



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC MISC APPLICATION No. 9B OF 2017

(FORMERLY NAKURU MISC NO 234 OF 2012)

**IN THE MATTER OF AN APPLICATION BY RUTH WANGARI WAIHENYA FOR
PREROGATIVE ORDERS IN THE NATURE OF PROHIBITION AND CERTIORARI**

AND

IN THE MATTER OF LAND DISPUTE TRIBUNAL ACT CHAPTER 303A REPEALED

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR.....1st RESPONDENT

THE NYANDARUA OLKALAU DIVISION

LAND TRIBUNAL.....2nd RESPONDENT

SENIOR PRINCIPAL MAGISTRATE

COURT AT NYAHURURU.....3rd RESPONDENT

EXPARTE

RUTH WANGARI WAIHENYA.....PLAINTIFF

CHARLES GICHUKI MURAGE.....INTERESTED PARTY

JUDGEMENT

1. Upon leave being granted on 19th July 2012 vide the order of Justice Anyara Emukule, the Applicant in her application dated the 24th July 2012 seeks for an order of Certiorari to bring to the High Court and quash the decision of the Senior Principal Magistrates Court at Nyahururu in Land Dispute No.10 of 2012 delivered on 22nd June 2012.

2. The Applicant further seeks for an order of prohibition, prohibiting the District Land Registrar from implementing the decision of the Senior Principal Magistrate at Nyahururu in Land Dispute.(sic)

3. The Applicant also sought that costs of the application be in cause.

4. Service was effected on the Respondents and although the Hon. Attorney General filed their grounds of opposition to dated 8th August 2016, for the 1st, 2nd and 3rd Respondents, there were no further documents filed. The interested party filed his Replying affidavit on the 24th November 2014. By consent, parties agreed to dispose of the matter through written submissions wherein only the Applicant and the Interested Party filed their written submissions.

5. The Applicant's ground for the Judicial Review was that;

- i. The Nyandarua Olkalau Division Land Dispute Tribunal overstepped its jurisdiction in giving an award that entailed the tampering of title which can only be done by the High Court or by the Environmental and Land Court.
- ii. That the decision of the Nyandarua Olkalau Land Disputes Tribunal to find the application time barred represented an error in the interpretation of law by the said Tribunal.
- iii. That the Nyandarua Olkalau Division Land Dispute Tribunal failed to consider the overwhelming evidence that the Applicant herein and her deceased husband had on many occasions expressed their dissatisfaction with the disputed boundaries as early as 1970s.
- iv. That the Nyandarua Olkalau Division Land Disputes Tribunal contravened the Applicant's rights to be heard on this matter and was in contravention of the rules of natural justice.
- v. That the implementation of the decision herein would occasion grave miscarriage of justice against the Applicant.

6. The Applicant framed the issues for determination as follows;

- i. Whether the Nyandarua Olkalau Division Land Dispute Tribunal overstepped its jurisdiction in giving an award that entailed the tampering of title which could only be done by the either the High Court or the Environmental and Land Court
- ii. Whether the application was time barred
- iii. Whether the second Respondent acted unreasonably, irrational when it failed to consider the Applicant's case.

7. On the first issue for determination it was the Applicant's, submission that the structure of the Land Dispute Tribunal is highlighted in Section 4 of the Land Disputes Tribunal Act which provides for the jurisdiction of the Tribunal. That Section 3 of the same Act limited the Tribunal to three aspects of civil nature. That further, Section 8 of the said Act established the appeals to the Appeal Committee in the Province where whenever one was aggrieved by the decision of the Tribunal, they could file an Appeal therein.

8. That jurisdiction was the capacity of a Court to handle the matter whereas Appellate jurisdiction was the power of the lower Court (sic) or a Tribunal to review a lower Court decision. While relying on the decided case of **Owners of Motor Vessel 'Lilian S' vs Caltex Oil the(Kenya) Ltd [1989] KLR 1**, the Applicant submitted that the Tribunal had no jurisdiction ab initio to determine this matter as it was a dispute regarding boundaries from the lower Tribunal. That the task of the appellant committee was to review the decision of the lower Tribunal, accessing its competence and the mechanism that the Tribunal had used to arrive at its decision. That the Committee in examining the correctness of the Tribunal's decision, had departed from its jurisdiction and made a decision outside its jurisdiction thereby ordering the Land Registrar Nyandarua and the District surveyor to visit the disputed boundary and establish the correct boundary between the parcels of land No. 20, 55 and 23. That the Committee had further directed the Land Registrar and the District surveyor to excise 3 acres from parcel No. 20 which the 2nd Applicant had purchased from the 1st Applicant. Parties were also directed to remove any developments that may have been on the wrong side of the boundary within 60 days.

