



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC JR NO. 7 OF 2016**

**(Formerly NANYUKI HC JR APPLICATION NO. 5 OF 2015)**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT, LAND REGISTRATION ACT**  
**CAP 3 AND LAND ACT**

**CAP 6 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**  
**ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

**BENEDICT MAINA WARUTERE ..... APPLICANT**

**-VERSUS-**

**MARY WAMBERE NGETHA ..... RESPONDENT**

**GRACE NYAMBURA NGETHA ..... DECEASED**

**RULING**

1. On **17<sup>th</sup> December, 2015** the *ex parte* applicant, Benedict Maina Warutere, filed the chamber summons dated **9<sup>th</sup> December, 2015** seeking leave to, *inter alia*, apply for judicial review orders of certiorari to remove to this court for purposes of being quashed the proceedings and decision in Land Disputes Tribunal Case No. 13 of 2007 at Lumuria and at Nanyuki SPM Land Case No. 40 of 2007; an order of prohibition to prohibit the Senior Principal Magistrate Nanyuki Law Courts from proceeding with Nanyuki SPMCC No. 40 of 2007 until the final hearing and determination of this case.
2. The *ex parte* applicant prays that the leave, if granted, should operate as stay of proceedings, decision and implementation of the decision and decree of Nanyuki SPMCC No.40 of 2007.
3. The application is premised on the grounds that the Tribunal lacked jurisdiction to order cancellation of the *ex parte* applicant's title; that the proceedings and the decision of the Tribunal and the court are null and void for want of jurisdiction.
4. In the application sworn in verification of the facts of this case, it is pointed out that the Tribunal found in favour of Mary Wangethe Betha and against the *ex parte* applicant and ordered the cancellation of the

*ex parte* applicant's title.

5. Aggrieved by the decision of the Tribunal, the *ex parte* applicant appealed to the Provincial Appeals Committee at Nakuru. Before the Appeal could be heard and determined, the appeals Committees were abolished through repeal of the Land Dispute Tribunals Act.

6. Arguing that the repeal of the Land Disputes Act had the effect of rendering the appeal useless and untenable, the *ex parte* applicant deposes that the application herein raises weighty issues of law touching on the enforceability of the award of the Tribunal.

7. The application is opposed on the grounds that it is frivolous, vexatious, time barred and an abuse of the court process. Given that there is a final decree which the lower court has power to execute, it is contended that the court cannot be enjoined from exercising its lawful mandate of entertaining execution proceedings.

8. The *ex parte* applicant's redress is said to be an appeal.

9. When the matter came up for hearing, counsel for *ex parte* applicant, **Mr. Gitibi**, reiterated the grounds on which the application is premised and urged the court to grant the prayers sought.

10. Concerning the grounds of opposition, he maintained that the application is not time barred because suit number 40 of 2007 is still alive (There is no final decree in that suit).

11. Counsel for the respondent, **Mr. Kariuki**, submitted that repeal of the Land Disputes Tribunals Act, did not render the proceedings conducted before the Tribunal or the Magistrates Court null and void. According to Mr. Kariuki orders made by the Tribunal remained valid.

12. With regard to the proceedings before the SPM Court Nanyuki and the decree issued, he submitted that those issues were raised from the bar. No decree or judgment was attached to the application for leave.

13. Explaining that a final determination was made by the Nanyuki Court, he submitted that the *ex parte* applicant's recourse, if dissatisfied, was to appeal to the High Court. Referring to documents marked **BM-3** and **BM-6** he maintained that the application is time barred.

14. In a rejoinder, Mr. Gitibi submitted that the documents on record show that the *ex parte* applicant has an arguable case.

### **Analysis and determination:**

15. The uncontroverted facts of this case are as follows:

a) That the respondents herein, Mary Wambere Ngethe and one Grace Nyambura Ngetha (now deceased) lodged a claim before the Lamuria Land Disputes Tribunal to wit, Land Case No. 13 of 2007;

b) That the suit was in respect of registered Land to wit, Laikipia Ngobit/Muhonia Block 1/21;

c) That upon hearing the dispute the Tribunal found in favour of the respondents and ordered the cancellation of the title held by the *ex parte* applicants.

d) That the award was adopted as a judgment of the court and subsequently an appeal filed before the Provincial Appeals Committee. (In support of that fact see the document marked **BM-6** in which the *ex parte* applicant was praying for stay of execution of the judgment/decreed obtained in Nanyuki SPMC's Land Disputes Case No.40 of 2007 pending the hearing and determination of the appeal. Also see the document marked **BM-7** in which the respondent urged the court to review or

set aside its orders made on 20<sup>th</sup> February, 2008 granting the *ex parte* applicant stay of execution of judgment/decree to pave way for the respondent to bring the matter to a close by carrying out execution in terms of the decree of the court delivered on 21<sup>st</sup> November, 2007).

e) That the Land Disputes Tribunals Act was repealed before the Appeal preferred before the Provincial Appeals Tribunal was heard and determined.

f) Thinking that the appeal had become useless and untenable the *ex parte* applicant filed the instant application seeking leave to apply for certiorari to quash the proceedings at the Tribunal and at the lower court.

16. Given the fact that the award of the Tribunal has since been adopted as a judgment of court, the sole issue for determination is whether leave can be granted to the applicant to quash a none existent award. There is also the issue of time bar in respect of the application for certiorari in that an application ought to be brought within 6 months from the time the decision sought to be granted was made.

17. In the circumstances of this case, it is clear that the decision sought to be quashed was made either on 21<sup>st</sup> November, 2007 or before then, which on the face of it, is more than the 6 months stipulated in law.

18. Although there is no time frame within which an order of prohibition ought to be applied for, the law requires that an application for prohibition be applied without undue delay. The application for leave having been brought more than 8 years after the decision whose execution is sought to be prohibited and there being no explanation for the delay in bringing the application for leave, I am not satisfied that the applicant has made up a case for being granted the orders sought.

19. In any event, this application appears to be based on a misapprehension of law. I say this because, it is not true that repeal of the Land Dispute Tribunals Act had the effect of rendering the Appeal preferred before the defunct Land Disputes Tribunals Act useless and untenable. In this regard see the case of *Chege Macharia v. Francis Kimani Kirimira* (2015)eKLR where the Court of Appeal stated:-

**“We are of the considered view that where, as in this case an award had been properly forwarded by the Chairman of the Tribunal but was not yet read when the Act was repealed, the proper course would have been for the magistrate to adopt the award and read it as a judgment of the court to be followed by the usual process of decree and execution and appeal where parties so desire. Such appeals would be to the High Court by dint of clause 13 of the practice direction, the Provincial Appeals Committee also having met their quietus with the repeal of the Act.**

**Such a course of action is inescapable from a proper reading of the Practice Direction as framed and also accords with the doing of justice in a timely, efficient and cost effective manner as commanded by Article 159 of the Constitution and the Practice Direction itself. Moreover, the effect of the repealing of a written law on proceedings, is provided for under the Interpretation and General Provisions Act, Cap 2, at Section 23 as follows;**

***“(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -***

***(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, penalty, forfeiture, or punishment aforesaid, and any such investigation, legal proceeding or remedy may be instituted, construed or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”***

20. Applying the aforesaid ruling to the circumstances of this case, I find that the applicant has not made up a case for being granted leave to apply for judicial review orders and I dismiss the application for chamber summons with costs.

**Dated, signed and delivered in Nyeri on this 16<sup>th</sup> day of January, 2017.**

**L WAITHAKA**

**JUDGE**

In the presence of:

N/A for exparte applicant

N/A for respondent

Court clerk - Esther