



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 44 OF 2014**

**(Formerly Embu Misc. Application No. 165 of 2006)**

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

**AND**

**IN THE MATTER OF KERUGOYA S.R.M. L.D.T NO. 38 OF 2006**

**AND**

**IN THE MATTER OF THE PROCEEDINGS AND DECISION OF THE KIRINYAGA DISTRICT LANDS DISPUTES TRIBUNAL CENTRAL DIVISION DATED 21<sup>ST</sup> SEPTEMBER 2006**

**AND**

**IN THE MATTER OF READING AND ADOPTION OF THE KIRINYAGA DISTRICT LANDS DISPUTES TRIBUNAL AWARD BY THE S.R.M'S COURT KERUGOYA (P.T. NDIKA S.R.M) READ AND ADOPTED ON 4<sup>TH</sup> OCTOBER 2006**

**AND**

**IN THE MATTER OF LAND PARCEL NO. INOI/THAITA/410**

**AND**

**IN THE MATTER OF AN APPLICATION FOR MANDAMUS, CERTIORARI AND PROHIBITION**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CHAIRMAN, LAND DISPUTES TRIBUNAL CENTRAL**

**DIVISION KIRINYAGA DISTRICT.....2<sup>ND</sup> RESPONDENT**

**THE LAND DISPUTES TRIBUNAL.....3<sup>RD</sup> RESPONDENT**

**SENIOR RESIDENT MAGISTRATE KERUGOYA.....4<sup>TH</sup> RESPONDENT**

**THE DISTRICT LANDS REGISTRAR KIRINYAGA.....5<sup>TH</sup> RESPONDENT**

**CHARITY NJOKI MUCHIRA.....6<sup>TH</sup> RESPONDENT**

**AND**

**ELIJAH KIMURU KATHOROKO.....EX-PARTE APPLICANT**

**JUDGMENT**

The applicant herein **ELIJAH KIMURU KATHOROKO** obtained leave on 27th November 2006 to apply for orders of certiorari, mandamus and prohibition following orders issued by the District Land Disputes Tribunal Kirinyaga and adopted by the Senior Resident Magistrate Kerugoya in L.D.T Case No. 83 of 2006 directing that the 6th respondent **CHARITY NJOKI MUCHIRA** be awarded 3 acres out of the applicant's land parcel No. INOI/THAITA/410.

Aggrieved by the order of **KHAMINWA J.** granting that leave, the 6th respondent filed an application seeking to set aside, vacate discharge or review that order. However, that application was dismissed with costs by **W. KARANJA J.** (as she then was) on 1st **JULY 2009.**

That paved the way for the applicant to file the substantive Notice of Motion dated 13th December 2006 seeking the following orders:-

- 1. An order of mandamus be issued to the respondents jointly and severally ordering them to restore land parcel No. INOI/THAITA/410 to the applicant immediately.**
- 2. An order of certiorari be issued bringing into this Honourable Court and quashing all deliberations, decisions, rulings and adoption of the 2nd, 3rd and 4th respondents with respect to land parcel No. INOI/THAITA/410 and in particular, the reading and adoption of the KIRINYAGA DISTRICT LAND DISPUTES TRIBUNAL award by the SENIOR RESIDENT MAGISTRATE KERUGOYA COURT IN LDT Case No. 83 of 2006 read and adopted on 4th October 2006.**
- 3. An order of prohibition be issued against the 5th respondent prohibiting him from registering any dealing on the parcel of land No. INOI/THAITA/410 and against the 6th respondent and/or her family members, assignees, servants, employees and/or any other person claiming under her from trespassing upon, remaining on, cultivating, using, developing and/or in any other manner whatsoever tempering with land parcel No. INOI/THAITA/410.**

The application, as required is supported by the applicant's statutory statement and affidavit verifying the same in which the following are raised:-

- 1. That the applicant is the lawfully registered proprietor of land parcel No. INOI/THAITA/410 and therefore enjoys all indefeasible rights under the now repealed Registered Land Act Chapter 300 Laws of Kenya.**
- 2. That the 6th respondent who is a distance relative by marriage to the applicant sued the applicant before the KIRINYAGA DISTRICT LAND DISPUTES TRIBUNAL which awarded her 3 acres and the applicant 1 1/8 acres from the said land.**
- 3. That award was adopted by the SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA in LDT Case No. 83 of 2006.**
- 4. The said KIRINYAGA DISTRICT LAND DISPUTES TRIBUNAL had no jurisdiction to entertain the dispute and the 6th respondent had no legally recognized interest in the land.**
- 5. That the KIRINYAGA DISTRICT LAND DISPUTES TRIBUNAL refused to hear the applicant and his witnesses and therefore there was a denial of natural justice.**

6. *That the reading and adoption of the said award by the SENIOR RESIDENT MAGISTRATE'S COURT KERUGOYA was done without jurisdiction and is therefore null and void.*
7. *That the whole process was unlawful, unjustified, un-Constitutional and untenable and amounts to depriving the applicant of his lawful property.*

Those averments are repeated in the statutory statement accompanying the application.

The 1st, 2nd, 3rd, 4th and 5th respondents filed grounds of opposition to the application as follows:-

1. *That the application is misconceived and in-competent.*
2. *That the application is bad in law and Judicial Review does not lie but rather, the applicant's remedy lies in an appeal.*
3. *That the application is otherwise an abuse of the Court process.*

On her part, the 6th respondent filed a replying affidavit dated 22nd December 2006 in which she deponed, inter alia, that:-

1. *That the application has been brought in bad faith as it does not disclose the facts.*
2. *That the 6th respondent was not served with the application as required in law to enable her defend herself.*
3. *That the application is an abuse of the Court process as it touches on matters already disposed of in KIRINYAGA LAND DISPUTES TRIBUNAL CASE No. LTD 22 of 2005 whereby she was awarded 3 acres out of land parcel No. INOI/THAITA/410.*
4. *That the applicant did not appeal that award to the Provincial Land Disputes Tribunal.*
5. *That the said award was read and adopted as the judgment of the Court in KERUGOYA SENIOR RESIDENT MAGISTRATE'S LDT CASE No. 83 of 2006.*
6. *That this dispute should therefore be heard and determined by the Provincial Land Disputes Tribunal since it originated from the elders award.*
7. *That this application is meant to delay justice, is vexatious and an abuse of the Court process and should therefore be dismissed.*

Following the transfer of this suit to this Court from the High Court in Embu, it was agreed that the application be canvassed by way of written submissions. However, although the respondents sought and were given time to file their respective submissions after having been served with the applicant's submissions, they did not do so. Finally, on 3rd October 2016, the Court was informed that **Ms WANGECHI MUNENE** counsel for the 6th respondent would not be filing any submissions. I therefore have on record only the submissions for the applicant.

I have considered the application, the statement of facts and the grounds of opposition by the 1st, 2nd, 3rd, 4th and 5th respondents and the replying affidavit of the 6th respondent. I have also looked at the relevant annexures availed by the parties.

This is a Judicial Review application seeking orders of certiorari, mandamus and prohibition. In **PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300**, the Court stated thus:-

*“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 or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principle, are instances of illegality..... Irrationality is when there is such gross un-reasonableness 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”.*

Judicial Review is concerned not with the merits of the decision itself but rather, with the decision making process – **MUNICIPAL COUNCIL OF MOMBASA & UMOJA CONSULTANTS LTD C.A CIVIL APPLICATION No. 185 of 2001 (2001 K.L.R.)**.

Before I consider the application on its merits, there is one issue raised by the 6th respondent in her replying affidavit which is crucial and which I need to interrogate before I proceed further. She has pleaded in paragraph 4 of that affidavit as follows:-

***“That, I have not been served officially with the said application as required by the law to defend myself on matters touched by the said application and therefore I should not be judged unheard”.***

The 6th respondent is, in essence, saying that there was no compliance with the provisions of **Order 53 Rule 3 (2) of the Civil Procedure Rules** which requires service of the Notice upon all affected persons. From the record however, that complaint cannot be true because, following the granting of leave by **KHAMINWA J.** on 27th November 2006, the applicant filed the substantive Notice of Motion dated 13th December 2006. On 15th June 2007, the 6th respondent filed an application dated 14th June 2007 seeking to set aside vacate and/or review the leave granted by **KHAMINWA J.** on 27th November 2006. Most significantly, in prayer No. 2 of that application, the 6th respondent sought the following order:-

***“That this Honourable Court be pleased to strike out the notice of motion dated 13th December 2006”***

The 6th respondent could not therefore be seeking to strike out this Notice of Motion unless she had been duly served with the same. That complaint is therefore not well founded and must be dismissed.

Going to the merits of the application, it is clear that it is based on two main grounds:-

1. Firstly, that there was a breach of the rules of Natural Justice in that the **KIRINYAGA DISTRICT LAND DISPUTES TRIBUNAL** (the Tribunal) determined the dispute without giving him an opportunity to be heard and;
2. Secondly, that the Tribunal had no jurisdiction to determine the dispute relating to land parcel No. INOI/THAITA/410 and make the orders that it did and therefore, the order of the **SENIOR RESIDENT MAGISTRATE’S COURT KERUGOYA** (the Court) adopting the Tribunal’s award are null and void.

The applicant is therefore raising issues of illegality and procedural impropriety in the manner in which both the Tribunal and the Court conducted themselves.

With regard to procedural impropriety, the applicant’s case is that the Tribunal neglected, ignored failed and/or refused to hear both him and his witnesses. I have however looked at the record of the Tribunal dated 21st September 2006 and it is clear that the applicant was heard and he also called his witness namely **CHARLES MUNENE KAGERIA** who testified on his behalf. There was therefore no breach of the rules of Natural Justice.

On the issue of illegality, the Tribunal in exercising its jurisdiction to determine the dispute between 6th respondent and the applicant over land parcel No. INOI/THAITA/410 (the suit land) was exercising its powers as bestowed upon it by **Section 3 (1) of the repealed Land Disputes Tribunal Act**. That provision circumscribed the Tribunal’s jurisdiction as follows:-

3(1) “Subject to this Act, all cases of a civil nature involving a dispute as to:

- a. the division of or 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”

It is now well settled that a Tribunal established under the repealed Land Disputes Act had no powers to order the sub-division of registered land. Yet that is what the Tribunal in this case did. It made the following award after hearing the applicant and the 6th respondent including their witnesses:-

**“The claimant Charity Njoki Mucira ID/NO 1405175 be given three (3) acres from the land parcel No. INOI/THAITA/410 and the rest 1 1/8 remain for the objector ELIJAH KIMURU KATHOROKO ID/NO 1210752”**

By making an award sharing the suit land into two portions, the Tribunal clearly exceeded its jurisdiction. In M’MARETE VS REPUBLIC & THREE OTHERS C.A CIVIL APPEAL No. 259 of 200 (2004) e K.L.R., the Court of Appeal held as follows:-

**“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupy or work the land but a claim to ownership. Taking into account the provisions of Section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under the Registered Land Act to the appellant. In our view, the Tribunal exceeded its jurisdiction”**

See also JOTHAM AMUNAVI VS THE CHAIRMAN SABATIA LAND DISPUTES TRIBUNAL & ANOTHER C.A CIVIL APPEAL No. 256 of 2002 (KISUMU).

It follows therefore that the decision of the Tribunal to sub-divide the suit land and the adoption of that award by the Court were nullities for want of jurisdiction. In JOSEPH MALAKWEN LELEI & ANOTHER VS RIFT VALLEY LAND DISPUTES APPEAL COMMITTEE & TWO OTHERS 2014 e K.L.R., the Court of Appeal after citing Section 3 (1) of the repealed Land Disputes Tribunal Act said:-

**“Evidently, the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a trust in favour of a party, which in essence was the basis of the 3rd respondent’s claim. Having found that the Tribunal and the Appeals Committee lacked jurisdiction to entertain on the matter before them, then all other grounds become moot. We say so because it is trite that where a Court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision or award that results from such a process must be construed as a nullity. See Macfoy Vs United Africa Co. Ltd 1961 3 ALL E.R; Re:**

**Continental Credit Finance Ltd (2003) 2 E.A 399, Owners of Motor Vessel “Lillian S Vs Caltex Oil (Kenya) Limited 1989 K.L.R 1”.**

It is therefore clear from the above that the award of the Tribunal ordering the sub-division of the suit land between the applicant and the 6th respondent was arrived at in excess of jurisdiction. Both that award and the order of the Court adopting it are null and void.

What then are the remedies available to the applicant?

The applicant seeks orders of certiorari, mandamus and prohibition. An order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that

person or body of person has failed or refused to perform that duty to the detriment of a party who has a legal right to expect the duty to be performed – **KENYA NATIONAL EXAMINATIONS COUNCIL VS REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & OTHERS 1997 e K.L.R (CIVIL APPEAL No. 266 of 1996)**. There is no evidence placed before me to suggest that any of the respondents have refused or failed to perform any public duty in relation to the suit land to the detriment of the applicant. If anything, there was an application filed by the 6th respondent seeking orders to compel the applicant to produce the old title deed to the suit land and for the Executive officer of the Court to sign all necessary documents on behalf of the applicant who had refused to sign any documents for the transfer of the suit land to the 6th respondent. The Judicial remedy of mandamus was not created to settle ownership disputes nor to create or confer title to land – **LUCY MIRIGO & OTHERS VS MINISTER FOR LANDS C.A CIVIL APPEAL No. 277 of 2011 (NYERI) (2014) e K.L.R.** The order for mandamus is therefore not available to the applicant.

The applicant also seeks an order of certiorari. Such an order is issued where a decision has been made in excess of jurisdiction or where the rules of Natural Justice have not been complied with or for such other reasons as expounded in the **PASTOLI** case (supra). As I have already found above, the Tribunal acted in excess of its jurisdiction in ordering the sub-division of the suit land between the applicant and the 6th respondent. Its award and the orders of the Court adopting the same are all nullities and must therefore be quashed. The remedy of certiorari is therefore well merited.

The applicant also seeks an order of prohibition to prohibit the 5th respondent from registering any dealing on the suit land or registering the 6th respondent with respect to the said land and also an order against the 6th respondent and/or her family, assignees, servants, employees and/or other person claiming under them from trespassing upon or remaining, cultivating or using, developing or tampering with the suit land. As this Court has already found that the order for certiorari to quash the award of the Tribunal and the order of the Court adopting the same for being nullities is well merited, it follows that there is really no legal order or decision capable of being executed by the respondents with respect to the suit land. The parties revert to the position to which they were before the decision of the Tribunal was made on 21st September 2006 with respect to the suit land. The other remedy which is combined with that of prohibition appears to be one of an injunction. A Court exercising its powers in Judicial Review proceedings cannot issue an order of injunction – **CORTEC MINING KENYA LIMITED VS ATTORNEY GENERAL & OTHERS C.A CIVIL APPLICATION No. 119 of 2015 (NBI) (2015) e K.L.R.** The remedy of injunction is therefore not available to the applicant.

Ultimately therefore and upon considering all the evidence herein, this Court enters judgment for the applicant against the respondents in the following terms:-

***1. The decision and award of the KIRINYAGA DISTRICT LAND DISPUTES TRIBUNAL dated 21st September 2006 and its adoption as a judgment of the SENIOR RESIDENT MAGISTRATE'S COURT IN L.D.T Case No. 83 of 2006 on 4th October 2006 are all called into this Court for purposes of quashing and are hereby quashed as they were arrived at in excess of jurisdiction.***

***2. The applicant will have the costs of this application to be met by the 1st, 5th and 6th respondents.***

**B.N. OLAO**

**JUDGE**

**25<sup>TH</sup> NOVEMBER, 2016**

**Judgment dated, delivered and signed in open Court this 25<sup>th</sup> day of November 2016**

Mr. Ngigi for Mr. Magee for the Applicant present

Mr. Miano for Miss Wangechi Munene for 6<sup>th</sup> Respondent present

No appearance by the other parties.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**25<sup>TH</sup> NOVEMBER, 2016**