9. The Applicant relied on the cases of **Republic vs Chairman of the Rent Restriction Tribunal & Another ex-parte Ezekiel Machogu & 3 Others [2013] eKLR** and the case of **Kenya Ports Authority vs Industrial Court of Kenya & 2 Others [2014] eKLR** to submit that the Appeals Committee had overstepped its jurisdiction when it introduced a subject matter which was not in dispute. That the boundary dispute had existed between two parcels of land being Nyandarua Olkalau Central 20 and Nyandarua Olkalau Central 55. That the Committee had erred when it directed the Land Registrar and surveyor of Nyandarua to ascertain boundaries of plot No. 23 to which parcel of land was not disputed and neither was it part of the proceedings. The committee had further ordered an excision of 3 acres of land from parcel No. 20 orders that departed from its jurisdiction.

10. That the directive by the 2nd Respondent involved interference of title to land parcel No. 20 which would not be authorized by the 1st Respondent. The Land Registrar's powers were established in the case of **Compar Investments Limited vs Kenya Urban Roads Authority[2014] eKLR** to which powers are limited to correcting errors and mis-description of land or boundaries or where entries or endorsements to any grant or a certificate of title were made in error or were fraudulent. This limited jurisdiction did not include cancellation of titles.

11. On the second issue for determination as to whether the application was time barred, it was the Applicant's submission that the decision by the Nyandarua Olkalau Division Land Dispute Tribunal stating that the application was time barred was misleading, because the 2nd Respondent had erred in the interpretation of Section 7 of the Limitation of Actions Act which only provided for recovery of land. That in this case the Applicant did not seek to recover land but a clear defined boundary between the two parcels of land. Section 7 of the Limitation of Actions Act was therefore not applicable in the circumstance.

12. That the record had showed clearly of the ex-parte Applicant's involvement with the Ministry of Land and Settlement from time immemorial through letters written in the years 1976, 1977, 1980, and 1987 which illustrate the efforts that ex parte Applicant had made to ensure that the boundary dispute had been settled.

13. That from the year 1965 to 1976 was a round 11 years and the Applicant was within time prescribed by the law and therefore the application was not time barred despite. Further, that the said application was not an application for recovery of land but one involving a boundary dispute.

14. The Applicant's take on the third issue for determination as to whether the 2nd Respondent acted unreasonably, and irrationally when it failed to consider the Applicant's case and while relying on the case of **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining and Chemical Engineering Co. Ltd/ Pride Enterprises vs Public Procurement Administrative Review Board & 2 others [2015] eKLR**, was that the elements of unreasonableness included a decision that was not aligned with the evidence tendered in Court that embarked on issues that were not to be determined by the Tribunal. That in the present case, the Tribunal had departed from determining boundary issues that existed between parcels No. 20 and 55 and embarked on determining on issues involving parcel No. 23 which dispute did not center on. Further, the Tribunal in making an order that 3 acres be excised from parcel No. 20 was not part of what was to be determined.

15. That irrationality as described in the above captioned authority on the other hand, was gross unreasonableness. That in the present case, the 3rd Respondent adopted the decision of the Appeals Committee that was ultra Vires and could not be enforced.

16. The Applicant sought that the order of Certiorari be issued to quash the decision of the Senior Principal Magistrate Court at Nyahururu in Land Dispute No. 10 of 2012 delivered on 22nd June 22 and an order of prohibition be allowed prohibiting the District Land Registrar and from implementing the said decision of the Senior Principal Magistrate.

Interested Party's submission.

17. The Interested Party, after giving the background of the matter in issue framed their issues for determination as follows;

- i. Whether the award of the Nyandarua Olkaleu Division Land Disputes Tribunal (the Tribunal) in Case No. 6 of 2004 entailed tampering of title.
- ii. Whether the claim in Nyandarua Olkaleu Division Land Disputes Tribunal case No. 6 of 2004 was time barred.
- iii. Which decision is sought to be quashed by the Applicant
- iv. Is the said decision available for quashing
- v. Has the subject in her submissions convinced the honorable Court to allow her application
- vi. Who bears the cost of this matter

18. The Interested Party's submission was to the effect that the award of the Tribunal at No 3 and 4 was requesting the Land Registrar and the District Surveyor **to amend the maps to conform to the boundaries as they were then**, and that **the disputed boundaries should remain as they were then without further interference**. That from this directions, it was the Interested Party's submission that the award did not alter or purport to alter the respective titles of the litigants by adding or excising any portion of land from either party's title.

