**IN THE COURT OF APPEAL**
**AT KISUMU**

**(CORAM: BOSIRE, GITHINJI & NYAMU, JJ.A.)**
**CIVIL APPEAL NO. 39 OF 2005**
**BETWEEN**
**KAKAMEGA COUNTY COUNCIL ……APPELLANT**
**AND**
**1. THE CHAIRMAN TIRIKI EAST LANDS DISPUTES TRIBUNAL**
**2. JOTHAM ASEKA MAHERI**
**3. LABAN ASEKA**
**4. JOHN MUKALUSHI.....…...RESPONDENTS**

***Being an appeal from the decision and ruling of the High Court of Kenya at Kakamega (Kariuki, J.) dated 26th November, 2004***

**in**

**H.C.Misc. Appl. No. 2 of 2003)**
**********
**JUDGMENT OF THE COURT**

This is an appeal against the decision of the High Court ***(G. B. M. Kariuki, J.)*** given on 26th November, 2004, in which the learned Judge in his ruling in an application for judicial review held that the leave which had been given earlier by another Judge, to bring the said application was a nullity having allegedly been given outside the time limited for bringing the application.

The dispute between the parties as we discern from the material on record, started when an application was made to the Tiriki Divisional Land Disputes Tribunal pursuant to the provisions of ***section 3(2) of*** the Land Disputes Tribunals Act, concerning a parcel of land known as *Kakamega/Cheptulu/642*. The tribunal after hearing the parties and their witnesses rendered a decision. It is not clear from the proceedings of the tribunal when that decision was made, but a letter forwarding the decision and the proceedings to the Vihiga Principal Magistrate's Court pursuant to ***section 7*** of the aforesaid Act dated 18th May, 2002, states that the decision was given on 24th April, 2002.

Following that decision, a party to the dispute, ACK. Church – Cheptulu, was dissatisfied and took steps to challenge the decision by way of Judicial Review proceedings. It moved the High Court at Kakamega for leave to apply for an order of certiorari and prohibition. The order of prohibition was intended to stop the Vihiga Principal Magistrate's Court from proceeding to make the tribunal's decision a judgment of the court in terms of the provisions of ***section 7(2)*** of the aforesaid Act. The Order of Certiorari was meant to quash the decision of the Tiriki Land Disputes tribunal for reasons which were given in the application for leave. Leave was granted and a motion was filed pursuant to that leave. However, when the motion came up for a hearing a preliminary objection was raised as to the competence of the church to bring the application. In a ruling delivered on 29th January, 2003, *Waweru, J.* held that the church was not a proper legal entity capable of seeking leave in absence of evidence that

the church was a legal person. He vacated the leave and struck out the application by notice of motion aforesaid. The church had to go back to the drawing board.

The land in dispute was registered in the name of Kakamega County Council, the appellant in the appeal before us. It was not a party to the proceedings before the tribunal nor was it made a party in the proceedings before the High Court. When the church hit a dead end it sought the assistance of the appellant. Fresh proceedings were commenced before the High Court, this time with the appellant as the applicant. The appellant by its Chamber Summons dated 5th December, 2002, successfully applied for leave to apply for an order of prohibition against the Vihiga Principal Magistrate's Court as earlier stated and also for an order of Certiorari to bring before the High Court the tribunal's decision for quashing. Following that leave the appellant filed a notice of motion dated 17th December, 2002, which application was placed before *Kariuki, J*. on 9th February, 2004, for hearing.

In her submissions before that court, ***Mrs. Osodo***, for the appellant as the applicant stated that the appellant was not made a party in the proceedings before the tribunal though it was the registered owner of the land in dispute. In her view that breached a fundamental principle of law. She did not also think the tribunal had jurisdiction to entertain a dispute over ownership of registered land. She further stated that the tribunal's award was read to the parties on 16th July, 2002, and the appellant applied for leave and was granted the same on 17th December, 2002, which in her view was within the 6 months period within which an aggrieved party would properly move the court for an order of certiorari. She also raised the issue regarding computation of time and argued that the Christmas vacation was excluded from computation.

In answer to those submissions *Mr. Michael Owuor* for ***Jotham Aseka Maheri*** (2nd respondent), ***Laban Aseka*** (3rd respondent) and ***John Mukalushi*** (4th respondent), submitted that the tribunal presented the award in court on 20th May, 2002 implying that the decision was made earlier than that date. In his view therefore the 6 months limitation period for bringing an application for judicial review expired on 20th November, 2002, with the result that the leave which was granted on 17th December, 2002 was a nullity. Learned counsel then concluded thus:

***"The result is that the Court's predecessor to grant the leave, and this Court has no jurisdiction to hear this case***."

In reply Mrs. Osodo submitted that in view of the fact that the decision of the tribunal was not dated, the relevant date of its decision was the date it was presented to the court, namely, 20th May, 2002.

As we stated earlier, Kariuki, J. rendered his decision on 26th November, 2004. He upheld Mr. Owuor's submission that leave having not been obtained by 20th November, 2002, the leave obtained on 17th December, 2002 was a nullity and thus rendered the motion before him incompetent. He then concluded that it was not necessary to deal with other issues raised in the motion. He consequently struck out the motion and hence the present appeal.

