



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW NO. 05 OF 2017**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF  
CERTIORARI**

**AND**

**IN THE MATTER OF SECTION 8 (2) AND 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL CASE NO. 03 OF 2011 AS READ IN  
CHUKA PRINCIPAL MAGISTRATES LADT NO. 32 OF 2011**

**AND**

**IN THE MATTER OF L.R. NO. MWIMBI/MURUGI/1102**

**BETWEEN**

**LEONARD RIUNGU.....1<sup>ST</sup> APPLICANT**

**FRANKLINE KIRIMI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE DISTRICT COMMISSIONER MAARA DISTRICT.....RESPONDENT**

**M'ARACHI NJERU.....INTERESTED PARTY**

**RULING**

1. This application is dated 9<sup>th</sup> September, 2011 and seeks the following orders:

1. This honourable court be pleased to call into itself and quash the entire proceedings and award of the Maara Land Disputes Tribunal filed in court on 30.06.2011 and read in Chuka Principal Magistrate's court on 26.07.2011 vide LDT NO.32 OF 2011.

2. Costs for this application be borne by the Respondent.

3. The court do make any other or such better orders which it may deem fit to grant in the circumstances.

2. This application has the following grounds:

- a. The District Land Disputes Tribunal lacked the requisite jurisdiction to entertain the claim lodged before it in Maara LDT NO. MWIMBI/3/2011 as read in Chuka LDT NO. 32 of 2011.
- b. The Tribunal acted unlawfully by adjudicating over a subject matter in which one of the registered owners was deceased.
- c. The proceedings before the Tribunal were res judicata as the issue before it had been determined by previous courts of competent jurisdiction.
- d. The proceedings and award of the Tribunal were a nullity in law.

3. The application is accompanied by a statement of facts dated 11<sup>th</sup> August, 2011 which states as follows:

**1. THE NAME AND DESCRIPTION OF PARTIES**

i. The Applicants are called LEONARD RIUNGU NGAI and FRANKLIN KIRIMI. They reside in Maara District of Tharaka Nithi County.

ii. Their address of service for all purposes of the instant suit is C/O

**M/S: BASILIO GITONGA & CO.**

**ADVOCATE**

**INTERCITY CENTRE**

**P. O. BOX 1491-60200**

**MERU**

**2. FACTS RELIED ON**

i. The subject matter herein is LR NO. MWIMBI/MURUGI/1102 and is registered in the joint names of the two applicants and one MAURICE MICHENI who is deceased.

ii. The interested party herein lodged a claim with the Maara District Land Disputes Tribunal vide LDT NO. MWIMBI/3/2011 in which he laid claim on the whole of LR NO. MWIMBI/CHOGORIA/1102.

iii. The dispute was heard by the Tribunal sitting at Mwimbi Division and the Tribunal decided in his favour.

iv. The Tribunal ordered that the entire parcel of land be transferred to the interested party.

v. That the award of the Tribunal was read on 26.7.2011 vide Chuka PMCC LDT NO.32 OF 2011.

vi. That under the provisions of section 3 of the Land Disputes Tribunal Act, the Land Dispute Tribunal lacked the requisite jurisdiction to entertain the claim before it.

vii. The tribunal therefore acted ultra vires the powers conferred to it.

viii. The Tribunal also acted unlawfully by adjudicating over the subject matter notwithstanding that one of the registered owners was long deceased before the dispute was lodged.

ix. The Tribunal further failed to record and/or consider vital evidence from the Applicant particularly that the subject matter had been subject of litigation in competent courts before the award was lodged and that ownership had been earlier determined, that is in Meru HCCC No. 6 of 1987 and Meru Succ NO. 83 of 1085.

x. Since the Tribunal lacked the requisite jurisdiction to entertain the claim lodged before it, then all subsequent proceedings, award and orders made were a nullity in law and of no legal consequence.

### **3. THE RELIEF SOUGHT**

i. The Applicant will be seeking for an order of certiorari to move into the High Court and quash in its entirety the proceedings and an award of the Land Disputes Tribunal in MW 1/3/2011 as read in Chuka Principal Magistrates LDT NO. 32 OF 2011.

ii. The Applicant will also seek for costs of these proceedings.

### **4. THE GROUNDS UPON WHICH THE RELIEFS ARE SOUGHT**

i. The Land Disputes Tribunal lacked the requisite jurisdiction to entertain the nature of the claim lodged before it in LDT NO. MWI/3 of 2011

ii. The Tribunal acted unlawfully by adjudicating over a subject matter in which one of the registered owners was deceased.

iii. The Tribunal failed to record vital evidence that the ownership of the subject matter had been determined before by courts of competent jurisdiction.

iv. The proceedings and the award of the Tribunal were (sic) therefore a nullity in law.

