



**Republic v Chairman, Land Disputes Tribunal Mulot Division; Nowoi
(Exparte); Ngerechi (Interested Party) (Environment and Land Judicial Review
Case 4 of 2018) [2024] KEELC 3482 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3482 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 4 OF 2018

CG MBOGO, J

APRIL 30, 2024

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW
IN THE FORM OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE LAND DISPUTE TRIBUNAL ACT (NO. 18 OF 1990)

AND

IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300 LAWS OF KENYA)

AND

IN THE MATTER OF THE LAW OF SUCCESSION (CAP 60 LAWS OF KENYA)

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES (CAP 21 LAWS OF KENYA)

AND

IN THE MATTER OF NAROK MISCELLANEOUS LAND CASE NO. 1 OF 2009

BETWEEN

BETWEEN

REPUBLIC APPLICANT



AND

**CHAIRMAN, LAND DISPUTES TRIBUNAL MULOT
DIVISION RESPONDENT**

AND

DAVID NOWOI EXPARTE

AND

ALICE CHERUTO NGERECHI INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted on 24th July, 2009, the Ex-parte Applicant filed the Notice of Motion Application dated 7th August, 2010 (corrected to read as 2009), expressed to be brought under Section 3 & 3A of the *Civil Procedure Act* and Order LIII Rule 1,3 & 4 of the *Civil Procedure Rules* seeking the following orders: -
 1. That the application be and is hereby granted an order of certiorari to issue to remove into the High Court and quash fortnight (sic)
 - a. The proceedings of the respondent held on the 10th day of December 2008 and the decision given on the 27th day of December 2008 and filed in court on the 13th day of January 2009 in Narok Miscellaneous Land Case No 1 of 2009 (Alice Cheruto Ngerечи v David Nowoi) awarding all that piece of land known as Cis-Mara/Ololulunga/2914 to the interested party herein.
 - b. The proceedings and judgment of the Senior Resident Magistrate Narok entered on the 27th day of January 2009 in Narok Miscellaneous Land Case No 1 of 2009 (Alice Cheruto Ngerечи v David Nowoi) awarding all that piece of land known as Cis-Mara/Ololulunga/2914 to the interested party herein.
 2. That an order of prohibition does issue to prohibit the Senior Resident Magistrate Narok or any other Magistrate from executing the judgment entered on the 13th day of January 2009 and or the resultant decree thereof.
 3. That the cost of this application be borne by the interested party.
2. The application is premised on the grounds inter alia that the Respondent did not have jurisdiction to entertain and determine the Interested Party's claim to a piece of land already registered in the names of the Applicant (sic) herein and that the Interested Party did not serve a statement of claim upon him to enable the latter file an answer thereto.
3. The application is supported by the facts contained in the statement of facts dated 23rd July, 2009. The Ex-Parte Applicant contended that the Respondent did not serve him with the statement of claim to enable him file an answer and instead went ahead and fixed the hearing of an alleged claim over the suit piece of land by the Interested Party. He further contended that the respondent went ahead with the hearing of the claim on 10th December, 2008 and received evidence from the Interested Party and her witnesses which was later adopted by the Senior Resident Magistrate as an order of the court.



4. The Ex-Parte Applicant stated that the suit land initially belonged to Zephaniah Kuchwa Arap Too (now deceased) from whom he purchased the said land. The Ex-Parte Applicant further stated that the proceedings and the decision are unlawful as he was not served with the claim to enable him file an answer in terms of Section 3 (4) and 3 (5) of the *Land Disputes Tribunal Act* (now repealed). It was also his contention that the Respondent did not have jurisdiction pursuant to Section 3 (1) of the *Land Disputes Tribunal Act* (now repealed) as this could only have been done as per Section 159 of the *Registered Land Act*.
5. He further stated that he purchased the suit land in the year 1995 and in terms of Section 7 of the Limitations of Actions Act as read with Section 13 (3) of the *Land Disputes Tribunal Act*, the alleged cause of action was thus null and void.
6. The application was further supported by the verifying affidavit of the Ex-Parte Applicant sworn on 23rd July 2009. The averments contained therein are similar to the facts relied upon in the statement of facts, save to add that the Ex-Parte Applicant deposed that the Respondent erred in failing to appreciate that the Interested Party's case was a claim to a piece of land with a title deed and not a boundary dispute. He also deposed that the Respondent exceeded its jurisdiction by giving a verdict of ownership of land that was registered in the names of a deceased person and which has since been transferred to his names.
7. The Interested Party filed grounds of opposition challenging the application on the following grounds:
-
 1. That leave granted to the ex-parte applicant to institute judicial review proceeding was based on an incompetent application (Chamber summons) hence the notice of motion filed consequently is also incompetent.
 2. That the notice of motion is incompetent having been filed outside the statutory time.
 3. That the proceedings to institute judicial review proceedings is an afterthought.
 4. The interested party prays that the notice of motion be dismissed.
8. This court directed that the substantive motion be canvassed by way of written submissions. The Interested Party filed her written submissions dated 26th March, 2024. The Interested Party raised four issues for determination as follows: -
 1. Whether the leave granted to the ex-parte applicant to institute judicial review orders of certiorari was based on an incompetent application (chamber summons) and hence the said leave should be dismissed and consequently, the notice of motion seeking the orders of certiorari also be dismissed as being incompetent.
 2. Whether an order of prohibition can stand in the event an order of certiorari is refused or denied by this honourable court.
 3. Whether the proceedings to institute judicial review proceedings is an afterthought.
 4. The interested party prays that the notice of motion be dismissed.
9. On the first issue, the Interested Party submitted that looking at the notice of motion, the proceedings sought to be quashed by the Ex-Parte Applicant were conducted on 10th December, 2008 and that pursuant to Order 53 Rule 2 of the *Civil Procedure Rules*, the application should have been made on or before 10th June, 2009. According to the Interested Party, there was 43-day lapse which means that the application seeking leave was incompetently before court.



10. On the second issue, the Interested Party submitted that in the absence of an order of certiorari, an order of prohibition as sought in the motion cannot stand on its own, due to the fact that there is nothing the magistrate court is to be prohibited from executing. The Interested Party went on to submit that failure to quash the tribunal proceedings and its verdict, makes the judgment emanating from the adopted verdict and decree invalid and the magistrates court will not be barred from executing the same.
11. The Interested Party did not submit on the rest of the issues.
12. By the time of writing this judgement the Ex-Parte Applicant had not file his written submissions. Be that as it may, I have considered the application, the grounds of opposition and the written submissions filed by the interested party.
13. In my view, the following are the issues for determination: -
 - i. Whether the Ex-Parte Applicant instituted judicial review proceedings within the time frame provided under Order 53 Rule 2 of the [Civil Procedure Rules](#).
 - ii. Whether the Ex-Parte Applicant is entitled to the orders of Certiorari and prohibition.
 - iii. Who is to bear costs.
14. Order 53 Rule 2 of the [Civil Procedure Rules](#) as read with Section 9 (3) of the [Law Reform Act](#) provides for the time limits within which an application can be filed.
15. Order 53 Rule 2 of the [Civil Procedure Rules](#) provides that: -

“Leave shall be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than 6 months after the date of the proceedings or such shorter period as may be described by any Act; and where the proceeding is subject to appeal and a time is limited by the law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
16. Section 9(3) of the [Law Reform Act](#) provides that: -

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings, for purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings or such period as may be prescribed under any written law...”
17. The Interested Party through her written submissions submitted that the Ex Parte Applicant filed the application after the lapse of the statutory six months’ period provided in Order 53 of the [Civil Procedure Rules](#). The Interested Party contention was that the application was made 43 days later, which was outside the time frame and owing to the lapse, the substantive motion is incompetently before this court.
18. I have perused the pleadings herein and I note that the award of the Tribunal was made on 17th December, 2008. The same was adopted as the judgment of the court on 27th January, 2009. In challenging the decision of the Tribunal, Order 53 Rule 2 of the [Civil Procedure Rules](#) would only kick in after the same has been adopted as a judgment of the court. In this case, the Ex-Parte Applicant moved the court and obtained leave to institute judicial review proceedings on 24th July, 2009. The said



orders were issued on 28th July, 2009. I am satisfied that the Ex-Parte Applicant instituted the instant proceedings within the provided under the law.

19. In the case of *Pastoli v Kabale District & others* (2008) 2 E.A. 300 the court set out the duty of a court in Judicial Review applications as follows: -

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or the 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 principles are instances of illegality.....irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority would have made 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.”

20. In the case of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd* Civil Appeal No 185 of 2007 (2002) eKLR the Court of Appeal 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 made the decision have power i.e. jurisdiction to make it. Were the provisions 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.”

21. 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 and that it is not part of that purpose to substitute the opinion of the court or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England* 4th Edition Vol (1)(1) Para 60.

22. The Ex-Parte Applicant argued that this court did not have jurisdiction to hear disputes where the land was registered. According to him, the claim would only be sustainable under Section 159 of the *Registered Land Act*. However, I am concerned that the Ex-Parte Applicant sought to come to this court before ensuring that he had exhausted all the available remedies to resolve the dispute.

23. Section 3(1) of the *Land Disputes Tribunal Act* CAP 303 (repealed) provides that:

“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.”

24. The Land District Tribunal, Mulot Division issued an award in favour of the Interested Party on 17th December, 2008. Being dissatisfied with the decision, there was a mechanism for appeal established under the *Land Disputes Tribunal Act* (repealed) that granted a right to an aggrieved party to the Tribunal’s decision to make an appeal within 30 days after delivery of the decision.

25. Section 8(1) of the *Land Disputes Tribunal Act* (repealed) states that:-

“Any party to a dispute under section 3 who is aggrieved by the decision of the tribunal may, within thirty days of the decision, appeal to the appeals committee constituted for the province in which the land which is the subject matter of the dispute is situated.”

26. If a party was further aggrieved upon appeal, Section 8(8-9) allows for a further appeal to the High Court on issues of law but not on issues of fact. Under Section 8(8) of the *Land Disputes Tribunals Act* (repealed), the decision of the Appeals Committee was deemed to be final on any issue of fact and no appeal was allowed thereof to any court. However, a party aggrieved by the decision of the Appeals Committee could under Section 8(9) appeal to the High Court on a point of law within sixty (60) days of the decision of the Appeals Committee. This provision of the Act is in the following terms: -

“Either party to the appeal may appeal from the decision of the appeals committee to the high court on a point of law within sixty days from the date of the decision complained of: Provided that no appeal shall be admitted to hearing by the high court unless a judge of that court certified that an issue of law (other than customary law) is involved.” A question of customary law shall for all purposes under this Act be deemed to be a question of fact.”

27. In the instant case, and instead of following the process laid under the law, the Ex-Parte Applicant did not prefer an appeal to the Appeals Committee and instead chose to institute judicial review proceedings. In a similar case where the applicant had made a judicial review application for an order of certiorari to quash the decision of the tribunal and the adoption of the decision by the Principal Magistrate’s Court at Kitui as a decree, the court held as follows in *Republic v Land Dispute Tribunal, Bahati & another; Peter Karani Nduku (Interested Party) Ex parte Jacob Kipkurui Konga & another* [2020] eKLR

“It is evident that the Tribunal heard and determined the dispute in 2006 and that the Magistrates Court adopted the award as judgment in 2008 while the Appeals Committee dismissed the applicants Appeal in 2009. Upto the time the appeal was dismissed the Land Disputes Tribunals Act (repealed), had not been repealed and was in force. Hence the procedure that ought to have been followed in resolving the dispute was the one laid out under the Act.....if he was not satisfied with the decision of the appeals committee, he ought to have filed an appeal against the committee’s decision if a point of Law was involved in the high court. He did not and although the decision in the appeal was given on 17th November 2009 the applicant only initiated these proceedings on 27th March 2019 when he filed the application for leave. It was not explained why it took the applicant over 9 years from the date the appeal to the Provincial Appeals Committee was dismissed to seek to bring these proceedings. The delay was inordinate and could only have been an afterthought. I view these proceedings as a fishing expedition on the part of the applicant in the hope that he



could somehow make a catch. The courts do not work in that manner as their solemn duty is to interpret and apply the law the quest of doing justice to the parties who come before them.

I have said enough to demonstrate that the instant application was defective for having been brought out of time, was unmeritorious as the applicant failed to exhaust the applicable procedure under the Land Disputes Tribunals Act(Repealed), and that the failure to enjoin the Magistrates Court that adopted the decision of the Tribunal and which the Applicant seeks to have quashed was a fatal omission.”(emphasis mine)

28. Arising from the above it is clear that the Notice of Motion dated 7th August, 2009 lacks merit as the Ex-Parte Applicant failed to exhaust the applicable procedure under the Land Disputes Tribunals Act (repealed). The same is therefore dismissed. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 30TH DAY OF APRIL, 2024.

HON. MBOGO C.G.

JUDGE

30/04/2024.

In the presence of: -

Mr. Meyoki Pere – C.A

