



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT LAND COURT AT KAJIADO**

**MISCELLANEOUS CIVIL CAUSE NO. 44 OF 2017**

**(Formerly Machakos ELC Misc. Civ Cause No. 31 of 2011)**

**IN THE MATTER OF: AN APPLICATION FOR THE ORDER OF CERTIORARI AND PROHIBITION BY WAY OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: THE LAND DISPUTES TRIBUNAL ACT NO. 8 OF 1990**

**AND**

**IN THE MATTER OF: THE CHAIRMAN LAND DISPUTES TRIBUNAL KAJIADO**

**AND**

**IN THE MATTER OF: THE SENIOR RESIDENT MAGISTRATE KAJIADO**

**AND**

**IN THE MATTER OF: THE DISTRICT LAND SURVEYOR KAJIADO**

**EX PARTE: KIRISET OLE MUSEI**

**INTERESTED PARTY: MARAU OLE MEYOKI SHOKORE**

**JUDGMENT**

By a Notice of Motion filed on 20<sup>th</sup> March, 2011 the ex parte applicant is seeking the following orders:

- a) That this Honourable Court be pleased to issue an order for Certiorari to remove into this Court for quashing the undated decree of 2010 issued by the Senior Resident Magistrate Court Kajiado in the Lands Dispute Tribunal Case No. 32 of 2010 directing a resurvey of the Applicant's parcel of land.
- b) That this Honourable Court be pleased to issue an order of Prohibition by way of judicial review directed to the District Land Surveyor Kajiado to prohibit him from effecting any resurvey in relation to parcel No. KAJIADO/ INTARSHART/ 1272 pursuant to the aforementioned undated decree.
- c) That the cost of this application be provided for.

The application is premised on the statutory statement filed on 8<sup>th</sup> March, 2011 and the verifying affidavit. In the statutory statement the Applicant avers that the purported resurvey of the Applicant's parcel of land by the District Land Surveyor is illegal there being no valid order and/ or decree from the Court directing the same. The purported decree of the Senior Resident Magistrate's Court which was served upon the District Surveyor does not indicate when it was issued and neither is it dated and is therefore null and void for all purposes. The decree was issued pursuant to the Kajiado Lands Dispute Tribunal award dated the 10<sup>th</sup> December, 2009. In making the decision, the Kajiado Lands Disputes Tribunal acted ultra vires their powers by hearing and determining a matter that emanates from the dissolution of a Group Ranch, which dispute should be dealt with under the provisions of the Land (Group Representatives) Act.

In the verifying affidavit sworn by KIRISIET OLE MUSEU who is the Applicant herein, he avers that together with the Interested Party, they were members of the Saikeri Group Ranch which was subdivided among its members around 1989 – 1990 with a resolution that each

member was to get 120 acres each. He explains that he was allocated land parcel number Kajiado/ Intarshat/ 1272 while the Interested Party was allocated Kajiado/ Intarshat/ 1273, which is now subdivided with the remainder registered as Kajiado/ Intarshat/ 2733. He claims that after subdivision, he realized the Interested Party who was the treasurer of the Group Ranch had fraudulently conspired with the Group Surveyor and hived off 54 acres out of his land and added to his. He confirms filing a suit in High Court Nairobi being Civil Case No. 4944 of 1991, which is still pending. Further, that he also registered a caution at the Lands Office. He contends that around 2010, he learnt that in 2009, the Interested Party had filed a claim against him before the Kajiado Lands Disputes Tribunal being case No. 32 of 2010 over an alleged boundary dispute between them. He insists the Interested Party sought to portray a fraudulent encroachment into his land as a boundary dispute. He denies being called to testify in the Tribunal and avers that it is only the Respondent who was heard and a ruling delivered in his favour in the Award dated the 10<sup>th</sup> December, 2009. Further, that the Award was presented before the Senior Resident Magistrate's Court in Kajiado for adoption and the same was read on 6<sup>th</sup> July, 2010 in his absence. He states that he only learnt of the existence of the Award and Decree when the District Surveyor served him with a letter dated the 5<sup>th</sup> January, 2011 expressing his intention to visit the disputed land to implement a Court Order. Further, that the survey exercise slated for 2<sup>nd</sup> February, 2010 did not proceed.

Both the Applicant and Interested Party filed their respective submissions that I have considered.

The Interested Party in his submissions claims to have filed a replying affidavit dated the 16<sup>th</sup> May, 2011 and filed in Court on 1<sup>st</sup> July, 2011 but the same is not on record.

