



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**MISC. CIVIL APPLICATION NO. 46 OF 2011**

**IN THE MATTER OF APPLICATION BY JACOB GITIGORI FOR JUDICIAL REVIEW  
(CERTIORARI AND PROHIBITION)**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**AND**

**IN THE MATTER OF KURIA WEST DISTRICT (KEHANCHA DIVISION) LAND DISPUTES  
TRIBUNAL**

**AND**

**IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KEHANCHA**

**AND**

**IN THE MATTER OF KEHANCHA SEM'S LDT NO. 10 OF 2010**

**AND**

**IN THE MATTER OF KURIA WEST DISTRICT (KEHANCHA DIVISION) LAND DISPUTES  
TRIBUNAL CASE NO. 8 OF 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**KURIA WEST DISTRICT (KEHANCHA DIVISION)**

**LAND DISPUTES TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**THE SRM'S COURT AT KEHANCHA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

AND

JACOB GITIGORI .....EXPARTE

**JUDGMENT**

1. The applicant, Jacob Gitigori (hereinafter referred to only as “the applicant”) obtained leave of this court on 13<sup>th</sup> May 2011 to bring the application herein that was filed on 31<sup>st</sup> May 2011. The applicant sought the following reliefs:

1. **An order of certiorari to remove unto the high court for the purposes of quashing the proceedings, decision and/or award of the Kuria West District (Kehancha Division) Land Disputes Tribunal. Tribunal Case No. 8 of 2010 undated and the decision of the Senior Resident Magistrate’s court at Kehancha vide Kehancha Senior Resident Magistrate’s Land Dispute Tribunal No. 10 of 2010 dated 10<sup>th</sup> February, 2011 adopting the proceeding and decision on the said Tribunal concerning Land parcel Number LR No. Bukira/Buhirimono/341 (hereinafter also known as “the suit land”).**
2. **An order of prohibition to issue prohibiting the Kuria West District (Kehancha Division) Land Disputes Tribunal or such other tribunal from hearing, deliberating to the ownership and/or purported sale or agreement of suit land and an order of prohibition to issue prohibiting the Kehancha Senior Resident Magistrate Court at Kehancha vide Kehancha Senior Residents Magistrate’s Land Disputes Tribunal No. 10 of 2010 from hearing deliberating, enforcing and executing its decision or judgment dated the 10<sup>th</sup> February 2011 in respect of the suit land.**
3. **THAT the costs of this application be provided for by the interested party.**
4. **Any other further orders as the court may deem fit to grant**

2. The application was premised on the grounds set out on the face thereof, the statement of facts dated 4<sup>th</sup> May 2011 and a verifying affidavit of the applicant sworn on the same date. The said statement and affidavit were filed pursuant to provisions of Order 53 Rule 1 (2) of the Civil Procedure Rules together with the application for leave. In summary, the application was brought on the following grounds:-

1. **The 1<sup>st</sup> respondent acted ultra vires its powers by adjudicating on and awarding compensation notwithstanding the express mandate as provided for in section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990.**
2. **The 2<sup>nd</sup> respondent erred by giving credence to the unlawful acts of the 1<sup>st</sup> respondent.**
3. **That the 1<sup>st</sup> and 2<sup>nd</sup> respondent erred in dealing with the suit land notwithstanding that its registered owner was deceased and was not party to the tribunal case.**

3. The circumstances that gave rise to the application as can be deduced from the facts contained in the applicants verifying affidavit together with the annexures thereto and the applicants statement of facts are briefly that sometime in 2010 the applicant filed a dispute with the 1<sup>st</sup> respondent against the interested party herein, claiming right to work on the suit land. The 1<sup>st</sup> respondent heard the dispute vide Kuria West District (Kehancha Division) Land Disputes Tribunal Case No. 8 of 2010 and made an award in the following terms:-

- i. **That this land parcel Bukira/Buhirimono/341 to remain under the registered ownership of Noreri Chacha.**
- ii. **That the objector Omari Adan Marwa to be fully compensated of his properties he used to bail out, this land parcel B/B/341 from the previous buyer. This compensation should be made by the claimant.**
- iii. **Thereafter the land reverts to the hands of the family of Omagori.**

- iv. **In case it will be established that Noreri Chacha is dead, the family of (Omagori) would apply in the normal procedure for the joint succession of this land parcel Bukira/Buhirimo/341, according to laws of Kenya.**

The 2<sup>nd</sup> respondent adopted the award as the judgment of the court on 10<sup>th</sup> February 2011 and issued a decree in terms thereof on 11<sup>th</sup> February 2011.

4. The applicant in the present application contends the 1<sup>st</sup> respondent's verdict was contrary to the provisions of Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 as the said award purported to order the applicant to compensate the interested party for the resources he allegedly used to bail out the suit land. The applicant avers that the 1<sup>st</sup> respondent acted ultra vires its powers and mandate as conferred under the Act by adjudicating over compensation, which it had no power to determine and/or award. The applicant further contended the 1<sup>st</sup> respondent acted ultra vires its powers by dealing with ownership of the suit land whose owner, one Noreri Chacha was deceased as the matter squarely lay within the province of the succession court. Additionally the applicant further averred that the 2<sup>nd</sup> respondent misdirected itself by entering judgment on a verdict that was void abinitio.
5. The application was opposed by the interested party who swore a replying affidavit dated 30<sup>th</sup> September 2011. The interested party averred that the applicant's application lacked merit stating that it was the applicant who lodged the complaint with the land disputes tribunal and he thus acceded to the jurisdiction of the tribunal and he therefore cannot turn around to claim the tribunal lacked jurisdiction to deal with the matter. The interested party averred that the complaint before the tribunal related to occupation and trespass to land which the tribunal had mandate and jurisdiction to handle. He contended the tribunal acted within its powers and jurisdiction to make the award that they did. He argued the issue of compensation was incidental to issues they were considering and hence the tribunal was in order to make an award respecting compensation.

