



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT NAKURU**  
**JUDICIAL REVIEW NO. 102 OF 2011**  
**REPUBLIC.....APPLICANT**  
**VERSUS**  
**LAND DISPUTES TRIBUNAL,**  
**KIPIPIRI DIVISION.....1<sup>ST</sup> RESPONDENT**  
**NYAHURURU SENIOR PRINCIPAL**  
**MAGISTRATE'S COURT.....2<sup>ND</sup> RESPONDENT**

**EX -PARTE**

**SAMUEL GACHAU**

**JUDGMENT**

***(Judicial Review inter alia for orders of certiorari to quash award of Land Disputes Tribunal; award having been filed and adopted as judgment and decree issued; whether such award once adopted may be quashed by an order of certiorari; held that fact that a decree is issued does not obliterate the award and award may be quashed; any decree or subsequent orders must also fall with the quashing of the award; claimant having proceeded to obtain title upon the award; such title must also fall with the award; parties must be brought back to the position that they were before the award; title quashed and ordered to revert back to the ex-parte applicant)***

1. This is a judicial review motion filed on 14 October 2011. As filed, it seeks the following orders (paraphrased):-

- i. Prohibition prohibiting the 2<sup>nd</sup> respondent (the Nyahururu Magistrate's Court) from adopting the 1<sup>st</sup> respondent's (Land Disputes Tribunal, Kipipiri Division), decision dated 3 June 2011 contained in Nyahururu Misc. Land Case No. 13 of 2011.
- ii. Certiorari to quash the 1<sup>st</sup> respondent's decision dated 3 June 2011 contained in Kipipiri Land Disputes Tribunal Case No. 5 of 2011 (James Mwaniki Njuguna vs Samuel Gachau Maina).

2. There are several grounds listed for seeking the above orders. Inter alia, it is averred that the ex-parte applicant was never served with the statement of claim contrary to the mandatory provisions of Section 3(5) of the Land Disputes Tribunal Act and no summonses or any Hearing Notices were served upon him;

that the rules of Natural Justice were not adhered to; and that the Kipipiri Land Disputes Tribunal did not have jurisdiction to handle the matter.

3. I have looked at the proceedings that were before the Tribunal. The claimant was James Mwaniki Njuguna who is the 2nd interested party in the case herein. He accused the ex-parte applicant of having sold certain land to him and failing to transfer the same. The land parcels in issue before the Tribunal were Nyandarua/Malewa/572 and 573. The claimant averred that the land sold to him measured 50 acres in total and the purchase price agreed was Kshs. 55,000/- per acre. He averred that a sale agreement was made on 12 May 1995. He stated that the total sum payable was Kshs. 2, 783,000/= of which Kshs. 1, 983,000/= was to be paid in cash and the balance was to be paid in form of transfer of two plots namely L.R Nos. 10901/201 and 202 valued at Kshs. 800,000/=. The above is in a nutshell, for his evidence before the Tribunal went further to state some complications arising from a bank loan that the ex-parte applicant had taken. At the Tribunal the claimant asked the Tribunal to grant him land equivalent of what he had paid, which according to him, entitled him to 22.5 acres. The elders at the Tribunal found that there was a land sale "deal" and that the claimant had paid a total of Kshs. 1, 250,000/=. They also found that consent of the Land Control Board had been given. They were of the view that the ex-parte applicant had breached the sale contract. They eventually ruled as follows :-

- i. *The title deeds to plots No. Nyandarua/Malewa/573 be dissolved and transferred absolutely to James Mwaniki Njuguna which is 16 acres.*
- ii. *The title deed to plot No. Nyandarua/Malewa/572 be subdivided into two portions and 6.4 acres be transferred to the purchaser James Mwaniki Njuguna.*
- iii. *That James Mwaniki Njuguna be given total acreage of 22.4 acres from plots Nyandarua/Malewa/572 and 573 since he had paid an amount of money equivalent to 22.4 acres.*

4. The above award was rendered on 3 June 2011. It was adopted by the Nyahururu Magistrate's Court on 16 August 2011 in Nyahururu Misc. Land Case No. 13 of 2011, and a decree issued on the same day.

