the Court of Appeal affirming that any proceeding seeking for an order of certiorari must be filed within six (6) months, the Court of Appeal has recently departed from those decisions. In the case of ***Stephen Kibowen vs. The Chief Magistrate's Court Nakuru & 2 others, Nakuru Civil Appeal No. 211 of 2013***, the Court of Appeal held that where a decision being challenged is a nullity, time could not run as against such a decision. In arriving at the said decision, the court relied on the case of ***Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair & 3 others Ex-parte Mwalulu & 3 others (2004) eKLR*** where the court held as follows:

***"Nullities are not covered by the six (6) months limitation period both on the wording of the rules and as a matter of principle to the nature of nullities."***

17. The Court of Appeal in the ***Stephen Kibowen*** case (*supra*) proceeded to declare the decision of the Bahati Land Disputes Tribunal as null and void for want of jurisdiction despite having been filed outside the six (6) months period. That is the current jurisprudence which is binding on this court.

18. The Applicant herein has deponed that the proceedings before the Tribunal were a nullity because the Tribunal acted outside its mandate. Further, the Applicant has argued that the decision of the Tribunal was *ultra vires*, having been made without hearing her or the administrator of the Estate of her deceased husband.

19. The jurisdiction of the Land Disputes Tribunal is found in the provisions of Section 3(1) of the Land Disputes Tribunals (*repealed*) which provides as follows:

**“Subject to this Act, all cases of a civil nature involving a dispute as to—**

**(a) the division of, or the determination of boundaries to land, including land held in common;**

**(b) a claim to occupy or work land; or**

**(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.”**

20. The evidence before me shows that the suit land was registered in favour of the Applicant’s late husband on 30<sup>th</sup> January, 1980. Having been registered as the proprietor of the suit land under the Registered Land Act (*repealed*), the Tribunal could not make a finding on the issue of ownership of the said land.

21. Indeed, title to land registered under the Registered Land Act (*repealed*) can only be affected by an order of the court and not otherwise, and upon proof that the said title was acquired either fraudulently or by mistake (*See Section 143 (1) of the Registered Land Act (repealed)*).

22. Consequently, the Tribunal did not have the jurisdiction to order for the rectification of the title that was issued to the Applicant’s late husband in the year 1980. The said decision was therefore *ultra vires* for want of jurisdiction and therefore null and void. Having found that the Tribunal did not have the jurisdiction to handle the dispute, it follows that there was nothing to be adopted by the lower court. The purported adoption of the Award of the Tribunal by the lower court in the Principal Magistrate’s Court at Kitui Land Case No. 13 of 2010 was null and void *ab initio*.

23. For those reasons, I allow the Applicant’s Notice of Motion dated 26<sup>th</sup> October, 2010 as follows:

***a. That the Judicial Review Order of certiorari be and is hereby issued to remove into this court for purpose of quashing the proceedings and decisions of Kitui District Land Disputes Tribunal Case No. 90 of 2008 read on 12<sup>th</sup> May, 2010 and adopted as Judgment of the court on the 27<sup>th</sup> day of September, 2010 in Kitui Civil Case No. 13 of 2010.***

***b. That an order of prohibition be and is hereby issued prohibiting the Principal Magistrate’s court at Kitui from enforcing the decision of the Kitui Land Disputes Tribunal Case No. 90 of 2008 read on 12<sup>th</sup> May, 2010 and adopted as Judgment of the court on the 27<sup>th</sup> day of September, 2010 at the Principal Magistrate’s Court at Kitui in Civil Case No 13 of 2010.***

***c. That the costs of this Application to be paid by the Interested Party.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**