### **Analysis and determination**

6. The 1<sup>st</sup> respondent was established under the Land Disputes Tribunal Act No. 18 of 1990 (now repealed) ("the Act"). The jurisdiction of the 1<sup>st</sup> respondent was spelt out in the Act and hence the 1<sup>st</sup> respondent could not exercise or assume jurisdiction other than that conferred by the Act. As submitted by the applicant, Section 3 (1) of the Act sets out the disputes and/or claims over which the 1<sup>st</sup> respondent had jurisdiction to handle 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 of land.**

#### **Shall be heard and determined by a Tribunal established under Section 4.**

7. As is evident from the award rendered by the 1<sup>st</sup> respondent, the tribunal made an award that included the payment of compensation to the interested party by the applicant by directing that:-

**"The objector Omari Adan Marwa to be fully compensated of his properties he used to bail out the suit land from the previous buyer. This compensation should be made by the claimant."**

In a somewhat similar matter to the matter before me in the case of **John Rotich –vs- Chairman Roret Land Dispute Tribunal & 2 Others [2010] eKLR** the tribunal had made a decision thus:-

1. **John Rotich to enjoy use of his land 1.13acres because David Rotich did not pay for it.**

2. **John Rotich to compensate David Rotich for the tea bushes planted by David Rotich in John Rotich's land.**

The applicant in the case challenged the Tribunal's decision on the basis that the Tribunal did not have jurisdiction to make the decisions that it did. Hon. Justice G. B M Kariuki (as he then was) considered the matter and in holding the tribunal lacked jurisdiction he expressed himself thus:-

**“Did the tribunal have jurisdiction to determine the dispute and make the above decision? The provisions of section 3 (1) of the Act 18 of 1990 do not confer jurisdiction on the Tribunal to deal with or determine issues of contract which the tribunal purported to do. Nor do the provisions in the said section vest any jurisdiction in the tribunal to make orders for compensation as it did. These are matters that fell outside the purview of the Tribunal's jurisdiction. The plenitude of its powers do not encompass the decisions that it made. The decisions were therefore null and void. Their adoption by the Resident Magistrate court in Kericho P.M Misc. Civil Application No. 26 of 2008 did not revive or breath new life into them. They remained dead”**

8. I am in complete agreement with the above holding by Honourable Justice G. B M Kariuki (as he then was) that the 1<sup>st</sup> respondent in the case before him had no jurisdiction to order compensation in respect of developments on the suit land. Equally in the present case the Tribunal lacked the jurisdiction to order for compensation to be paid to the objector and in doing so they acted in excess of their jurisdiction under section 3 (1) of the Act and consequently their award was a nullity.
9. In the case of **Desai –vs- Warsama [1967] E. A 351** Hamlyn, J. of the High Court of Tanzania while considering an appeal from the magistrate's court whose jurisdiction was challenged held that no court can confer jurisdiction upon itself and that a judgment or order of a court without jurisdiction is a nullity and in support of the proposition referred to Volume 9, Halsbury's Laws of England paragraph 351 where the principle is set out thus:-

**“Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”**

10. The land disputes tribunal in the matter before me acted without jurisdiction when it made the order respecting compensation of the interested party and hence the award was a nullity and amounted to nothing. There was in effect no valid order or award that the 2<sup>nd</sup> respondent could adopt as judgment. There was nothing that could be adopted by the 2<sup>nd</sup> respondent as the award forwarded to it was a nullity. Lord Denning in the case of **Macfoy –vs- United Africa Co. Ltd [1961] 3 ALL ER 1169** while considering and distinguishing between a null and irregular act and/or a void and voidable act had this to say about a null and void act:-

**“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 declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

11. The decision of the 1<sup>st</sup> respondent was filed before the 2<sup>nd</sup> respondent for adoption as a judgment of the court pursuant to section 7 of the Land Disputes Tribunal Act, 1990. It goes without saying that the award that is envisaged to be filed under the said section 7 of the Act is an award that is valid in terms of the Act and not an award that is made by the tribunal in excess of its jurisdiction and therefore *ultra vires* or void. In my view section 7 cannot validate an award or decision that is otherwise void. The adoption as judgment of a void award or decision by a court under section 7 does not acquire any legitimacy merely because it has been adopted as such. A judgment cannot flow from nothing.
12. Having come to the conclusion that the decisions sought to be quashed was made by a body that had no power or mandate to make them, I allow the application by the ex parte applicant and issue

an order of certiorari bringing into this court for quashing the decision of the Kuria West District (Kehancha Division) Land Disputes Tribunal Case No. 8 of 2010 which was purportedly adopted as judgment of the court on 10<sup>th</sup> February, 2011 in Kehancha SRM's LDT No. 10 of 2010. I allow the Notice of Motion by the applicant dated 31<sup>st</sup> May 2011 and grant orders in terms of prayers 1 and 2 thereof. I award the costs of the application to the ex parte applicant to be paid by the interested party.

**Judgment dated, signed and delivered at Kisii this 23<sup>rd</sup> day of June, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the ex parte applicant  
..... for the respondents  
..... for the interested party  
..... for the Court Assistant

**J. M MUTUNGI**

**JUDGE**