4. I find it necessary to also reproduce in full a supporting affidavit sworn on 11<sup>th</sup> August, 2011 by Basilio Gitonga, the ex parte applicants' advocate. The affidavit states as follows:

**I, BASILIO GITONGA of P. O. Box 1491-60200, MERU** in the Republic of Kenya do hereby make oath and state as follows:

1. That I am an Advocate of the High Court of Kenya practicing as such in the firm of Basilio Gitonga & Co. Advocates who are in conduct of this matter for the Applicants.

2. That I am instructed that the award of the District Land Disputes Tribunal which the Applicants are challenging was read in court on 26.7.2011 and the right of appeal was explained for (sic) the Applicants.

3. That the Applicants have preferred to challenge this award by way of an application for judicial review in the nature of certiorari.

4. That the 30 days right of appeal expires on 26.8.2011 by which time the high court vacation will still be on.

5. That there is a possibility that the award of the Tribunal being complained of will be executed upon expiry of the 30 days.

6. That if execution is effected, the likely orders of this court will be rendered nugatory.

7. That there is therefore need to have this matter heard during High Court vacation in order to preserve the subject matter of the suit.

8. That what is deponed herein above is correct to the best of my knowledge, belief and information.

5. I note that at paragraph 2 of the supporting affidavit, it is admitted that the court that read the award of the Maara District Land Disputes Tribunal on 26.7.2011 explained the right of Appeal to the applicants.

6. At paragraph 3 of the same supporting affidavit, it is proffered that the applicants, instead of appealing against the award of the District Land Disputes Tribunal elected to challenge that award by way of this application for judicial review craving for an order of certiorari.

7. To be fair to all sides and to put the interested party's case into perspective, I reproduce the further Replying Affidavit sworn by M'RACHI NJERU, the interested party, on 18<sup>th</sup> March, 2013. The affidavit read as follows:

**I, M'RACHI NJERU** of Post Office **Box Number 87-60401, CHOGORIA** do hereby make oath and States as follows:

1. That I am the interested party in this matter well versed with all the matters therein and therefore competent to make and swear this affidavit.

2. That I am a resident of Murugi East Ward, Mwema Sub-location Kiria Unit within Maara District.

3. That I am the son of M'RACHI THUURA (deceased) who was the brother to AUGOSTINO MUGAMBI (deceased) who is the father to the Applicants herein Leonard Riungu and Franklin Kiriimi.

4. That (sic) originally land parcel No. MWIMBI/MURUGI/995 measuring 5.83 acres belonged to Kiambanjuo who was the grandfather to both Agostino and M'rachi Thuura. The said land was passed down to both my deceased father, Thuura and Agostino but since my father was retarded the same was registered in the name of Agostino to hold in trust for my late father, Thuura.

5. That later on Agostino bought another land parcel No. MWIMBI/MURUGI/1102 on the understanding that Thuura my father would get land parcel No. Mwimbi/murugi/1102 and would then not claim land parcel No. MWIMBI/MURUGI/995. His reason were that he did not want parcel No. MWIMBI/MURUGI/995 subdivided.

6. That before Agostino died in 1964 he showed my father and I parcel NO. MWIMBI/MURUGI/1102 and said that this land was to be our share. However later when I went to collect the land title from the land office we found that parcel No. MWIMBI/MURUGI/1102 was registered in Agostino's name. Annexed and marked MN 1 is a copy of the green card.

7. That I took the complaint to the clan elders who heard the matter and decided that parcel NO. MWIMBI/MURUGI/1102 was M'rachi Thuura's share and should be put in my name to hold in trust for Thuura's dependants. However this did not happen and in the year 1985 the applicants instituted succession cause no. 83 of 1985 in which they distributed to themselves both land parcels No. MWIMBI/MURUGI/995 and 1102. This succession cause was done secretly and without my knowledge. Annexed and marked MN 2 is a copy of the said order.

8. That upon discovery of this issue, I took the matter to the clan elders who sought the services of advocate Pius Mugambi Kai who instituted Meru HCCC No. 6 of 1987. The matter was then referred to the District officer's office for arbitration. However the defendant in that matter, BONIFACE MUGAMBI the elder brother of the applicants never turned up all the six times he was summoned. After that I assumed the matter to be completed.