5. On 26 September 2011, the ex-parte applicant filed the motion for leave to commence judicial review proceedings. On the same day, leave was granted to commence the said proceedings and it was ordered that the leave granted do operate as a stay of proceedings of Misc. Land Case No. 13 of 2011.

6. On 8 May 2012, the application was amended to include the Land Registrar Nyandarua District as 3<sup>rd</sup> respondent and Grace Wanjiku Njau as interested party. The ex-parte applicant also sought two more prayers as follows :-

(a) *The Kenya Gazette Notice No. 13176 dated 21 October 2011 issued by the Land Registrar Nyandarua be revoked and titles issued in respect of such gazettelement be nullified.*

(b) *The title deed obtained while the suit was pending by interested parties in respect of L.R No. Nyandarua/Malewa/573 be revoked.*

7. It would appear that on 21 October 2011, the Land Registrar, Nyandarua did place a notice in the Kenya Gazette to the effect that he will proceed to issue a new land certificate in respect of the land parcel Nyandarua/Malewa/573 as the registered proprietor had failed to surrender it for purposes of having the same transferred to James Mwaniki Njuguna pursuant to the order of the Principal Magistrate Nyahururu in Civil Case No. 13 of 2011. Following this notice, the land parcel Nyandarua/Malewa/573 was thereafter transferred to James Mwaniki Njuguna. Mr. Njuguna then entered into a sale agreement with Grace Wanjiku Njau.

8. In her replying affidavit, Grace Wanjiku Njau (1st interested party) has deposed that she purchased the land parcel Nyandarua/Malewa/573 from the registered proprietor James Mwaniki Njuguna. She met the said Mr. Njuguna who gave her the history of the land. She has deposed that he informed her that the matter had been before the Land Disputes Tribunal which ruled in his (James' favour). She was given a copy of the award and the decree of the Principal Magistrates Court Nyahururu adopting the award. She deposed that Mr. Njuguna informed her that he thereafter pursued the registration of the property and the

transfer was signed by the Executive Officer of the Court. A title deed was then issued to Mr. Njuguna. It is then that she entered into a sale agreement with Mr. Njuguna and the land sold to her at a consideration of Kshs. 3.5 Million. She has sought that she be treated as an innocent purchaser for value. It is her view that she should get title to what she has purchased.

9. It is not very clear to me how James Mwaniki Njuguna came into these proceedings, but it appears as if he has been treated as the 2<sup>nd</sup> interested party, and he did file a replying affidavit. He deposed that the suit herein is incompetent for the reason that the award of the Tribunal has already been adopted as a judgment and decree; that the resultant decree was executed and he became registered as proprietor of the land parcel Nyandarua/Malewa/573 on 30 November 2011; that the court order issued on 26 September 2011 only stayed the proceedings and not execution of the decree and in any event was only registered against the title on 5 December 2011. It is averred that the orders sought cannot be granted as the execution process is complete and the applicant's remedy lies elsewhere. It is contended that this court cannot revoke title through the instant proceedings.

10. In his submissions, Mr. Wanyoike for the ex-parte applicant, inter alia submitted that the Tribunal had no jurisdiction in the matter and that it acted ultra vires. He also submitted that there were procedural flaws in the manner in which the Tribunal conducted its proceedings and that the ex-parte applicant was not given a fair hearing. He was of the view that the award was null and void *ab initio*. He further submitted that the Gazette Notice by the Land Registrar was illegal as there was already a stay order issued on 26 September 2011 by Justice Ouko (as he then was). He submitted that in essence the Land Registrar is in contempt and his actions illegal. He asked that the award and decree be quashed alongside the Gazette Notice and the title of the 2<sup>nd</sup> interested party. He relied on various authorities to buttress his submissions.

11. On the part of the respondents, represented by the State Law Office, it was submitted that the orders of prohibition and certiorari sought are in vain. It was submitted that the order of prohibition cannot be granted as the award has already been adopted by the Nyahuruu Magistrates Court. It was also submitted that the order of certiorari cannot issue against the award as it has already been adopted by the Magistrates Court. I was directed at the decision of ***R vs Chairman Kajiado Central Land Disputes Tribunal & 2 Others ex parte Timaiyo Kirtar (2012) eKLR*** where it was held that once an award has been adopted the decision ceases to have a life of its own and cannot be quashed.

12. On the part of the 1<sup>st</sup> interested party, Mr. Njengo submitted that no appeal was filed against the award of the Tribunal. Counsel submitted that both the Tribunal and the Magistrates Court acted within their powers. I was referred to the case of ***Wamwea vs Catholic Diocese of Murang'a Registered Trustee (2003) KLR 389*** where Khamoni J, held that once adopted, the decision of the Tribunal becomes a decision of the Magistrate's Court and ceases to exist as a separate entity challengeable alone. He submitted that the prayer of prohibition has been overtaken by events. On certiorari, it was submitted that one needs to file an application for certiorari within 6 months of the decision. It was argued that the decision was rendered on 3 June 2011 and the suit was filed on 18 August 2015 about 3 years thereafter. ( I do not know where this submission has come from for it is clear to me that the motion was filed on 14 October 2011). He submitted that under Section 39 of the Registered Land Act, (now repealed), the title of the 1<sup>st</sup> interested party is protected.

13. On the part of the 2<sup>nd</sup> interested party, Mr. Gakuhi Chege also submitted that once adopted, the award ceases to have a life of its own and merges with the court judgment to form the decree. He submitted that it cannot be challenged separately from the court decree. It was submitted that by the time leave to commence judicial review proceedings was issued, the award had already been adopted and a decree had been issued, and therefore the order of prohibition cannot be granted. It was also submitted that certiorari cannot issue since the decree has been fully executed. Counsel submitted that the additional orders cannot be granted as they were not the subject matter of the application for leave. He submitted that the addition of the Registrar, Nyandarua District as 3<sup>rd</sup> respondent was done without leave or amendment. He further argued that the grant of stay of proceedings was not similar to stay of execution.

14. I have considered the matter. I think I first need to sort out the sequence of events of which there is no contention. The award of the Tribunal was delivered on 3 June 2011. That award was on 16 August 2011 adopted by the Senior Resident Magistrate, Nyahururu, and a decree issued on the same day. On 26 September 2011, leave to commence judicial review proceedings for orders of prohibition and certiorari were granted and it was ordered that the grant of leave do operate as a stay of proceedings of the case before the Magistrate's Court. On 7 October 2011, the Executive Officer of Nyahururu Court, executed the transfer forms transferring the land parcel Nyandarua/Malewa/573 to James Mwaniki Njuguna, the 2<sup>nd</sup> interested party. On 21 October 2011, the Land Registrar vide Gazette Notice No. 13176 did give intention to issue a new certificate of title since the ex-parte applicant had not surrendered the original one. He gave a notice of 30 days. On 30 November 2011, James Mwaniki Njuguna was registered as proprietor of the land parcel Nyandarua/Malewa/573. On 5 November 2011, a restriction was entered in the title that there be no further dealings until the High Court case (I think in reference to this case) is determined. On 3 January 2012, James Mwaniki Njuguna entered into an agreement with the 1<sup>st</sup> interested party to purchase the land parcel No. 573. The transfer has not been effected yet, probably because of the restriction in the title. On 8 May 2012, the ex-parte applicant amended his Statement and added the prayers to quash the Gazette Notice No. 13176 and the title of the 2<sup>nd</sup> interested party.

