



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

JR.ELC.6 OF 2017

DAVID KIMANI KAROGO.....APPLICANT

-VERSUS-

THIKA LAND DISPUTES TRIBUNAL.....1st RESPONDENT

FLORENCE GATHONI NDUATI.....2nd RESPONDENT

RESIDENT MAGISTRATE COURT, THIKA.....3rd RESPONDENT

JUDGEMENT

The Applicant herein **David Kimani Karogo** filed an application dated **13th September 2011**, seeking for orders that he be granted leave to apply to court for orders of **certiorari**, **mandamus** and **prohibition** directed at the Land Disputes Tribunal, Thika to quash its proceedings and award in Land Disputes Tribunal claim **No.Thika 5/2006**, and that the grant of the said leave do operate as a stay of Land Disputes Tribunal Thika's decision given on **9TH August 2011**.

The said leave was granted on **5th November 2011** and Applicant was directed to file the substantive application within a period of 15 days from date of the said Ruling.

Subsequently, the Applicant filed the instant **Notice of Motion** application dated **28th November 2011**, brought under Order 53 Rule 3 of the Civil Procedure Rules and Sections 8 and 9 of the Land Reform Act.

The orders sought are:-

- 1) An order for certiorari do issue to remove into this court and quash the proceedings and decision/award of the Thika Lands Disputes Tribunal (1st Respondent) made on 9th August 2011 in Thika Claim No.Thika 5/2006.**
- 2) An order of prohibition do issue to prohibit the Respondents jointly and severally from acting pursuant to or in furtherance of the said decision/award and/or judgement of the court under Section 7(2) of the Land Disputes Tribunal Act or in any other manner whatsoever.**
- 3) Costs of this application be provided for.**

The said application was premised on the grounds stated on the face of the application and the statement of facts and **Verifying Affidavit** of the Applicant **David Kimani Karogo**. These grounds are:-

a) That this matter revolves around a parcel of land namely Land parcel No.Ruiru/Ruiru East Block 2/5174, registered in the name of the Applicant David Kimani Karogo, and which matter is pending reading of the award before the Resident Magistrate's Court, Thika.

b) That Thika Land Disputes Tribunal acted in excess and/or want of jurisdiction in that it sought to arbitrate on matters related to title to land which are vested in the High Court in accordance with Section 159 of the Registered Land Act.

c) That Thika Land Disputes Tribunal sought to rectify/order for the registration of the land in the name of the 2nd Defendant contrary to the provisions of the Registered Lands Act.

d) That the adoption of the decision by the Resident Magistrate Court in Thika will be null and void abinitio.

In his statement of facts, the Applicant averred that he is the registered owner of **LR.No.Ruiru/Ruiru East Block 2/5174**, in which a title deed was issued to him on **13th May 1992**. He also averred that sometimes in the year **2000**, the 2nd Respondent claimed that the said land belonged to her and she therefore referred the matter to the District Officer, Ruiru on **16th March 2000**. Thereafter the Applicant was summoned to appear before the District Officer, Ruiru with all his documents and he did so.

Further that after the District Office Ruiru scrutinized all the documents, he referred the matter for arbitration before the Thika Land Disputes Tribunal. It was his contention that the Tribunal ruled in his favour wherein it declared that the applicant was the legal owner of the suit land. However, the 2nd Respondent was dissatisfied with the decision of the Thika Land Disputes Tribunal, Ruiru Division and she appealed against the said award at the Provincial Land Disputes Appeal Tribunal, Nyeri. He alleged that the Provincial Land Disputes Tribunal ruled in favour of the 2nd Respondent on **9th August 2011**.

He contended that the Thika Land Disputes Tribunal as well as the Provincial Land Disputes Appeal Tribunal in Nyeri, did not have jurisdiction to arbitrate over the suit parcel of land as it had a title deed and the said jurisdiction was only vested in the High Court. It was the Applicant's further contention that the Provincial Land Disputes Appeal Tribunal may at any time forward the said award dated **9th August 2011**, to the Resident Magistrate's Court, Thika to be adopted as the Judgement of the court. That with the said adoption, the Applicant would suffer irreparable loss and damage even though the entire proceedings contravened the law. He urged the Court to quash them. He further contended that the Thika Land Disputes Tribunal, as well as the Provincial Land Disputes Appeal Tribunal acted in excess of their Jurisdiction contrary to Section 3(1) of the Land Disputes Tribunal Act, and therefore the said proceedings should be quashed.

The Attorney General entered Appearance on behalf of the 1st and 3rd Respondents and on **17th July 2012**, **Mr. Kahumba**, appearing for 1st and 3rd Respondents informed the Court that they would be conceding to the instant application.

However, the 2nd Respondent opposed the application and appointed the **Law Firm of Waithira Mwangi & Co. Advocates** to act for her. Subsequently, the 2nd Respondent filed grounds of objection on **24th April 2012**, and stated that:-

i. The application is bad in law.

ii. The application is incurably defective and incompetent for failing to comply with mandatory procedures.

iii. That the application should be dismissed with costs.

Further the 2nd Respondent, **Florence Gathoni Nduati** also filed a **Replying Affidavit** on **11th January 2012** and averred that she is the registered owner of **LR.No.Ruiru/Ruiru East Block 2/5174**, as evident from her title document issued on **26th August 1988**. Further that she is also a shareholder of Nyakinyua Investment Ltd, as is evident from her share certificate **No.05679** issued on **3rd July 1985** and **Ballot No.140** marked as **F3 and F4** respectively. She also averred that on or about the year 2000, she appeared by summons before the Ruiru Land Disputes Tribunal, and during the hearing, the Applicant herein **David Kimani Karogo** claimed he bought the suit land **Ruiru/Ruiru East Block 2/5174** from one **Hannah Wanjiru**. That upon perusal of the document, it was noted that **Hannah Wanjiru**, was the registered owner of land parcel **No.Ruiru/Ruiru East Block 2/5173 and not Ruiru/Ruiru East Block 2/5174**. Therefore the Tribunal wrote to the Land Registrar, Thika asking him to nullify title deed issued to the Applicant as he was not in the right parcel of land that was sold to him. She alleged that the Applicant has intentions of defrauding him of his rightful property and she urged the Court to uphold the Judgement of the Provincial Land Disputes Appeal Tribunal. She further urged the Court to dismiss the Applicant's instant Notice of Motion.

The Court thereafter directed that the said **Notice of Motion** dated **28th November 2011**, be canvassed by way of written submissions. In response thereto, the **Law Firm** of **F. N. Kimani & Associates** for the Applicant filed the written submissions on **7th June 2012**, and submitted that the **Thika Land Disputes Tribunal**, acted in excess of its jurisdiction as it sought to arbitrate on matters related to title to land, which power is vested in the High Court and now in the Environment and Land Court as provided by Article 162(2)(b) of the Constitution 2010 and Section 13 of the Environment and Land Court Act. The Applicant relied on two decided cases: **Mbogo Mwachhi...Vs...John Chege Mbogo, Civil Appeal No.531 of 2000**, where the Court held that:-

“Land Disputes Tribunals do not have jurisdiction to adjudicate on matters involving registered land and they cannot award cancellation or rectification of a title.”

Further, he relied on the case of **James Alukoye Were...Vs...Lurambi Division Land Disputes Tribunal, Misc. Civil Appl. No.165 of 2005**, where the Court too held that:-

“The Land Disputes Tribunal has no powers to arbitrate on matters involving title to land or give such order to grant specific performance to rectify the register”.

The Applicant therefore urged the court to allow the instant application.

The 2nd Respondent through the **Law Firm** of **Waithira Mwangi & Co. Advocates**, filed her submissions on **9th November 2015**, and submitted that the entire application as filed is bad in law as the orders of judicial review are special orders and the law is specific how such applications are to be commenced. That in particular, they must be instituted in the name of the State as the Applicant and the State cannot be the Respondent in an application for prerogative orders. It was the 2nd Respondent's submission that the application herein has breached Order 53 of the Civil procedure Rules.

The Court has now carefully considered the instant **Notice of Motion** application and the annexures thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and the Court makes the following findings;-

There is no doubt that the Applicant herein **David Kimani Karogo** and the 2nd Defendant, **Florence Gathoni Nduati** are both holders of title deeds in respect of **Ruiru/Ruiru East Block 2/5174**. The title deed for **Florence Gathoni Nduati**, was issued on **26th August 1988**, and the approximate area is **0.4136 Hectares**. The title deed in respect of **David Kimani Karogo**, the Applicant herein was issued on **13th May 1992**, and the approximate area is **0.4042 Hectares**. Therefore, there are two competing titles and the dispute is who is the rightful owner of the suit property, **Ruiru/Ruiru East Block 2/5174**, wherein

both the Applicant and 2nd Respondent hold certificate of titles over the same property.

There is also no doubt that this dispute was first arbitrated by the ***Thika Land Disputes Tribunal- Ruiru Division***, wherein as per the Applicant's statement, the Tribunal ruled in favor of the Applicant. There is also no doubt that the 2nd Respondent appealed before the ***Provincial Land Disputes Appeal Tribunal in Nyeri*** and as per the Appeals Tribunal's findings dated ***9th August 2011***, the verdict was in favour of the 2nd Respondent wherein the Appeals Tribunal held that ***Florence Gathoni Nduati***, was the legal owner of ***Plot No.Ruiru/Ruiru East Block 2/5174***, the suit land.

Thereafter the Applicant filed this Judicial Review application wherein he alleged that both the District and Provincial Land Disputes Appeal Tribunals did not have jurisdiction to handle the dispute in issue and so this Court should issue an order of *certiorari* to quash the said proceedings and prohibition to bar any further orders emanating from the impugned proceedings.

The issues for determination are:-

- a) ***Whether the application herein is incurably defective and incompetent for failing to comply with mandatory provisions of Order 53 of the Civil procedure Rules.***
- b) ***Whether the Applicant has met the grounds for grant of Judicial Review order of certiorari.***
- c) ***If so, whether the application dated 28th November 2011 is merited.***
- d) ***Who is entitled to costs of these proceedings.***

Courts have variously set out the purpose of judicial Review. In the case of ***Municipal Council of Mombasa..Vs..Republic, Umoja Consultant Ltd, Nairobi Civil Appeal No.185 of 2007 (2002) eKLR***, the Court held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an Appeal Court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.

Further, in the case of ***Pastoli...Vs...Kabale District Local Government Canal & Others 2008 2EA, Justice Kasule*** elaborated as follows:-

“In order to succeed in an 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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a 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 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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidwi...Vs...Secretary of State for the Housing Department (1990) AC 876”.

In the case of ***Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Civil Appeal No.266 of 1996***, the Court elaborated what Judicial Review orders entail. The Court held as follows:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128..”

Having now established the applicable law in the cases of Judicial Review, the Court will consider the available evidence and facts in determining whether the Applicant is deserving of the orders sought.

(a) Whether the application herein is incurably defective and incompetent for failing to comply with the mandatory procedures.

The 2nd Respondent submitted that the Judicial Review being a special application, the law is specific on how such an application is to be commenced. She submitted that such an application is to be instituted in the name of the State as the Applicant but not the Respondent as the case herein. Therefore, the 2nd Respondent submitted that the procedure used by the Applicant breached Order 53 of the Civil Procedure Rules.

The Court has perused the provisions of Order 53 and has not seen any specific provisions on the procedure or manner of how an application for Judicial Review should be framed. Specifically Order 53 Rule 3(1) provides that an application for orders of ***mandamus, prohibition or certiorari***, shall be made by way of ***Notice of Motion*** to the High Court and in our case to the Environment and Land Court within ***21 days*** after leave has been granted to file such an application. The said provision of law does not categorically state that the Applicant of such order shall be the State and that the State cannot be named as a Respondent. Maybe such a procedure is adopted through practice but is not clearly provided as a mandatory provision of Order 53.

The Applicant has filed a ***Notice of Motion*** application as provided by Order 53 Rule 3(1). The orders sought by him are very clear and the substance of the said application is well understood. Order 51 Rule 10(2) provides that:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

Even if the Applicant herein named the State as a Respondent and not as an Applicant, that is want of form which basically does not affect the substance of the application. What the Applicant is seeking is very clear from the prayers stated in the instant application and the fact that the description of the State as a Respondent rather than an Applicant has not affected the substance of this application.

Further, this Court is behoven by Article 159 (2)(d) of the Constitution to administer justice without undue regard to procedural technicalities.

For the above reasons, the Court finds that the **application herein is not incurably defective or incompetent** for failing to comply with mandatory provisions of law.

(b) Whether the Applicant has met the grounds for grant of Judicial Review Order of Certiorari and/or prohibition.

The Applicant submitted that both the **Thika Land Disputes Tribunal** and the **Provincial Land Disputes Appeal Tribunal** in Nyeri did not have jurisdiction to arbitrate the dispute herein as it related to title to land and the issue at hand is about competing titles, which jurisdiction was vested at the High Court and/or Environment and Land Court.

The Court has considered the provisions of Section 3(1) of the Land Disputes Tribunal Act, No.18 of 1990 (now repealed) which gave the jurisdiction to the **Land Disputes Tribunals** in all cases of Civil nature involving disputes 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.**
- c) **Trespass to land.**

The above Section of the law does not vest any jurisdiction to the tribunal to determine matters under the **Registered Land Act, Cap 300** (now repealed) and specifically registered land. In this matter, both the **Thika Land Disputes Tribunal** and the **Provincial Land Disputes Appeal Tribunal**, determined this matter which dealt with competing titles registered under the Registered Land Act, Cap 300 (now repealed).

Did the said Tribunals therefore exceed its jurisdiction? This Court finds and holds that the said Tribunal exceeded its jurisdiction. In the case of **Kenya National Examination Council...Vs...Republic (Ex parte Geoffrey Gathenji & Another (supra))**, the Court held that:-

“the order of certiorari can quash a decision already made as an order of certiorari will issue if the decision is made without or in excess of jurisdiction or when the rules of justice are not complied with...”

It is evident that both Tribunals acted without jurisdiction and/or exceeded their jurisdiction when they arbitrated matters registered under Cap 300 and which dispute was over competing titles. Therefore the said tribunals acted *ultra vires* or in excess of their jurisdiction.

Having now carefully considered the instant **Notice of Motion**, the Court finds that the **Applicant has established the threshold for grant of Judicial Review orders.**

(c) If so, whether the application dated 28th November 2011, is merited.

The Applicant has sought for Judicial Review orders of *certiorari* and **prohibition**. The Applicant has urged the Court to quash the proceedings of both tribunals and prohibit issuance of any further orders emanating from the said proceedings. The Court has indeed found that both the **Thika Land Disputes Tribunal** and the **Provincial Land Disputes Appeal Tribunal** at Nyeri acted in excess of their jurisdiction and therefore the said decision was ***ultra vires, null and void***. A decision issued by a public body in excess of its jurisdiction is ***null and void*** and such ground is enough to warrant the issuance of an order of *certiorari* by the court to quash such a decision. In the case of **Republic...Vs...Kenya Revenue Authority, Ex parte Yaya Towers Ltd (2008) eKLR**, the Court held that:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to

ensure that the individual is given fair treatment by the authority to which he has been subjected.....”

The Court will further rely on the case of **Republic...Vs...Kajiado North District Ngong Land Disputes Tribunal, Senior Resident Magistrate Kadjiado**, where the Court held that:-

“If the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void”. Land Disputes Tribunal had no jurisdiction to interfere with title to a registered land”.

And further in the case of **Gibson Semele Mato...Vs...Eastern Province Land Dispute Committee & Another, Nairobi Misc. CA 331 of 2003**, where the Court held that:-

“Makueni District Land Tribunal Appeals Committee had no jurisdiction to determine question of ownership and title to land registered under the Registered Land Act and that in doing so, the Tribunal acted ultra vires and the entire proceedings became a nullity.”

Therefore having found that both tribunals herein acted in excess of their jurisdiction and having found that the decision emanating from the said proceedings is **null and void**, the **Court finds that the Applicant herein is deserving of the orders sought.**

(d) Who is then entitled to costs of these proceedings?

Section 27 of the Civil Procedure Act provides that costs are granted at the discretion of the court. Further, ordinarily costs do follow the event. These proceedings emanated from the decisions of the two tribunals which had no jurisdiction to arbitrate the matter. The 1st and 3rd Respondents did concede to the application. The 2nd Respondent was a victim of the two tribunals, just like the Applicant herein. She is not the one who decided that this matter should be arbitrated by the two tribunals. Though the 2nd Respondent opposed this application and the Applicant is the successful litigant, she cannot be penalized with costs as the decision of having the matter arbitrated by the two tribunals was out of her control.

The Applicant did not sue the Attorney General and it would be difficult for this Court to order that the costs be met by the Attorney General on behalf of the 1st and 3rd Respondents. For that reason, **the Court will therefore order that each party herein to meets its own costs.**

The Court therefore finds and holds that no party is entitled to costs of these proceedings as each party is to bear its own costs.

Having now carefully considered the available evidence and the written submissions, the **Court finds that the Applicant herein is deserving of the orders sought** in the **Notice of Motion** application dated **28th November 2011**, and consequently, the **Court enters Judgement in favour of the Applicant as prayed in the said Notice of Motion application in terms of prayers No.1 and 2** with no orders as to costs as **each party is to bear its own costs.**

It is so ordered.

Dated, Signed and Delivered at Thika this **8th** of **December 2017**.

L. GACHERU

JUDGE

In the presence of

M/S Senayati holding brief for Mr. Kimani for Applicant

No appearance for 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

Lucy- Court clerk.

L. GACHERU

JUDGE

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

8/12/2017