9. That in January 2011, I found out that the applicants were in the process of selling parcel No.

MWIMBI/MURUGI/1102 on conducting a search I found out that the land was registered in the applicants' names and their deceased brother Maurice Micheni. I then put a caution of (sic) the land and instituted the matter before the tribunal.

10. That the tribunal upon hearing both sides decided that the land belongs to me. I then brought an application in court at Chuka PMCC LDT No. 32 of 2011 to have the tribunal' award adopted as the judgment of the court and it was on 26<sup>th</sup> July, 2011.

11. That the applicant then advised (sic) to raise an appeal they never did and once I was issued the land by an order of the court, the applicants have now instated (sic) this suit seeking to quash the tribunal's award which rightly determined in my favour.

12. That what is deponed to herein above is true to the best of my knowledge, information and understanding.

8. An interlocutory application dated 14<sup>th</sup> November, 2014 filed by the interested party was dismissed on 17<sup>th</sup> September, 2014. In dismissing the application, among other things, the court noted that the interlocutory application was filed almost 2 years after the court had granted the exparte applicants leave to file Judicial Review Proceedings.

9. The interested party had also filed a Preliminary Objection on Points of Law dated 13<sup>th</sup> November, 2014. The court on 22<sup>nd</sup> September, 2015 dismissed the application on grounds that some of the issues raised in the application invited arguments and could, therefore, not be pure points of law. The parties in this suit were advised by the court to move diligently and facilitate the expeditious hearing of this judicial review application.

10. The exparte applicants submit that the Maara District Land Disputes Tribunal lacked jurisdiction to preside over a matter touching on ownership and or title to land. They also proffer that the tribunal adjudicated over a matter concerning a deceased registered owner of the subject parcel of land. The applicants have proffered the following cases in support of their assertions:

***1. R. versus Baringo Land Disputes Tribunal & 2 others exparte Chelimo Chepyegon, Misc. Application NO. 20 of 2009.***

***2. R. versus North Kinangop Division Land Disputes Tribunal & 2 others exparte Rahab Njuquini Kinyua [2015] eKLR***

***3. R. versus Borabu Land Disputes Tribunal & 2 others exparte Florence Nyaboke Machani, E & L Judicial Review No. 128 of 2009 at Kisii.***

11. The exparte Applicants proffer that the proceedings before the Tribunal were Res Judicata Meru HCCC No. 6 of 1987 and Meru Succession Case No. 83 of 1985. They submit that the issue of ownership over the suit property was substantially heard and determined by a court of competent jurisdiction.

12. For the assertions they have postulated, the applicants pray that orders of certiorari to quash the entire proceedings and award of the Maara Disputes Tribunal filed in court on 30<sup>th</sup> June, 2006 and read in Chuka PMCC LDT. NO. 22 of 2011 on 26.7.2011 be issued.

13. The respondents have submitted that Section 159 of the Registered Land Act confers jurisdiction on tribunals to hear and determine land disputes. They particularize the point that the section clearly states that proceedings relating to title, possession or title to lease or charge of land registered under Cap 300 shall be heard by the High Court, Magistrates Court or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunal Act, the Land Disputes Tribunals.

14. The respondents contend that what was before the Maara Land Disputes Tribunal was a boundary

dispute as the parties in this matter were contesting the subdivision of the suit land.

15. The respondents have submitted that the applicants were not in order to challenge the decision of the magistrate's court via Judicial Review proceedings instead of appealing to the Provincial Tribunal. In support of this assertion, the respondents proffer the case of ***Republic versus Mwangi Nguyai and 3 others ex parte Haru Nguyai [2013] eKLR*** where the ***Hon. Justice G.V. Odunga, J***, held inter alia, that once the decision of the tribunal is adopted by the court, it becomes a judgment of the court and in this case the applicants ought to have filed an appeal against the decision of the magistrates court AND not to have filed Judicial Review Proceedings.

16. The Respondents opine that the applicants had embarked on a forum shopping adventure as they had not exhausted the process provided for in the apposite statute. They also opine that the applicants were challenging the merits of the decision and not the process that culminated in the impugned award being made.

17. The respondents pray that the court dismisses this application.

18. The interested party submits that what was being contested before the Maara District Land Disputes Tribunal was a boundary dispute. For that reason, he says that the Tribunal had jurisdiction. He also says that once the decision of the Tribunal was read by the court, it became a judgment and once it became a judgment, the only recourse the applicants had was to lodge an appeal or seek review of the judgment before the Chief Magistrates Court at Chuka. The interested party asserted that it was a well settled principle that litigants should utilize the correct forums in their pursuit of justice. The interested party, in support of this assertion proffered the case of ***Republic versus Mwangi Nguyai [2013] eklr where the Hon. Justice G.V. Odunga, J, inter alia***, opined as follows:

***“Once the decision of the tribunal is adopted by the court, the same becomes the judgment of that court. The applicants herein ought to have filed an appeal against the decision of the magistrate's court and not judicial review proceedings as filed.”***

19. The interested party submits that this application is misconceived, unfounded and an abuse of the court process in that it attacks the merits of the award made by the Maara District Land Disputes Tribunal and not the integrity of the process culminating in that award. He laconically proffers that judicial review proceedings are concerned with finding out if the decision making process had integrity but should not concern themselves with the merits of the impugned decisions. To buttress this assertion, the interested party offers the case of ***Omar Mohamed Siba versus Principal Magistrate and Another, Meru HCCC JR No. 3 of 2014***.

20. The interested party prays that the court dismisses this application.

21. I have carefully considered the pleadings and the submissions proffered by the parties in support of their various assertions. I have also carefully considered the authorities proffered by the parties as authorities in this suit.

22. I do opine that no two cases are fully congruent to the extent of mathematical certitude in their facts and circumstances.

23. I do not find the authorities proffered by the applicants in support of their assertions helpful to them in this matter. They are good authorities in proper circumstances but not in this case.

24. The Registered Land Act unequivocally allows Land Disputes Tribunals to handle matters concerning titled land in proper circumstances. In the circumstances of this case as brought out in the parties' pleadings, I find that the Maara Land Disputes Tribunal had jurisdiction to handle the matter or matters brought before it.

25. Concerning the claim that what the Maara District Land Disputes Tribunal was handling was Res

Judicata Meru HCCC No. 6 of 1987 and Meru Succession No. 87 of 1985, this court cannot comment from an informed position. The *ex parte* applicants did not deem it necessary to annex judgments concerning the 2 cases. If or if not the respondents and the interested parties participated in those proceedings remains a matter of conjecture to the court. I dismiss the Res Judicata claim.

26. I agree with the respondents and the interested party that Judicial Review proceedings should concern themselves with the integrity of the process culminating in the impugned decision and not on the merits of the apposite decision. Indeed issues such as lack of jurisdiction, Res Judicata and the claim that the tribunal had handled land belonging to a deceased person, should have been better handled at the level of the District Tribunal or during the appeal before the Provincial Tribunal had the *ex parte* applicants appealed.

27. I have already noted that the *ex parte* applicants had in paragraph 2 of their supporting affidavit admitted that the magistrate's court that read the award of the Maara Land Disputes Tribunal had explained the right of appeal to the applicants. At paragraph 3 of the said affidavit the applicants had owned up that instead of filing an appeal as provided for in the apposite law, they elected to file this Judicial Review Application. I tend to agree with the respondents' submissions that this amounted to forum shopping for reasons only the applicants know.

28. I opine that where a statute sets out defined remedies, it would be the right and proper thing to do to exhaust those remedies. In this case, the award had already been read by the court and thus had gained the status of a judgment. The applicants should have appealed. I do note that their application attacks the merits of the impugned award. It does not challenge the process. I reiterate that Judicial Review ideally concerns itself with the integrity of the process. The integrity of the process that culminated in the award given by the Maara District Land Disputes Tribunal has not been challenged at all. It is not claimed that the *ex parte* applicants had not been accorded a fair hearing. Bias on the part of the tribunal is not claimed. It is not claimed that any of the rules of natural justice had been ignored.

29. Courts should discourage parties from embarking on forum shopping activities. Where there are statutory remedies provided by statutes, parties should exhaust them. Avoiding exhaustion of statutory remedies by filing of Judicial review proceedings and constitutional petitions should be discouraged.

30. I find that this application lacks merit.

31. This application is dismissed. The order of stay granted at the *ex parte* stage is vacated.

32. Costs are awarded to the respondents and the interested party.

33. It is so ordered

Delivered in open court at Chuka this **19<sup>th</sup> day of September, 2017** in the presence of:

CA: Ndegwa

Kiautha Arithi for the Interested Party

Mrs Mwanzia h/b Muriithi for the *ex parte* Applicant

Kiongo present for the Respondents

**P.M. NJOROGI**

**JUDGE**