15. Having sorted out the sequence of events, I want to delve into the question whether the Land Disputes Tribunal had jurisdiction to deal with this matter. The jurisdiction of the Land Disputes Tribunal was contained in the Land Disputes Tribunal Act, Cap 303A, Laws of Kenya (repealed by the Environment and Land Court Act, 2011, which came into force on 27 August 2011). Section 3 (3) thereof provided as follows :-

*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 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.*

16. It will be noted from the above that the jurisdiction of the Land Disputes Tribunals (LDTs) was quite limited. They could only hear disputes related to the division of land, determination of boundaries to land, claims to occupy or work land, and trespass to land. The dispute that was presented in the matter herein did not fall within the boundaries above. The matter was actually a claim for land based on agreement and essentially what the claimant wanted was almost similar to a decree on specific performance. The LDTs did not have jurisdiction to adjudicate on matters related to land sale agreements or specific performance of agreements. I have no doubt in my mind that the dispute was outside the jurisdiction of the Kipipiri Land Dispute Tribunal and the proceedings and award are therefore *ultra vires* Section 3 of the Land Disputes Tribunal Act.

17. The first prayer in the Substantive Motion filed on 14 October 2011 is for an order of prohibition to stop the adoption of the award as a judgment of the court. However, by the time leave was being granted to commence the motion, the award had already been adopted by the Nyahururu Magistrate's Court. It follows that one cannot issue an order of Prohibition, to prohibit that which has already been done. The prayer of prohibition was filed after the event and cannot be granted.

18. The second prayer in the motion is to quash the award of the Tribunal by an order of Certiorari. It was argued by the respondents and interested parties, that the award cannot be quashed as it has already been adopted by the Magistrate's Court as a decree. I was referred to the decision in the case of **R vs Chairman Kajiado Central Land Tribunal & 2 Others ex parte Timaiyo Kirtari** . In the said suit, the ex-parte applicant sought to quash the award of the Kajiado Land Disputes Tribunal. The court held the award to be out of jurisdiction but declined to grant the orders sought. The refusal was because the Kajiado Senior Resident Magistrates Court was not a party to the proceedings and the court could not therefore quash the decree of the court. It was also held in the matter that once adopted, the award cannot be quashed.

19. On my part, and with the utmost respect, I disagree. In as much as the award is adopted by the Magistrate's Court, it does not cease to exist. It actually does exist alongside the decree. It is only that the award cannot be enforced until it becomes a decree. But I do not think that the fact that there exists a decree now means that the award does not exist. The award is not obliterated or killed by the decree. It exists just as the decree exists. Indeed the decree draws its life from the award. If there is no award there cannot be a decree. If the award is null and void, so too the decree. The fact that there is a decree does not mean that there is no award. That to me is the interpretation I would give to the provisions of Section 7 of the Land Disputes Tribunal Act, which was drawn as follows :-

*7.(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.*

*(2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.*

20. What the above provisions display, is that once judgment is entered, "*a decree shall issue*". The provisions do not say that "*the award shall cease to exist*". In essence what I am saying is that the fact that a decree has been issued does not mean that the award is dead or ceases to exist. If we take it that it ceases to exist, then it means you cannot even make reference to it for any purpose because it is no longer there; it has ceased to exist; it is dead. If we say that the award no longer has life, because of the decree, what then should happen if the decree as issued does not tally with the award? Do we now say that we cannot amend the decree because the award no longer has life, it has ceased to exist? Does it also mean that once a decree is issued that is the end of the matter, such that if the award was made without jurisdiction, the court's hands are tied simply because a decree has issued? I do not think so. This would in my view also fly against the public policy of having awards made outside jurisdiction not be allowed to do the rounds as they are prone to cause injustice.

21. In essence, my holding is that there is no bar to a person coming to court to quash an award even where a decree has issued. If the court quashes the award, it means that the decree, which draws its life from the award, will also die. It will either die a natural death or the court will issue an order so that there is no doubt, that it is unenforceable for the reason that the award, which gave it life, no longer exists, or simply say that the award is also quashed. A person can also come to court to quash the decree and the only reason the decree can be quashed is if the award was irregularly issued, for example, if made without jurisdiction. Reference in such instance must be made to the award. If the court is minded to quash the decree, then the award will also die as it can never be enforced.

22. Following my discourse above, I do hold that the award in this instance, though already adopted as a decree, may be quashed for the reason that it was made without jurisdiction. I hereby bring that award before this court and proceed to quash it for the core reason that it was made outside jurisdiction. With the quashing of the award, no decree can issue. The decree issued must be extinguished. It is also quashed.

23. Now, it is not just the decree which is extinguished. All other processes, procedures and subsequent orders which purported to follow the award must also be obliterated; for why would you quash the award and yet still allow all other things done in pursuance of the award to remain? You must bring back the parties to the position that they were in before the award.

24. In our instance, the claimant before the Tribunal proceeded to obtain title on the strength of the award and subsequent decree. These must go, even if no prayer for the same had been made. It is an automatic consequence of having quashed the award. But I am unable to hold myself back and wish to say one or two things in the manner in which the title was obtained.

25. I note that the title was obtained after Ouko J had issued an order to stay further proceedings of the Magistrate's Court. It was argued that what was stayed was only further proceedings and there was no stay of execution. To me, that is an attempt at splitting hairs. The process of execution is a process of the court. It would of course have been more elegant if the ex-parte applicant had sought a stay of execution.

But to me that is at most a procedural irregularity which in the circumstances of this case, is curable under Article 159 of the Constitution, which provides that justice needs to be done without undue regard to procedural technicalities. It is clear what the ex-parte applicant wanted. He wanted all processes stopped until his suit is heard. I do not think it can be argued that the court that issued the stay of proceedings order would have meant it any differently. The action of the Executive Officer in signing the transfer forms to the 2<sup>nd</sup> interested party was in essence an action in execution of the decree which action was a proceeding. It flouted the stay orders issued on 26 September 2011. Should this court be a bystander when it is clear that the 2<sup>nd</sup> interested party was trying to steal a march on the ex-parte applicant ? Clearly not.

26. The title of the 2<sup>nd</sup> interested party was issued irregularly and must be quashed. I draw strength from the provisions of Section 26 of the Land Registration Act, 2012, which provides inter alia that a title that has been issued irregularly or unprocedurally may be cancelled. Neither is there any protection offered to the 1<sup>st</sup> interested party who intends to have the property transferred to her. She cannot get title for the simple reason that the 2<sup>nd</sup> interested party has no good title to give.

27. Counsel for the respondent and interested parties argued that the orders to cancel the Gazette Notice and title cannot be obtained because the prayers were not among those stated when the application for leave was allowed. That may be so, but it is irrelevant whether or not the ex-parte applicant had specifically applied for these orders. The fact that the award has been quashed, means, as I have stated above, that all subsequent orders and processes must fall by the way side. It was not therefore even necessary for the ex-parte applicant to specifically ask for these orders although I cannot fault him for seeking the same. The argument that no leave was sought before requesting these orders therefore holds no water.

28. As I have said, once the award is quashed, the parties must be brought back to the position that they were before the said award. That is exactly what I am going to do. The ex-parte applicant has succeeded and I will award him costs as against the respondent and 2<sup>nd</sup> interested party.

29. I now make the following orders :-

- i. *I hereby quash by an order of Certiorari the award of the Kipipiri Land Disputes Tribunal which was made on 3 June 2011 in Land Dispute Tribunal Case NO. 5 of 2011 and all subsequent orders including, but not limited to, the decree issued on 16 August 2016 , the Gazette Notice No. 13176 of 21 October 2011, and the title issued to James Mwaniki Njuguna in respect of the land parcel Nyandarua/Malewa/573.*
- ii. *I order the Land Registrar, Nyandarua, to have the title in respect of the land parcel Nyandarua/Malewa/573 revert back to Samuel Gachau Maina as proprietor.*
- iii. *The ex-parte applicant shall have costs of this suit jointly and/or severally as against the respondent and John Mwaniki Njuguna.*

30. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 10<sup>th</sup> day of May, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of: -**

Mr. Wanyoike for ex-parte applicant.

Mr. Gakuhi Chege for 2<sup>nd</sup> interested party and holding brief for Mr Njengo for 1<sup>st</sup> interested party .

No Appearance for State Law Office for respondent

Court Assistant: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**