19. That in fact in terms of No. 3 of the award, the same was bringing to the attention of the Land Registrar that there was an error in terms of mis- description of the boundaries and that was the reason that the said award was not drafted in mandatory terms, but as a request in line with the provisions of Section 60 (1) of the Registration of Titles Act (now repealed). That from a clear reading of the award it did not contain tampering with the titles of either party to the proceedings, in fact the said award maintained the status quo.

20. On the second issue for determination, it was the Interested Party's submission that indeed the parties had been agitating over a boundary dispute with the contention and expectation of the Plaintiff therein and the subject herein, that the boundary ought to have been extended into the Defendant's and the Interested Party's portion of land. That a claim to have a boundary extended into on other parcels portion of land was one of recovery of land whatever the size of the portion that is sought to be recovered was since the land is constant and does not expand to suit people's needs.

21. The interested party relied on Section 7 of the Limitation of Actions Act to submit that from the Plaintiffs own statement in the Tribunal proceedings the same had been to the effect that the issues herein arose before the year 1976. That it was without saying that it was exactly 28 years from the year when the Settlement Officer had purported to solve the dispute between the subject herein and the former owner of the Interested Party's land, to the year when the plaintiff's claim was taken before the Tribunal which was in the year 2004. That from the said calculations, it was clear that the Plaintiffs claim was outside the time limit for an action to recover land.

22. That Section 13(3) of the Land Disputes Tribunals Act barred any entertainment of proceedings in respect of which the time for bringing the said proceedings was barred under any law relating to the limitation of actions, that the claim in the Nyandarua Olkaleu Division Land Disputes Tribunal Case No. 6 of 2004 was time barred and as such could not have been entertained by the Tribunal.

23. That on issues No. (iii), (iv) and (v) for determination, it was the Interested Parties submission that from the face of the Notice of Motion dated the 24th July 2012, the decision that was sought to be quashed was as follows;

- i. The decision of the Senior Principal Magistrate at Nyahururu in Land Dispute No. 10 of 2012 and
- ii. The award of the Tribunal in Case No. 6 of 2004.

24. From the Subjects submission, the decision sought to be quashed was the decision of the Provincial Appeals Committee which issue had been the subject matter in Nakuru Judicial Review No.114 of 2009 which matter had been concluded and hence the Subject's submission

incurably offended the provisions of Section 7 of the Civil Procedure Act in that the same was Res Judicata.

25. That the award of the Nyandarua Olkalau Division Land Disputes Tribunal in Case No. 6 of 2004 therefore remains unchallenged as the Subject in her submissions does not seek to have the said award quashed.

26. That the 3rd Respondent had its hands tied by virtue of the provisions of Section 7 of the Land Disputes Tribunal Act which demands that the Court shall enter judgment in accordance with the decision of the Tribunal, a position which had been held in the case of **Muthoni Van Someren vs Kieni West Land Disputes Tribunal & 4 Others [2014] eKLR**.

27. The Interested Party's submissions therefore was that the order of Prohibition as sought by the Applicant would be an order in vain in the absence of an order of Certiorari which remains unavailable to the Applicant. That in the premises thereof, the application ought to be dismissed with costs.

Determination.

28. 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”.

29. 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.
- ii. If so, whether the application dated 24th July 2012 is merited.
- iii. Who is entitled to costs of these proceedings

30. In the instant case, the Applicant's main issue was that that the Nyandarua Olkalau Division Land Dispute Tribunal overstepped its jurisdiction in giving an award that entailed the tampering of title which action could only be ordered by either the High Court or by the Environmental and Land Court. That despite the said award having been outside the 2nd Respondent's jurisdiction, it was forwarded to the 1st Respondent for adoption **in Nyahururu Land Dispute No.10 of 2012 and adopted on the 22nd June 2012. The** implementation thereof would occasion grave miscarriage of justice to the Applicant.

