REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW MISC .APPLICATION NO. 72 OF 2011.

THE REPUBLIC..APPLICANT.

VERSUS

THE MERU CENTRAL DISTRICT

LAND DISPUTES TRIBUNAL..............................RESPONDENT.

TABITHA KAREA KUNGANIA........1ST INTERESTED PARTY.

JERICA KIRIGO MBAYA................2ND INTERESTED PARTY.

LILIAN GUKU..................................3RD INTERESTED PARTY.

ALICE MUGITO KABURU.............4TH INTERESTED PARTY.

CATHERINE NTIBUKA....................5TH INTERESTED PARTY.

EXPARTE: **M'KUNGANIA S/O MARETE** ALIAS **M'KUNG'ANIA MARETE.**

JUDGEMENT.

The applicant brought a notice of motion dated **12/11/2011** seeking the following orders:

1. An order of prohibition, to prohibit the Respondent and interested parties from implementing the decisions in Meru Central District Land Disputes Tribunal N0. 28 of 2009 and read in Meru CMCC LDT NO. 29 of 2009.

2. That the proceedings of the said land disputes tribunal and award in LDT NO 28 of 2009 Meru CMCC LDT No 29 of 2009 be declared as null and void ab initio.

3. THAT the costs of this Application be provided for and the same be paid by the respondent and the interested parties.

The application is brought under **Order 53 Rules 3(1), (2), (3), and 4 of the Civil Procedure Rules (Cap 21) and Sections 8 and 9 of the Law Reform Act (Cap 26).**

The grounds upon which the relief is sought are stated in the statutory statement as follows: that the *ex parte* Applicant is the registered owner in possession of **LR NO. Nkuene/Kathera/40**; the respondent has issued orders in favour of the interested parties pursuant to its decision; that on the basis of the respondent's decision or award, the interested parties are now seeking inter alia, to subdivide the ex parte applicant's land; the respondent acted unreasonably, arbitrarily and illegally in entertaining a dispute when it had no jurisdiction to entertain the same; the respondent usurped the jurisdiction of the High Court; that its award is void *ab initio* as it has the effect of subdividing the ex parte applicant's land; the decision and/or finding and/or award by the Respondent amounts to gross violation of the *ex parte* applicant's fundamental rights to protection from deprivation of property and is thus unconstitutional and, finally, that the decision and/or finding and/ or award by the respondent is manifestly unreasonable, arbitrary oppressive, unlawful and is void *ab initio.*

The motion is supported by the sworn affidavit of the *ex parte* applicant dated **20/9/2011**. It reiterates what is already outlined in the grounds stated above and adds that the applicant has extensively developed the suit land.

The 2nd 3rd and 4th interested parties filed grounds of opposition dated **13th June 2017**. The grounds are that no order quashing the decision has been sought by way of certiorari and an order of prohibition can not be issued against an order that has already been made.

The ex parte applicant filed his submissions on the **4th July 2017**. I have perused the court file and found no submissions filed on behalf of the interested parties and the respondent.

The issues that arise in this matter are as follows:

> ***1. Whether the respondent acted outside jurisdiction;***
>
> ***2. Whether the motion is defective for non-inclusion of a prayer for certiorari before seeking a prayer for prohibition.***
>
> ***3. What orders should issue.***

Regarding the first issue it is the submission of the ex parte applicant that the respondent acted in contravention of **Section 3** of the **Land Disputes Tribunals Act No 18** of **1990** by entertaining a dispute that was in respect of registered land. Therefore, argues the applicant, the award should have been rejected by the magistrate's court. The applicant cites the decisions of **Beatrice M'Marete Vs Republic and Others CA NO 259 of 2000,** the case of **Florence Muthoni Stanley Vs Samuel Kinyua Mugambi Meru HCCA 76 of 2008** and finally **Republic Vs Meru Central District Tribunal & Rael Gachoga JR No 51 of 2008.**

It is not denied by the respondent through affidavit evidence that the dispute before the respondent involved registered land. In fact the impugned decision itself reads as follows in part:

> ***"According to the witness given (sic) in this suit that the disputed parcel no Nkuene Kathera /40 is a (sic) family land. It is registered in the name of M'Kungania M'Marete who is the objector in this case."***

Nevertheless the respondent proceeded to order the subdivision of the land between the objector's 1st wife, the objector's 2nd wife and the objector who is the applicant herein.

