REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT NYAHURURU

ELC CASE NO 44 OF 2018

(FORMALLY H.C JUDICIAL REVIEW No 10 OF 2017)

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER: OF THE LANDS DISPUTES TRIBUNAL CLAIM No. 74 OF 2006 THAT GAVE RISE TO NYAHURURU PRINCIPLE MAGISTRATE'S COURT LAND DISPUTE No.18 OF 2010

(MWIHOTI WOMEN GROUP VS JOEL MACHARIA)

AND

IN THE MATTER OF CHAMBER SUMMONS DATED 28th JULY, 2010

BY THE HON PRINCIPALE MAGISTRATE AT NYAHURURU

IN THE MATTER OF AN APPLICATION BY;

JOEL MACHARIA.....APPLICANT

AGAINST

THE PRINCIPAL MAGISTRATE'S COURT OF

NYAHURURU….....1st RESPONDENT

KIPIPIRI LAND'S DISPUTES TRIBUNAL.....2nd RESPONDENT

MWIHOTI WOMEN GROUP .....1st INTERESTED PARTY

JOEL MACHARIA.....2nd INTERESTED PARTY

EX-PARTE

JOEL MACHARIA.....SUBJECT

JUDGEMENT

1. **Initially, Joel Macharia**, the 2nd interested party herein had filed in the High Court, the present Notice of Motion dated the 14th December 2010 pursuant to the provisions of Order LIII Rule 3(1) of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act. The matter was subsequently transferred to this court on the 28th May 2018.

2. **In his application, the 2nd interested party** sought for the following orders:

i. That this Honorable court be pleased to issue an Order of CERTORARI and to remove in the High Court and instantly quash the

order made on (sic) by the 2nd Respondent herein together with all the previous Decrees or Orders issued by the said 2nd Respondent on 21st April 2010.

ii. That this Honorable court be pleased to issue an Order of PROHIBITION to prohibit and to stop the Respondent and the interested parties from executing or implementing the order issued on 21st April 2010 arising from Kipipiri Land Dispute Tribunal claim No. 74 of 2006.

iii. The costs of these proceedings be borne by the interested parties.

3. The application is premised on grounds set out on the face of it as well as on the verifying affidavit dated the 25th November 2010 sworn by Joel Macharia.

4. The 1st and 2nd Respondents herein represented by the office of the Hon the Attorney General, upon service of the said application, filed their grounds of objection dated the 15th March 2018 in court, on the 21st March 2018 opposing the said application.

5. Directions to proceed with the disposal of the Application through oral evidence were taken on the 5th December 2018 wherein the matter proceeded for hearing on the 12th March 2019.

Applicant's case

6. It was the Applicant's case that the notice of motion dated 14th December 2010 sought three prayers herein above. While submitting on their application, the Applicant's Counsel relied on the grounds on the face of the application, the supporting affidavit and statement of facts wherein they sought for the prayer for certiorari because the 2nd Respondent had determined an issue placed before it by the interested party without the participation of the applicant.

7. That when the proceedings were determined, the tribunal had given an award in excess of their jurisdiction as at that time. They annexed a copy of the award as annexure JM2.

8. It was the Applicant's submission that he was the proprietor of the piece of land to which the title was cancelled by the land tribunal as evidenced from the annexure marked as "JN1".

9. In support of their application, the Applicant relied on the decided cases of **Masagu Ole Koitelel Naumo v Principal Magistrate Kajiado Law Courts & another [2014] eKLR** and **Gitau Kamau vs Ndungu Kamau and the Chief Magistrate Court at Thika [2018] eKLR** which cases dealt with the issue of cancellation of titles by the tribunals, and issuance to 3rd parties thereafter.

10. That pursuant to the finding by the court that the tribunal had acted in excess of their jurisdiction, the Applicants submission was that their second prayer of prohibition be issued against the 1st interested party prohibiting it from executing the award of the tribunal.

11. It was their further submission that pursuant to the 1st and 2nd Respondents filed grounds of opposition dated 15th March 2018, there was a presumption that the facts they had laid down were uncontested and remain true.

12. Their further submission was that the court had the power under Order 53 of the Civil Procedure Rules and there was no limit to hear the dispute if it found out that the tribunal had no power to issue the award.

13. That when they had sought leave to file the said proceedings, the court had found that they had done so within the time lines and as such they were properly before court therefore the Respondents could not now say that the court has no jurisdiction.

14. That the Applicant was an elderly man who had been unable to access his piece of land since the 1994 wherein the land had laid bare all these years.

15. It was therefore their prayer that the court grants him justice and since his title had not been challenged, he was entitled to costs.

1st and 2nd Respondent's case

16. The 1st and 2nd Respondents, herein represented by State Counsel opposed the application and while relying on their Grounds of Opposition dated 15th March 2018 and filed in court on the 21st March 2018 where Counsel submitted that it was not in doubt that there had been a decision by the Tribunal which was adopted by the lower court.

17. That what was in doubt was whether the lower court had the jurisdiction to adopt the decision of the Land Disputes Tribunal.

18. That in order to determine the issue therefore, it is important to understand the role of the Magistrate's court under the Repealed Disputes Act.

19. That the jurisdiction of the Land Disputes Tribunal was set out in Section 3 of the Land Disputes Tribunal Act (repealed). That once a tribunal had determined a dispute, Section 7(1) of the Act required the chairman to cause the decision to be filed in the Magistrate's court

together with any dispositions and documents provided before the tribunal.

20. That Section 7 (2) of the same act was explicit as to what had to be done by the Magistrate and did not leave any room for a Magistrate to review, alter, amend or set aside the tribunal's award. If any of the parties were aggrieved by the award, they could either prefer an appeal to the Appellate Committee as provided under Section 8(1) of the Act.

21. That this had not been done by the Applicant herein. To this effect, the submission that the proceedings in the Tribunal proceeded without the participation of the Applicant did not justify the 1st Respondent's court to decline to adopt the award.

22. Counsel submitted that there were several decisions to that effect. That the lower court only had the power to adopt the award and that the Magistrate adopted the award as forwarded by the Tribunal and in doing so the Magistrate acted within the premise of the law and under the Magistrate's Act Cap 301.

23. The Respondent further submitted that this court had no jurisdiction where a decision by the tribunal had been transmitted into a judicial determination. That the tribunal's decision had already been adopted by the court and awarded.

24. That the decree emanating from the lower court as the judgment could only be challenged by the Applicant by seeking that it be vacated, set aside or reviewed by the same court or an Appellant court in appropriate proceedings.

25. The Respondent submitted that the application before court was therefore unmerited and an abuse of the court process and the same was a candidate for dismissal with costs to them.

26. In rejoinder, the Applicant submitted that at the time they had applied for leave, the Chief Magistrate's Court had not adopted the award. There had been a general stay until the matter before court had been canvassed.

27. That Section 7 of the Land Disputes' Tribunal was to the effect that:-

> *The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.*

28. That there had been an application filed as per their annexure marked as "JM2" wherein the procedure had been adhered to by the chairman and interested party. The applicant was not a party to the same.

29. The Applicant had no issue with the Chief Magistrate's jurisdiction although it was their submission that the Respondents had not addressed the issues as to whether the Tribunal had the jurisdiction to issue the award.

30. That it did not matter whether the award had been adopted or not or whether proceedings were ongoing in the court. What mattered was whether the tribunal had jurisdiction to give the award it gave.

31. That the adoption by the Chief Magistrate's court could change the character of the decision. That this court needed to declare the award and any proceedings flowing from it as a nullity.

32. That the nature of proceedings from this court did not flow from an appeal or reference to any other court. They were proceedings set out by the statute. Their prayer could therefore be issued at any stage.

Analyses and Determination.

33. The purpose of judicial Review as set out in the case of ***Municipal Council of Mombasa.vs.Republic, Umoja Consultant Ltd, (2002) eKLR is*** :-

> *"The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an Appeal Court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review".*

34. After considering the matter before me, I find the issues for determination being-

i. Whether the tribunal had given an award in excess of their jurisdiction as at that time.

ii. If so, whether the application dated 14th December 2010 is merited.

iii. Who is entitled to costs of these proceedings.

35. In Judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be

impugned. It was held in the decided case of **Mohamed Ahmed vs. R [1957] EA 523** that:

> ***"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitule and served accordingly. The Crown cannot be both applicant and respondent in the same matter".***

16. Nevertheless, in the decided case of **Republic v Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officers [2006] eKLR** the Court of Appeal stated as follows:

> ***"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".***

36. I therefore find that whereas the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalized in costs, that omission or commission was not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.