31. I have looked at the ruling of the 1st Respondent **in Nyahururu Land Dispute No.10 of 2012 where a reference was made to the award of Nyandarua Olkalau Division Land Disputes Tribunal in Case No. 6 of 2004 delivered on the 22nd October 2004 and which award was adopted thereafter.**

32. For ease of reference, I wish to reproduce **the** findings of the Nyandarua Olkalau Division Land Disputes Tribunal in case No. 6 of 2004 dated the 22nd October 2004 :

- i. The Tribunal has established that there is a dispute between the two parties in parcel No. Nyandarua/Olkalou Central/55 vs 20.*
- ii. It has been established that the maps and the ground differ in the disputed common boundary.*
- iii. It was found that the two maps presented by both parties agreed that the mutation forms differs.*
- iv. It was noted that the surveyor has never visited the disputed area that only the settlement Officer who recommended that the boundaries remain intact.*
- v. It was established that the case has never been settled though it had lasted for long.*
- vi. It was noted that the common boundary had been fenced by both parties since the memorial.*
- vii. It was found that the trees in the common boundary were planted some time back in 1965 and are still present and accepted by both parties*

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

- i. The Court to execute the documents*

ii. As per circular No. CLR/R/17/170 of 8-3-85 it states that whereas the boundaries have been accepted as correct for more than twelve (12) years the claim should be considered as time barred and in this case the claim can't be accepted at all.

iii. The District surveyor and Land Registrar are requested to amend the maps to confirm (sic) with the current boundaries.

iv. The disputed boundaries should remain as they are current (sic) without further interference.

v. Both parties to share the cost of Surveyor.

34. The elders' findings and award to the Principal Magistrate's Court at Nyahururu were adopted as the judgment of the Court **on the 22nd June 2012.**

35. The Applicant's case is that she seeks **for an order of Certiorari to bring to the High Court and quash the decision of the Senior Principal Magistrates Court at Nyahururu in Land Dispute No.10 of 2012 delivered on 22nd June 2012.**

36. 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*. 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"

37. 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."

38. From a reading of the proceedings herein, since it has been proved that the pursuant to the forwarding of the Tribunal's Award to the Magistrate, that the same was adopted, I find that the Magistrate entered judgment in terms of the award as received from the chairman of the Tribunal in compliance of the provisions of Section 7 (2) of the repealed Land Disputes Tribunals Act.

39. 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/or an appeal where the parties so desired.

40. On the second issue on whether the Tribunal had the jurisdiction to pass the award it passed on the 22nd October 2004, 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

41. 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 but could deal with matters concerning *determination of boundaries and trespass to land*. From the history of the issue herein above stated and the finding of the Land Dispute Tribunal thereafter, I find that the **Nyandarua Olkalau Division Land Disputes Tribunal dealt with a matter that was well within their jurisdiction as provided for by the law.**

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

"... 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..."

43. During the proceedings in the Tribunal, The Plaintiff/Applicant had clearly stated as follows;

‘The defendant by the name Charles Murage has trespassed into my land and having been assisted by the initial owner of the plot... This was in 1976.

In 1999 some boundaries were corrected by the surveyor and some part of the land was returned to us. However, the problem did not end since part of the land surveying was not done....This Tribunal should also note that this area has already been sold...’

44. The Plaintiff sought for the remedy of trespass on her suit land and the recovery of the same thereafter. As stated above the cause of action herein arose before the year 1976. The Plaintiff’s claim was taken before the Tribunal in the year 2004, this was after 28 years.

45. Section 13(3) of the Land Disputes Tribunals Act provides as follows:

For a void and sold out it is hereby provided that nothing in these act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings in is barred under any law relating to the limitation of actions off to any proceedings which had been hired and determined by any Court.

46. This provision of the law barred the entertainment of proceedings in respect of which the time for bringing the said proceedings was barred under any law relating to the limitation of actions. The claim in the Nyandarua Olkalau Division Land Disputes Tribunal Case No. 6 of 2004 was time barred and as such could not have been entertained by the Tribunal.

47. Section 7 of the Limitations of Actions Act provides as follows;

“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

48. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of 12 years from the date on which the right accrued. It is clear that the Plaintiff’s claim was outside the time limit for an action to recover land.

49. From the above captioned finding, it is therefore clear that the said Tribunal did not act *ultra vires* or in excess of its jurisdiction and therefore the order of Certiorari cannot lie and neither can an **order of prohibition, prohibiting the District Land Registrar from implementing the decision of the Senior Principal Magistrate at Nyahururu in Land Dispute No.10 of 2012.**

50. In the end, I find that the Applicant’s Application herein lacks merit and the same is dismissed with costs to the Interested Party herein.

Dated and delivered at Nyahururu this 26th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE