



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

MISC. CIVIL APP. NO. 3 OF 2012 (JR)

**IN THE MATTER OF AN APPLICATION BY MICHAEL THIONGO GATETE FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)**

AND

**IN THE MATTER OF LANDS DISPUTES TRIBUNAL ACT NO. 18 OF 1990 (NOW
REPEALED)**

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF KIOGORO LAND DISPUTES TRIBUNAL (KEUMBU DIVISION)

AND

IN THE MATTER OF KISII CMCC MISC. APP. NO. 120 OF 2011

BETWEEN

MICHAEL THIONGO GATETE.....APPLICANT

AND

HON. ATTORNEY GENERAL.....1ST RESPONDENT

KIOGORO LAND DISPUTES TRIBUNAL.....2ND RESPONDENT

THE CHIEF MAGISTRATE COURT – KISII.....3RD RESPONDENT

AND

DAVID MACHUKA ONTONYI.....1ST INTERESTED PARTY

NAFTAL MABEYA ONTONYI.....2ND INTERESTED PARTY

J U D G M E N T

1. With leave of the court the ex parte applicant, **Michael Thiongo Gatete** instituted the instant Judicial Review application vide the Notice of Motion dated 13th February 2012. By the application the applicant seeks the following orders:-

1. That the Honourable court be pleased to grant an order of judicial review in the nature of Certiorari and Prohibition to remove into the High Court and quash the proceedings of and the decision of the 2nd respondent herein dated 13th December 2012 emanating from land disputes claim No. 1 of 2011 concerning and touching the applicants' land that is LR No. Nyaribari Chache/B/B/Boburia/403 now subdivided into 9633 and 9634 and that the leave herein do hereby operate as stay of the execution of the decree of the Magistrates Court emanating from the said decision dated the 13th December, 2011.

2. That the interested parties herein are hereby prohibited from having any dealings in the said land herein in any manner whatsoever.

3. That the interested parties be and are hereby evicted from the suit land which rightfully belongs to the ex parte applicant.

4. That the costs of this application be provided for.

2. The application was supported on the grounds set out on the body of the application as follows:-

(i) That leave to bring the application has been duly granted.

(ii) That the applicant is the registered owner of LR No. Nyaribari Chache/B/B/Boburia/403 now subdivided into 9633 and 9634.

(iii) That the land disputes tribunal does not have jurisdiction to decide on ownership of land as the jurisdiction of the elders is donated by Section 3 of the Land Disputes Act No. 18 of 1990

(iv) That the land disputes tribunal aforesaid could not have had jurisdiction under Section 13 of the said Act as the matter herein is pending before the High Court of Kenya at Kisii being HCCC No. 125 of 2011.

(v) That since the applicant acquired the suit land herein it has taken many years and hence the claim herein was hopelessly time barred under Section 13 of the said Act.

(vi) That Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya bars such suits from being heard by another court when the same matter whereby the same parties litigate or parties litigating under the same title are pending before a court of competent jurisdiction.

(vii) That Section 159 of Cap 300 Laws of Kenya does deny both the Land Disputes Tribunal and the Chief Magistrate Court from hearing the matter as they did.

(viii) The elders award was made under an Act which had been repealed.

(ix) The applicant purchased the land parcel under the Statutory Power of Sale and property given all the papers and the interested powers fully signed the same through a court order.

(x) That the transaction went to the land control board and the same was consented to and the consent was duly granted to the applicant and the suit land was duly transferred to the applicant.

(xi) That the balance of convenience militates towards the grant of the orders prayed for

herein.

(xii) That if the orders prayed for herein are not granted then the applicant will suffer loss and damage as his land is likely to be taken away by the respondents herein.

3. The application was further supported on the grounds set out in the affidavit sworn in support of the application for leave and on the statement of facts in support of the chamber summons application for leave.

4. The brief facts in this matter are that the ex parte applicant was registered as the owner of land parcel **Nyaribari Chache/B/B/Boburia/ 403** on 23rd June 1977 as per copy of title annexed as “**MTG1**” to the application for leave. The interested parties are sons of one, Mabeya Ontonyi who was the registered owner of land parcel **Nyaribari Chache/B/B/Boburia/403** before the same was transferred and registered in the ex parte applicant’s name in 1977. The interested parties filed a dispute before the Kiogoro Land Disputes Tribunal and the Tribunal gave an award on 10th November 2011 where they held that the ex parte applicant had acquired title to land parcel **Nyaribari Chache/B/B/Boburia/403** through fraud and directed him to surrender the entire land parcel to the interested parties who the Tribunal held were the rightful owners. The Resident Magistrate in Kisii CMCC No. 120 of 2011 (L.T.D) on 13th December 2011 adopted the Tribunal’s award as judgment of the court. This is what triggered the present application by the ex parte applicant.

5. The ex parte applicant’s application was properly brought within the period of six (6) months as required under Order 53 of the Civil Procedure Rules in regard to judicial review applications. The Tribunal’s award in this matter was given on 10th November 2011 and was adopted by the Magistrate’s Court as judgment on 13th December 2011. The instant application for judicial review was filed on 13th February 2012 with leave having been given on 31st January 2012.

6. The jurisdiction of the defunct Tribunals established under the Land Disputes Tribunals Act, Cap 303A was conferred by Section 3(1) of the Act which provided as follows:-

3(1) Subject to this Act, all cases of 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.

7. The ex parte applicant’s application is principally premised on the ground that the Tribunal did not have the jurisdiction to deal with this matter as it fell outside its mandate as conferred by Section 3(1) of the Land Disputes Act. It is the applicant’s contention that the Tribunal lacked jurisdiction to deal with title in respect of registered land and that the Tribunal erred when it ordered the ex parte applicant’s title to be cancelled and the interested parties to be issued with title instead. The applicant argued that under Section 159 of the Registered Land Act, Cap 300 Laws of Kenya (repealed) it was only the High Court that had jurisdiction to deal with issues relating to registered land. Section 159 of the Registered Land Act provided as follows:

159. Civil suits and proceedings relating to the title to or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident

Magistrate’s court, or, where the dispute comes within the provisions of Section, 3(1) of the Land Disputes Tribunals Act in accordance with that Act.

8. It is clear therefore, the Tribunal could only handle disputes that fell under Section 3(1) of the Land Disputes Act and did not have jurisdiction to deal with matters affecting title to land.

9. Both the 1st and 2nd interested parties filed replying affidavits dated 1st March 2012 in response to the applicant’s application. The interested parties make admission that the ex parte applicant was the registered owner of the suit property and that it was after they discovered that he was so registered, that they filed the case before the Kiogoro Land Disputes Tribunal. They averred that the Tribunal had jurisdiction and that their claim was not time barred as alleged by the applicant. The interested parties affidavits go to some considerable detail to deal with what may be the merits of their case if they were to be called upon to give evidence or testify in a trial.

10. Judicial review is not concerned with the merits of the decision but whether there was fair treatment in the decision making process. The Court of Appeal in the case of **Cortec Mining Kenya Ltd –vs- Cabinet Secretary Ministry of Mining & 9 Others [2017] eKLR** considered the scope of judicial review and after reviewing several authorities stated thus:-

28. As for the scope of the remedy, it is also trite that:

“In order to succeed in any application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of the law or its principles are instances of illegality.....irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards....

Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.” See Pastoli –vs- Kabale District Local Government Council and Others [2008] 2 E.A 300.

11. The above passage elaborately sums up the scope of judicial review although the Court of Appeal nevertheless acknowledged the limits of judicial review are not closed and continue to expand to meet the demands of the ever changing conditions and demands.

12. In the instant application for judicial review the issue is whether there is any illegality, irrationality and/or procedural impropriety to vitiate the decision that the Tribunal made. If they acted in error of the law and/or without jurisdiction in making the decision that they made that would constitute illegality sufficient to vitiate the decision.

13. The Tribunal entertained a dispute that related to title to registered land as is evident from their decision when they held that the applicant was registered owner of land parcel **Nyaribari Chache/B/B/Boburia/403** through fraud which led them to direct the title to be surrendered to the interested parties. In effect, the Tribunal directed the cancellation of the applicant’s title. The Tribunal in rendering the decision exceeded their mandate under Section 3(1) of the Land Disputes Tribunals Act. They had no jurisdiction to deal with any dispute relating to title to land and such dispute fell to be dealt with by the High Court in terms of the provisions of Section 159 of the Registered Land Act, Cap 300 Laws of Kenya. The Tribunal’s decision therefore was illegal and was a nullity. The adoption of the decision by

the Magistrates Court could not clothe the decision with any seal of legality. The decision was ineffectual as it was *void abinitio*. Lord Denning famously in the **Privy Council** case of **Macfoy –vs- United Africa Co. Ltd [1961] 3 ALL E. R** stated as follows:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will the judgment collapse if the statement of claim was a nullity....”.

14. As I have held that the Tribunal’s decision was null and void for want of jurisdiction, there was nothing that the Magistrate’s Court could adopt as a judgment. An order quashing the Tribunal’s decision will issue as well as an order prohibiting the implementation of the order and/or decree issued by the Resident Magistrate’s Court.

15. The applicant has further sought in the Notice of Motion orders prohibiting the interested parties from having any dealings with the suit land and for their eviction on the basis that the suit land rightly belongs to him. These are orders which are beyond the scope of judicial review application which only concerns itself in determining whether the impugned decision was properly arrived at. A judicial review application cannot properly be used to determine the legal rights of parties in a dispute as such determination may require the taking of oral evidence which is not permissible in judicial review applications. The orders of injunction and eviction sought by the applicant belong to the province of the regular suits where the hearing is by way of viva voce evidence which allows for parties to be cross examined to establish the veracity and credibility of their evidence. I will therefore decline to grant these orders which fall outside the purview of judicial review.

16. The net result is that I grant an order of judicial review in the nature of certiorari quashing the decision and the proceedings before Kiogoro Land Disputes Tribunal and further grant an order prohibiting the Magistrate’s Court from implementing or executing its order adopting the decision of the Tribunal dated 13th December 2011.

17. Each party to bear their own costs of the application,

Judgment dated, signed and delivered at Kisii this 10th day of November, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyambati for Mokuwa for the applicant

N/A for the 1st, 2nd and 3rd respondents

Ms. Kebungo for Omwenga for the 1st and 2nd interested parties

Ruth court assistant

J. M. MUTUNGI

JUDGE