37. In the instant case, the Applicant's main issue was that he was the registered proprietor of parcel of land Known as LR Nya/Ndemi/1769 to which the Land dispute Tribunal at Kipipiri, the 2nd Respondent herein, in his absence, issued an award that was adverse to him and in excess of its jurisdiction. That despite the said award having been outside the 2nd respondent's jurisdiction, it was forwarded to the 1st Respondent for adoption.

38. I have looked at the findings of the Kipipiri Land Dispute Tribunal case No 18 of 1990 dated the 21st April 2010, to which I wish to reproduce for ease of reference:

Ø That Joel Macharia has defied order and summons to appear before the Kipipiri land Dispute tribunal and so the case was heard and determined in his absence.

Ø That Mwihoti Women group had purchased the disputed land which is confirmed by the letter of consent issued to the group by Kipipiri Land Control Board dated the 23/11/1994.

Ø That land transfer form dated the 29/8/1996 confirms the land is owned by Mwihoti Women Group.

Ø That Mwihoti Women group has occupied the land since 1994 a period over (12) twelve years.

Ø That Mugure Njuguna (seller) had not sold any land to Joel Macharia and she does not know how he acquired the title.

Ø That Joel Macharia is stranger (sic) and trespasser to the land.

39. The Elders, having come up with the above findings went ahead to make their **decision and award** as follows;

Ø The Land Registrar to revoke and cancel the title No Nya/Ndemi/1769 because it is in the name of Joel Macharia who is a stranger and trespasser to this parcel of land.

Ø Issue a fresh title deed to Mwihoto Women's Group as the tribunal panel has established the Joel has no right to the disputed land

Ø Joel Macharia should meet cost incurred by the group in the process of the case.

40. Following the elder's decision and award, no appeal was instituted by the Applicant wherein the applicant vide his letter dated the 28th July 2010, forwarded the elders' findings and award to the Principal Magistrate's Court at Nyahururu and sought to have the same adopted as the judgment of the court.

41. Before the said award could be adopted however (the court has not provided a copy of the order adopting the award) the Applicant filed the present application.

42. The Applicant's case is that the 1st Respondent ought not to adopt the award of the Tribunal in light of the fact that the 2nd Respondent acted beyond their jurisdiction.

43. In order to determine this issue it is important to understand the role of the Magistrate's Court under the repealed *Land Disputes Tribunal Act*.

44. Once the magistrate received the award from the Tribunal, (s)he was under a statutory duty to enter judgment in terms of the award and it was not open to her/him to alter, amend, question or set it aside. That is the plain meaning of Section 7 (2) of the repealed Land Disputes

Tribunals Act which reads:

> "*The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act*"

45. The duty of the trial Court has been re-affirmed in many cases including the case of **Peter Ouma Mitai vs. John Nyarara [2008] eKLR,** where **Musinga, J** (as he then was) following the decision in **Zedekiah M Mwale vs. Bikeke Farm Directors & Another [2004] eKLR** expressed himself as follows:

> ***"The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal….The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate's court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise."***

46. From a reading of the proceedings herein, since it has not been proved either by express or implied evidence, that the pursuant to the forwarding of the Tribunal's Award to the Magistrate, that the same was adopted, I find that the Magistrate in compliance of the provisions of Section 7 (2) of the repealed Land Disputes Tribunals Act was under a statutory compulsion to enter judgment in terms of the award once (s)he received it from the chairman of the tribunal.

47. It was not open to the Magistrate to alter, amend, question or set aside the award so long as the court was satisfied that the same was on the face of it, issued by a proper Tribunal. The Magistrate was therefore under duty to adopt the award no matter how repugnant or unjust it was so that its adoption as a judgment of the court could now be followed by the usual process of decree and execution and appeal where the parties so desired.

48. On the second issue on whether the Tribunal had the jurisdiction to pass the award it passed on the 21st April 2010, it is important to look at the powers of the Tribunal as provided for under Section 3 of the repealed *Land Disputes Tribunals Act* which provides 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*

49. The above section of the law does not vest any jurisdiction to the tribunal to determine matters under the *Registered Land Act, Cap 300* (now repealed) and specifically registered land. From the history of the issue herein above stated and the finding of the Land Dispute Tribunal thereafter, I find that the Kipipiri *Land Disputes Tribunal* determined a matter which dealt with a title that was registered under the Registered Land Act, Cap 300 (now repealed).What then would be the consequence?

50. In the case of **Kenya National Examination Council.vs.Republic (Exparte Geoffrey Gathenji & Another *Civil Appeal No.266 of 1996*** the Court held that;-

> "*the order of certiorari can quash a decision already made as an order of certiorari will issue if the decision is made without or in excess of jurisdiction or when the rules of justice are not complied with..."*

51. From the above captioned finding of the court, it is therefore clear that the said tribunal acted *ultra vires* or in excess of its jurisdiction as it was prohibited, by operation of the law, from undertaking a determination with respect to title to land

52. The Applicant has sought for Judicial Review orders of *certiorar*i and *prohibition*. The Applicant has urged the Court to quash the proceedings of the Kipipiri Tribunal and prohibit issuance of any further orders emanating from the said proceedings. The Court, having found that indeed Kipipiri Land Disputes Tribunal acted in excess of their jurisdiction and therefore the said decision was *ultra vires, null and void,* it goes without saying that a decision issued by a public body in excess of its jurisdiction is ***null*** and ***void***. Such ground is enough to warrant the issuance of an order of *certiorari* by the court to quash such a decision.

53. In the case of **Republic v Kajiado North District Ngong Land Disputes Tribunal & another Ex-Parte Caroline Wambui Ngunjiri & 2 others [2014] eKLR**

> *In my view if the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since a decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void. This is in line with the celebrated decision in* ***Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 to the effect that*** *that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but*

incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse.

54. Since the court has found that the Kipipiri land Disputes tribunal had no jurisdiction to issue the orders it did, any orders and or proceedings arising from the said award would also have been a nullity. Accordingly on that score, the applicant is entitled to the order quashing the 2nd Respondent's decision.

55. The Applicant also contended that he was never afforded an opportunity of being heard which denial of the right to be heard is one of the recognized grounds for granting judicial review orders.

29. Since the 2nd Respondent no longer exists, the court of Appeal, while faced with the same scenario, in the case of **David Mugo vs. The Republic Civil Appeal No. 265 of 1997, held** as follows:

"The learned judge held that since the Court Brokers Licensing Board had ceased to exist as a result of repeal of Cap. 20, the appellants' application for certiorari was merely technical and academic. With respect here the judge fell in error of law. Certiorari was sought to quash the Board's decision revoking the appellant's licence. It (certiorari) was not to keep the Board in continuous existence. Where the body or authority against which certiorari is sought has ceased to exist or has become functus officio, but a decision it (body or authority) made is still enforceable certiorari must issue to quash or nullify that decision, if it is bad."

56. The 2nd Respondent's decision was made without jurisdiction and was a nullity, if at all the 1st Respondent was to make a decision, the same would have been founded on the 2nd Respondent's decision which would have also collapsed.

57. In the circumstance thereof I do make the following orders:

i. I hereby grant that an order of Certiorari hereby issued removing into this Court the decision of the 2nd Respondent made and dated on 24th April 2010 requiring the Land Registrar to revoke and cancel the title No Nya/Ndemi/1769 and to issue a fresh title deed to Mwihoto Women's Group for the purposes of being quashed and the same is hereby quashed.

ii. Since there was no evidence implied or express that the 1st Respondent had adopted the award by the 2nd Respondent, an order for prohibition is herein granted to stop the 1st Respondent and the interested parties from executing or implementing the order issued on the 21st April 2010 arising from Kipipiri Land Dispute Tribunal Claim No. 74 of 2006.

iii. With respect to the order for costs, it must be noted that the 1st Respondent was simply to implement the decision of the 2nd Respondent. Since Section 7(2) of the repealed Land Disputes Tribunals Act does not confer upon the magistrate jurisdiction to alter, amend, set aside, review or in any other manner interfere with a Land Disputes Tribunal's award filed in court but to adopt it as it is, irrespective of how repugnant or unjust the Magistrate may deem the award to be, and since the 2nd Respondent no longer exists, there will be no order as to costs.

Dated and delivered at Nyahururu this 21st Day of May 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE