



**REPUBLIC OF KENYA**

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

**ELC JR APPLICATION No. 26 OF 2018**

**(FORMERLY HC JR APPLICATION No. 50 OF 2008)**

**HARON THEURI NGUNYI.....APPLICANT**

**VERSUS**

**KINANGOP DIVISION LAND**

**DISPUTE TRIBUNAL NYANDARUA..... 1<sup>ST</sup> RESPONDENT**

**JAMES KIARII .....2<sup>ND</sup> RESPONDENT**

**BENSON MAINA MAINGI .....3<sup>RD</sup> RESPONDENT**

**JOHN NGANGA..... 4<sup>TH</sup> RESPONDENT**

**ELIJAH NYAGA GITHAMBO.....5<sup>TH</sup> RESPONDENT**

**JOHN NDUNGU WACHIRA.....6<sup>TH</sup> RESPONDENT**

**DAVID THEURI.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This matter was initially filed as High Court Judicial Review Application No. 50 of 2008 but was later transferred to this court. Having been granted leave to commence judicial review proceedings on 10<sup>th</sup> November 2008, the ex parte applicant filed Notice of Motion dated 28<sup>th</sup> November 2008 seeking the following orders:

***1. That this court do grant orders of certiorari to remove into the High Court at Nakuru and quash the proceedings and award by Kinangop Division Land Dispute Tribunal Nyandarua cause No. 70/2006.***

***2. That all the necessary and consequential orders and directions be given.***

***3. That the costs of the application be provided for.***

2. The application is supported by an affidavit sworn by the ex parte applicant. He deposed that he is the registered proprietor of a parcel of land known as Nyandarua/Ol'aragwai/1407 (the suit property) and that in the year 1984, he sold one acre of the suit property to Ol'aragwai Co-operative Society at a consideration of KShs 14,000. He stated that the society owed him KShs 17,000 on account of fresh milk which he had supplied to it. Since the amount owed by the society was not paid, he repossessed the land. The respondents filed North Kinangop Tribunal Case No. 70 of 2006 against the ex parte applicant. The tribunal case was heard and determined in a ruling delivered on 16<sup>th</sup> February 2007. The tribunal ordered that the ex parte applicant transfers 1 acre of the suit property to Ol'aragwai Farmers Society and that the District Land Registrar Nyandarua issues a title deed for the 1 acre to Ol'aragwai Co-operative Society. The tribunal's decision was adopted in Principal Magistrates Court Land Dispute No. 2 of 2008 (Nyahururu) and a decree issued on 18<sup>th</sup> March 2008.

3. The 2<sup>nd</sup> to 7<sup>th</sup> respondents opposed the application through a replying affidavit sworn by the 2<sup>nd</sup> respondent. He deposed that the ex parte applicant indeed sold 1 acre of the suit property to Ol'aragwai Farmers Cooperative Society and that the consideration of KShs 14,000 was paid in full. He added that the ex parte applicant's action of repossessing the land was meant to deny the cooperative its right to the 1 acre. He therefore supported the findings of the tribunal

4. Counsel for the ex parte applicant informed the court that the 3<sup>rd</sup> and 6<sup>th</sup> respondents are since deceased. He withdrew the claim against them.

5. The 1<sup>st</sup> respondent did not respond to the Notice of Motion.

6. The application was heard by way of written submissions. The ex parte applicant's submissions were filed on 24<sup>th</sup> March 2015 while the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> respondents' submissions were filed on 17<sup>th</sup> August 2015. The 1<sup>st</sup> respondent did not file any submissions.

7. I have considered the application, the affidavits filed and the submissions. There is no dispute that the ex parte applicant is the registered proprietor of the suit property pursuant to title deed dated 25<sup>th</sup> November 1992 issued under the **Registered Land Act** (repeated). The said title deed shows that he became registered proprietor on 25<sup>th</sup> November 1992. There is equally no dispute that the North Kinangop Land Dispute Tribunal ordered on 16<sup>th</sup> February 2007 in **North Kinangop Tribunal Case No. 70 of 2006** that the ex parte applicant transfers 1 acre of the suit property to Ol'aragwai Co-operative Society and that the District Land Registrar issues a title deed for the said 1 acre to the co-operative Society. Further, there is no dispute that the tribunal's decision was adopted and a decree issued on 18<sup>th</sup> March 2008 in **Principal Magistrate's Court Land dispute No. 2 of 2008 (Nyahururu)**. The said decree read as follows:

*1. That Harum Theuri Ngunyi to transfer land parcel 1 acre to Ol'aragwai Farmers Society to construct public cattle dip.*

*2. The A.F.C Co-operative to release notification of charge on Nya/Ol'aragwai 1407 approximate 9 acre amount granted to Harum Theuri Ngunyi at Kshs.227, 000/= (Two hundred and twenty seven thousands).*

*3. The District Surveyor Nyandarua District revisit the disputed land and subdivide 1 acre land and marking properly distorted boundaries through cultivating.*

*4. The District Land Registrar Nyandarua to issue a title deed from Nya/Ol'aragwai 1407 subdivision to Ol'aragwai Co-operative Society 1 acre.*

*5. The objector to pay the cost of this case and any other that may arise list attached.*

8. Counsel for the ex parte applicant argued that the tribunal lacked jurisdiction to deal with ownership of registered land. On the other hand, the respondents argued that the tribunal's decision is sound and should stand. Although the respondents have argued at length that they are entitled to the 1 acre and that the decision of the tribunal should therefore stand, their case in that regard addressed merits of the decision of the tribunal as opposed to the process of decision making in the matter.

9. The scope of the court's jurisdiction in judicial review proceedings is limited to the process of decision making and not its merits. In **Republic v Chairman Amagoro Land Disputes Tribunal & another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** the Court of Appeal stated thus:

*Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be 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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.*

10. In the circumstances, only two issues emerge for determination: firstly whether the tribunal acted within its jurisdiction and secondly whether the relief sought is merited.

11. Land dispute tribunals were established pursuant to **Section 4** of the **Land Disputes Tribunals Act, 1990**. The Act has since been repealed by **Section 31** of the **Environment and Land Court Act, 2011**. Jurisdiction of the tribunals was provided for at **Section 3 (1)** of the **Land Disputes Tribunals Act, 1990** 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.*

12. It immediately becomes clear that the tribunals did not have jurisdiction to determine ownership of registered land. There are indeed many authorities to that effect. Suffice it to cite the case of **Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR** where the Court of Appeal stated:

*On the issue of jurisdiction, we note that the law on this issue is settled and we do not need to belabour it. Section 3 of the Land Disputes Tribunal Act (repealed) gives jurisdiction to the Land Disputes Tribunal to handle claims in the following matters only:*

**“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 on in common,**
- (b) A claim to occupy, or work land or**
- (c) Trespass to land.”**

**Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land ....**

13. Nyandarua/Ol’aragwai/1407, the suit property herein, is registered land as can be seen from the title deed dated 25<sup>th</sup> November 1992 issued to the ex parte applicant under the **Registered Land Act** (repeated). I therefore find and hold that the tribunal lacked jurisdiction to deal with ownership of the suit property. In purporting to do so, it acted in excess of its jurisdiction.

14. The last issue for determination is whether the relief of certiorari which is sought is merited. The scope of an order of certiorari was discussed by the Court of Appeal in the case of **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** as follows:

**... Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.**

15. In **Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others** (supra) the court stated:

**.... it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity.**

16. In view of the foregoing, I find and hold that the ex parte applicant is entitled to an order of certiorari to quash the decision delivered on 16<sup>th</sup> February 2007 in **North Kinangop Tribunal Case No. 70 of 2006** as well as the decree issued on 18<sup>th</sup> March 2008 in **Principal Magistrates Court Land Dispute No. 2 of 2008 (Nyahururu)**.

17. I therefore make the following orders:

- a) An order of certiorari is hereby issued removing into this court and quashing the proceedings and the decision delivered on 16<sup>th</sup> February 2007 in North Kinangop Tribunal Case No. 70 of 2006 as well as the decree issued on 18<sup>th</sup> March 2008 in Principal Magistrates Court Land Dispute No. 2 of 2008 (Nyahururu).
- b) Costs of this case are awarded to the ex parte applicant.

**Dated, signed and delivered in open court at Nakuru this 7<sup>th</sup> day of December 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the ex parte applicant

No appearance for the 1<sup>st</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents

2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents present in person

Court Assistants: Gichaba & Lotkomo