### **Analysis and Determination**

Upon consideration of the instant application including the statement of facts, verifying affidavit and submissions, the only issue for determination is whether the Applicant is entitled to the orders sought in the application.

The Applicant seeks orders of certiorari and prohibition against the undated Decree issued by the Kajiado SRM's Court. I note the Kajiado SRM's Court adopted the aforementioned Award from the Land Disputes Tribunal. The dispute which was determined by the Land Disputes Tribunal related to a boundary one. The Applicant claims that the Interested Party had fraudulently encroached on his land and proceeded to claim it was a boundary dispute. He insists the tribunal did not have jurisdiction to deal with it. Further, that the undated Decree is incapable of enforcement and hence should be quashed. The Applicant has relied on the case of **KOLA CHACHA Vs KENYA COMMERCIAL BANK & ANOR (2006) eKLR** to support his arguments.

The Interested Party opposed the application for judicial review and relied on the cases of **Judicial Review NO. 170 of 2013 Republic Vs Land Registrar, Kajiado North & Others Exparte Irene Naipanoi Montet; Council of Civil Service Unions Vs Minister of State for Civil Service (1984) 3All ER 935; Pastoli Vs Kabale District Local Government Council and Others (2008) 2 EA 300 and Misc Civil Application No. 4 of 2011 Republic Vs The Land Disputes Tribunal Kajiado North, Exparte Rachael Gathoni Mbai & Muema Mbai** to enhance his arguments.

I wish to make reference to various provisions in the repealed Land Disputes Tribunal Act which conferred jurisdiction to the said Tribunal and directed it on how to deal with an Award therefrom. Section 3 (1),(a), (b), ( c ) and (7) of the repealed Land Disputes Tribunal Act provided that: **' (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.'..... (7) The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party's witness or witnesses.'**

Further, Section 7 of repealed Land Disputes Tribunal Act stipulates thus: **' (1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal. (2) 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.'**

From the proceedings attached to the application dated 2011, the Tribunal were actually dealing with a boundary dispute. Further, I note from the said undated Decree that the Award from the Tribunal was adopted.

To my mind, the main issue of contention is whether the undated decree is enforceable and in essence what the Applicant seeks to quash.

**Lord Diplock** in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the standards of judicial review when he stated that:-

**"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'**

In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”**

In the instant case, I note the Tribunal dealt with a boundary dispute and proceeded to send the Award to the Kajiado SRM’s Court for adoption as envisaged in the repealed Land Disputes Tribunal Act. I find that there was no illegality in their dealing with a boundary dispute. Further, from the proceedings, the Magistrate proceeded to adopt the said Award in accordance with the provisions of the Magistrates’ Act and the repealed Land Disputes Tribunal Act. In the said proceedings, I do not decipher any irrationality in the Magistrate’s action while adopting the said Award as he simply relied on the findings of the Tribunal and did not alter it. Further, I note the elders indicated in their proceedings that both the Applicant and the Interested Party including their witnesses were present during the said proceedings. It was further evident that they were dealing with issues of boundary, which was within their mandate. As to whether there was **‘procedural impropriety’ when the Magistrate proceeded to adopt the Award, there is no indication that he failed to observe basic rules of natural justice or failed to act with procedural fairness towards the Applicant.** So the only remaining issue is the undated Decree which I wish to make reference to. In the said Decree, I note it refers to the Award and its adoption but during extraction, the date was omitted. To my mind, I deem this as a mistake, which can be rectified in accordance with the Civil Procedure Act. Further, I opine that the omission of the date does not affect the Award and its adoption by the Magistrate as envisaged by the Law.

I find that the Applicant’s insistence that the Decree should be quashed is a matter of technicality which cannot stand in the current constitutional dispensation.

The Applicant has sought for orders of Prohibition for a decision already made. I find that this prayer hence cannot stand as it is a common principle that orders of Prohibition can only be sought to prevent a decision being contemplated. As for the prayers of Certiorari being sought by the Applicant, it is my view that he participated in the Tribunal proceedings and hence cannot claim the rules of natural justice was not adhered to. The Magistrate’s adoption of the Award was simply procedural and did not exceed his jurisdiction. In the submissions, I note the Interested Party explains that the Applicant had even been charged for interfering with the Interested party’s boundary. The Applicant claims there is a pending suit but has not indicated the outcome of the said suit from 1991 to date.

Based on the analysis above, I find the notice of motion dated 20<sup>th</sup> March, 2011 unmerited and will proceed to dismiss it with costs to the Interested Party.

**Dated signed and delivered in open court at Ngong this 23rd day of September, 2019**

**CHRISTINE OCHIENG**

**JUDGE**