There are three grounds of appeal as follows:

***"(1) The learned Judge erred in law and in fact in making a finding that the High Court did not have discretion to grant the appellant leave to apply for judicial reviews.***

***(2) The Judge erred in law and in fact in failing to determine and consider all the merits of the appellant's application.***

***(3) The Judge erred in fact and in law in making a finding that the Appellants' application was filed out of time."***

There are four respondents in this appeal. However, the 1st respondent, The Chairman Tiriki East

Lands Disputes Tribunal, was neither served with the notice of appeal, nor the record of appeal. At the commencement of the hearing of this appeal we inquired from the counsel present why the 1st respondent was not served. We were shown a copy of a decision of this Court by a single Judge ***(Githinji, J.A.)*** in which the learned Judge had granted an order, upon application, to the appellant dispensing with service upon the 1st appellant of both the notice of appeal and the record of appeal. Consequently the 1st appellant did not participate in the appeal.

The arguments before us largely centered on the issue whether the appellant applied timeously for leave. A decision granting the appellant leave was made by a Judge other than Kariuki J. That issue was not therefore competently before him for determination. The 2nd, 3rd and 4th respondents did not challenge the decision to grant the appellant leave. It is axiomatic that a Judge has no power to sit on appeal against a decision of another judge of concurrent jurisdiction. There are instances where a Judge may entertain an application for review of a decision of a Judge of equal jurisdiction, but exercise of that power is circumscribed. Judicial review is a special jurisdiction. It deals with the decision making process. The respondents having not taken steps to challenge the leave granted to the appellant, Kariuki, J. was not right in interfering with it.

Besides, Kariuki, J. heard the appellant's notice of motion in full. In the course of the hearing it emerged that the tribunal was dealing with a dispute over land in which none of the parties before it was the registered owner. It was common ground that the appellant was and may still be the registered owner of the land in dispute. There is documentary evidence on record which leaves no doubt in anybody's mind that the contending parties before the Land Disputes Tribunal were not the registered owners of the land. This fact should have reminded the learned Judge of the superior court that there was the risk of the land being transferred by order of the subordinate court to people who under the law may not be entitled to it. We say so advisedly. The tribunal in the decision which the appellant wanted quashed, concluded as follows:

***"It is therefore ruled that the land is genuinely for the Masikini's sons who are the claimants in this case. They should therefore make arrangements with the Lands Department to register the land in their names or the church to negotiate for payment to them."***

***Section 7(2)*** of the Land Disputes Tribunals Act, provides:

***"The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act."***

Among the reasons which would entitle a court, in an application for judicial review, for an order of certiorari, is that the decision making authority lacked or acted beyond is jurisdiction to make the decision under attack, or acted unreasonably, or that it acted illegally or that there was procedural impropriety or acted against the rules of natural justice.

In the foregoing circumstances we hold that the learned Judge having been addressed fully in the application before him he erred, on the main, for making a decision against a party who was neither before it nor had notice of the proceedings affecting its interest in the suit property.

In the result we are constrained to allow the appeal, set aside the High Court order dismissing the appellant's notice of motion dated 7th January, 2003. The question which immediately arises is what order should be made regarding that application.

***Rule 31*** of the Court of Appeal Rules provides as follows:-

***"On any appeal the Court, shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or***

***consequential orders including orders as to costs."***

Considering the fact that Kariuki, J. did not deal with the merits of the judicial review application, this is a matter which would, ordinarily, have been sent back to the High Court for rehearing. However in view of the overriding objective enshrined in ***sections 3A*** and ***3B*** of the Appellate Jurisdiction Act, Cap. 9 Laws of Kenya, which mandates the Court to facilitate the just expeditious, proportionate and affordable resolution of disputes, it may not be a step in furtherance of that objective if the matter is sent back to the High Court. To do so will increase expense, delay the final disposal of the dispute, and may not be in the best interests of justice. In the result we are inclined to finally deal with the matter.

As earlier stated neither of the parties who attended before the Tiriki East Land Disputes Tribunal, was registered as owner of the land in dispute. The registered owner then and possibly even presently, is the appellant. The respondents may possibly have an un-registrable interest in the land. However, as the proceedings before the aforesaid tribunal were irregular, the same shall not be let to stand. In the result in view of the provisions of ***section 3(2)*** of The Appellate Jurisdiction Act, and ***rule 31*** of the Court of Appeal Rules, we order that the decision of the Tiriki East Land Disputes Tribunal given on 24th April, 2002 be and is hereby brought before the High Court and quashed.

Regarding the issue of costs, it is clear from the record that the appellant was partly responsible for the irregular proceedings before the aforesaid tribunal. It made the respondents believe that the ACK Church – Cheptulu was the owner of the land, and that Church initially held itself out as the owner. That being so, we are of the view and so order that each party should bear own costs.

***Dated and delivered at Kisumu this 29th day of July, 2011***

**S. E. O. BOSIRE**
**…….**
**JUDGE OF APPEAL**

**E. M. GITHINJI**
**…….**
**JUDGE OF APPEAL**

**J. G. NYAMU**
**…….**
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**