Section 3(1) of the ***Land Disputes Tribunals Act*** provides as follows:-

> ***3. (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.***

This court has had occasion to refer to previous decisions touching on the issue of a Land Dispute Tribunal's want of jurisdiction for reason that land is registered, including **Kisumu Civil Appeal No 256 of 2002 – Jotham Amunavi Vs Chairman Sabatia Division Land Disputes Tribunal.**

The decision of **Beatrice M'Marete Vs Republic and Others CA NO 259 of 2000** cited by the applicant also squarely addresses the same issue. Where the implementation of the tribunal's decision would entail rectifying or cancelling of titles, the court in that case held, the dispute before the tribunal did not relate to boundaries, a claim to occupy or work the land but a claim to ownership, and the tribunal in determining such a dispute, would be exceeding its jurisdiction.

I therefore find that the respondent exceeded its jurisdiction in dealing with the suit land which was registered land and that its entire decision or award amounts to a nullity.

On the contention that the notice of motion lacks a prayer for certiorari, this is quite apparent on its face. The respondent's grounds aver that the prayer for prohibition should not issue as there is no prayer for certiorari and that what is sought to be prohibited has already passed.

However it is the opinion of this court that a prayer for prohibition can stand on its own if there is a future event that is sought to be prohibited. It is not at all times conjoined at the hip with a prayer for certiorari like a siamese twin. The only thing that matters is whether there is a future event that can be properly prevented by issuance of a prohibition order. The motion is therefore not defective simply for the reason that it does not include a prayer for an order of certiorari.

The submission of the interested parties, is that there is nothing to prohibit. But what is sought to be prohibited in the first prayer in the Motion? It is any action of the respondent to implement its decision which I have now found to be outside jurisdiction. The interested parties may be right when one considers the fact that the respondent is not the one who implements the decision, but others who are not enjoined in the motion. The prayer has therefore been sought against the wrong party.

However the applicant has sought to include the interested parties in that prayer. I find this to be irregular in that it goes against the provisions of **Order 53** of the **Civil Procedure Rules** as the interested parties are not included in the proposed relief laid out in the statutory statement. **Order 53 rule 4** states as follows:-

> ***"Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."***

It is therefore clear that no other relief other than that stated in a statutory statement can be sought at the hearing of the Motion. The finding of this court is that there is no party who is currently enjoined who may be considered to be the implementing authority for the purpose of sustaining the prayer for prohibition. However I must have regard to other decisions in which the courts have deemed it to be not fatal to omit to enjoin a party such as a Magistrate's court in Judicial review proceedings where a party has challenged a land disputes tribunal's award, for example, the case of **Republic v Chairman, Kanduyi Land Disputes Tribunal Ex parte Erick Barasa Wanyonyi & another [2014] eKLR, [Bungoma H.C Miscellaneous Civil Application No. 390 OF 2005 [J.R]** and the case of **Republic V Chairman Kanduyi LDT Tribunal & 2 Ex-Parte [2013] eKLR, [Bungoma H.C Judicial Review 111 of 2012].** The learned Judges **Visram, Karanja & Koome, JJ.A** also addressed the same issue in and came up with similar conclusion in **John *Kasimu Kilatya v Chairman Machakos Land Dispute Tribunal & 2 others [2017] eKLR, C.A at Nairobi Civil Appeal No. 220 of 2015.***

Therefore I find that though it has been submitted that an order of prohibition cannot issue under the present circumstances, the decision of the tribunal has been found wanting, unenforceable and a nullity. In the **John Kasimu** case (supra) the Court of Appeal found as follows:

> **"[17] It is trite that if a party has a direct and substantial interest in a matter in which he/she may be affected prejudicially by the judgement of a court or tribunal in the proceedings that is a necessary party. The question we have asked ourselves regarding the joinder of the magistrates' court is how an ultra vires order made without jurisdiction by the tribunal would affect the magistrate's court that merely adopted the order as an order of the court. Had the learned Judge considered this aspect, that in any case the award that he found was made without jurisdiction was a nullity, we have no doubt he would have arrived at the same conclusion as we have, that the only legal solution was to down his tools and not proceed any further as the award was of no legal effect."**

To the Court Of Appeal therefore what mattered was only the fact that the tribunal decision was a nullity, and thus the non-joinder of the magistrate's court in the motion did not render it fatally defective. The point here is that the Magistrate in the instant dispute should also have downed his tools had he also come to the finding that the Tribunal decision was a nullity.

In the proper circumstances an order of certiorari and prohibition would have issued. However, as no certiorari was sought and prohibition has not been sought against the proper parties in the instant case, this court's hands are bound and it is constrained to dismiss the notice of motion application dated 12/11/2011. The notice of motion is therefore dismissed. Each party shall bear its own costs.

Dated, and signed at Kitale on this **1st** day of **August 2018.**

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 29th day of August**,** 2018 in open court in the presence of:

Mr. Omari holding brief for Kiogora for applicant

Mr. Kiongo for respondent

Mr. Mwirigi for interested party

C/A: Mutua

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE.