



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CONSTITUTIONAL APPLICATION 2 OF 2011

DR. IGNATIUS L. M. MUTURI.....APPLICANT

VERSUS

**THE DISTRICT LAND DISPUTES TRIBUNAL
KIENI DIVISION.....1ST RESPONDENT**

THE CHIEF MAGISTRATE'S COURT, NYERI.....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, NYERI.....3RD RESPONDENT

JUDGMENT

Pursuant to *Articles 22(1), 23(1), (3) (f) and 40 (1)* of the Constitution, Dr. Ignatius L. M. Muturi, the Applicant herein, took out the Originating Notice of Motion dated 14th February 2011 in which he sought for the following orders against The District Land Disputes Tribunal, Kieni West Division, The Chief Magistrate's Court, Nyeri and The District Land Registrar Nyeri, being the 1st, 2nd and 3rd Respondents respectively:

- 1. *The applicant's fundamental right to own property has been infringed by the District Land Disputes Tribunal Kieni West by ordering the District Land registrar, Nyeri to revoke and cancel his title to parcel of land number NYERI/ENDARASHA/1558 without giving him, an opportunity to be heard.***
- 2. *The Chief Magistrate, Nyeri in Award case number 23 of 2010 has now entered judgment in terms of the said award and yet the applicant has not been made a party in the suit, nor has he been notified.***
- 3. *The District Land registrar has by a letter dated 25th January 2011 threatened to cancel the said title-deed.***
- 4. *This Honourable Court in exercise of its supervisory powers may be pleased to quash the Land Disputes Award dated 16th February 2010 and the chief Magistrates Court order issued on 18th September 2010.***

The Motion is supported by the affidavit of the Applicant sworn on 14th day of February 2011. The Motion was served upon all the Respondents but none filed any response hence the Applicant was granted leave to prosecute the same *ex parte*.

I have considered the facts deponed in the affidavit of Dr. Ignatius L. M. Muturi plus the oral submissions made by Mr. Wachira, learned counsel for the Applicant. The main ground argued by the Applicant in seeking for the above orders is that his right to own property was infringed without being given a right of hearing. Under *Article 40(1)* of the Constitution, every person has the right to acquire and own property of any description in any part of Kenya subject to the provisions of *Article 65* of the Constitution. Under *Article 50(1)* of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and by a public hearing before a court of law or an impartial tribunal or body. In the matter before this court, the Applicant has alleged that he was not heard by the Land Disputes Tribunal, Kieni West before the tribunal decided to make a decision leading to the cancellation of the Applicant's title No. **NYERI/ENDARASHA/1558**. When a person claims that his fundamental rights have been infringed, he is entitled to approach this court under *Article 22(1)* of the Constitution. This court is empowered under *Article 23 (3)* to issue various orders which include *interalia*:

- (i) A declaration of rights.
- (ii) An injunction.
- (iii) An order for compensation.
- (iv) An order for judicial review.

The Applicant has invoked *Article 23 (3) f* of the Constitution to seek for orders for judicial review to have the award of the Land Disputes Tribunal quashed. I can infer from the wording of the orders sought that the Applicant is basically seeking for the order of certiorari. Under *Article 22 (3)* of the Constitution, the chief Justice is enjoined to make rules providing for the court proceedings under this Article. At the time of filing the current Motion, the Chief Justice had not made such rules. In such a case we fall back to the provisions of *schedule 6 part 5 clause 19* of the Constitution, that is to say that we shall continue to apply the rules for the enforcement of the fundamental rights and freedoms under *Section 84 (6)* of the former Constitution. It appears the Applicant took that route when making this Motion. The question which lingers in my mind now is whether this court should entertain the application in view of the fact that in seeking for orders for judicial review one has to apply the provisions of the Law Reform Act and *Order 53* of the Civil Procedure Rules. At the time of making this application, the aforesaid Act and Rules were in existence. I refer to the *Sixth Schedule part 2 clause 7* of the Constitution, in which it is clearly states *interalia* that all laws in force immediately before the effective date continues to be in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution. The fact of the matter is that there are existing legislative provisions which govern the issuance of orders of judicial review, meaning the Applicant should have come under the purview of the Law Reform Act rather than under *Section 84* of the former Constitution. A person who wishes to apply for judicial review orders of Mandamus, certiorari and prohibition may invoke the provisions of *Sections 8 and 9* of the Law Reform Act (Cap. 26 Laws of Kenya). Such applications are regulated by the rules under *Order 53* of the Civil Procedure rules. Those rules were promulgated pursuant to *Section 9 (1)* of the Law reform Act. Parliament in its wisdom limited the period in which one can seek for leave to apply for an order of Certiorari to quash a judgment, order, decree, conviction or other proceedings to six months from the date when such a judgment, order, decree, conviction or proceedings was made. The time limit is clearly expressed in *Section 9 (3)* of the Law Reform Act and under *Order 53 rule 2* of the Civil Procedure Rules. The decision sought to be quashed is the award made by the Kieni West Land Disputes Tribunal vide Mweiga civil case No. 24 of 2008. The aforesaid decision is stated to have been made on 16th February 2010. It would appear from the material placed before this court that the award was adopted as the decision of the Nyeri Chief Magistrate's Court vide Nyeri Award Case No. 23 of 2010 on 18th September 2010. The Applicant claims that he came to learn of the Tribunal's decision when he received a letter from the District Land Registrar, Nyeri, dated 25th January 2011, requiring him to surrender his title for cancellation. The aforesaid letter prompted him to file this Motion. Had the Applicant been a party to the aforesaid proceedings complained of, he would have obviously been barred from seeking for an order of certiorari because the decision or award sought to be quashed was made more than six months before leave was applied for. This is a unique case where the Land Disputes Tribunal did not give the Applicant being a title holder a chance to be heard on why his title should be cancelled. The Applicant was not aware of the existence of those proceedings hence he cannot be bound by the time limit fixed by Parliament. I believe Parliament did not intend to use time

limits to apply to people who were not parties nor aware of such awards. The letter and spirit of the Constitution must be given effect by this court in the circumstances of this case. Under *Article 23 (1)* of the Constitution, this court is enjoined to hear and determine applications for redress for a denial, violation or infringement of or threat to, a right or fundamental freedom in the bill of rights. In *Article 22 (3) (b)* of the Constitution, the Chief Justice is enjoined to make rules to satisfy the criteria that formalities relating to proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation. It would appear at the appropriate time Parliament may also be required to amend the laws that tend to restrict parties from accessing courts on the ground of time limits. In broad interest of justice and in upholding the provisions of the Constitution enjoining this court to enforce the Bill of Rights, I will entertain the Motion.

This court has been urged to issue the order of judicial review in the nature of certiorari under *Article 23 (3) (f)* of the Constitution. I have already stated that there is an Act of Parliament which prescribes time limit to apply for such orders. I have further stated that the Applicant herein is not bound by such time limit because he was not a party to the proceedings which gave rise to the decision in question. The jurisdiction to issue orders of judicial review is the court's power to review a lower court's, tribunal's or administrative body's factual and legal findings.

Having examined in detail the powers given to this court to deal with such cases, let me now examine the background of the Applicant's case. The applicant's affidavit filed in support of the Motion gives the brief summary of facts of the case before this court. It would appear from the annexures and the averments contained in the affidavit of support that the Applicant bought the parcel of land known as **L.R. NO. NYERI/ENDARASHA 1558** from one Edward Wachira Karuiru in the year 2005. He was thereafter issued with a title deed on 14th September 2005. The Applicant avers that he immediately moved into the land whereupon he effected considerable developments thereon. The Applicant avers that he was shocked to receive a letter dated 28th January 2011 from the District Land registrar, Nyeri requiring him to surrender his title deed for cancellation. That letter prompted the Applicant to make inquiries as to what sparked the District Land Registrar to write such a letter. It is then that the Applicant discovered that one Moses Wachira Keeri had filed a complaint before the Land Disputes Tribunal Kieni West, claiming part of the parcel of land known as **L.R. NO. NYERI/ENDARASHA/222**. In the Plaint, the complainant named Moses Wachira Karuiru (deceased) and five others as the Respondents. The Tribunal appears to have heard the complainant's case without hearing the Defendants nor the title holders. I have perused the Tribunal's decision which is attached to the Applicant's affidavit. In that decision, Tribunal made the following observations inter alia:

(i) The parcel of land known as L.R. NYERI/ENDARASHA/222 was registered in the name of Moses Wachira Karuiru, deceased.

(ii) Thereafter in 1994, this land was subdivided into parcels No. 1552-1558.

(iii)

(iv) The title No. NYERI/ENDARASHA/1556-1558 and 1552 were transferred without the due process of succession.

(v) The title No. NYERI/ENDARASHA/1558 was supposed to be transferred to Joseph Keeri Wachira (deceased), father to Moses Wachira Keeri but was transferred to Ignatius L. M. Muturi.

In the end the Land Disputes Tribunal made a decision directing the Land Registrar to revoke titles known as L.R. No. NYERI/ENDARASHA/1552-1558.

There is no doubt that the Applicant herein is the registered proprietor of the parcel of land known as L.R. NO. NYERI/ENDARASHA/1558. The Land Disputes Tribunal, Kieni West made an award which will lead to the cancellation of the Applicant's title without giving him a right of being heard. The Tribunal therefore breached the Applicant's fundamental rights enshrined in the Constitution. The Land Disputes

Tribunal in effect breached the provisions of Section 3 (7) of the Land Disputes Tribunals Act when it purported to make a decision without hearing all the parties interested in the subject matter of the dispute. It is trite law that any decision made in breach of the rules of natural justice is amenable by an order of judicial review in the nature of certiorari. The other fundamental issue which has also emerged from the Tribunal's decision is the question of jurisdiction. The Land Disputes Tribunal's jurisdiction is limited to dealing with disputes in respect of trespass to land, a claim to occupy or work land and division or determination of boundaries to land. The tribunal in this dispute went overboard when it purported to determine a dispute relating to title to land. Again, such an award or decision can be quashed by an order of certiorari.

In the final analysis, I am convinced the Originating Notice of Motion is well founded. The same is allowed as prayed.

Dated and delivered at Nyeri this 27th day of May 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Mugo holding brief Wachira for the Applicant and Wairoma for the Respondent.