



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW CASE NO. 4 OF 2014**

**IN THE MATTER OF AN APPLICATION BY MARY WANJA KIOGA FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF CERTIORARI**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT 18 OF 1990, THE LAW REFORM ACT (CAP 26) LAWS OF KENYA, THE REGISTERED LAND ACT (CAP. 300) LAWS OF KENYA, ORDER 53(1), (2) AND (3) OF THE CIVIL PROCEDURE RULES, THE INHERENT POWERS OF THE COURT AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF AN APPLICATION ADOPTED BY RESIDENT MAGISTRATE MURANGA ON 6TH JULY, 2011 AND AN AWARD BY THE LAND DISPUTES TRIBUNAL MAKUYU DIVISION MURANG'A SOUTH DISTRICT VIDE MURANGA RMC LDT CASE NO. 15 OF 2011 IN RESPECT TO LAND PARCEL NO. MAKUYU/MAKUYU/BLOCK 1/5499 AND 5498 RESPECTIVELY.**

**BETWEEN**

**REPUBLIC .....  
APPLICANT**

**AND**

**THE RESIDENT MAGISTRATE - MURANGA..... 1ST  
RESPONDENT**

**THE LAND DISPUTES TRIBUNAL MAKUYU  
DIVISION**

**MURANG'A SOUTH DISTRICT..... 2ND  
RESPONDENT**

RULING

1. Pursuant to leave granted on **19th December, 2011** the *ex parte* applicant, **Mary Wanja Kioga**, filed the notice of motion dated **6th January, 2012** seeking the following orders:-

**1. An order of *certiorari* to remove to this court and quash the order adopted by the 1st respondent on 6th July, 2011.**

**2. An order of *certiorari* to remove to this court and quash the decision of the Land Disputes Tribunal Makuyu Division Murang'a South District delivered on 27th March, 2007 received, read and adopted by Murang'a Resident Magistrate's Court vide LDT case No.15 of 2011 on the 6th July, 2011 relating to land parcels No.Makuyu/Makuyu/Block 1/5499 and 5498 (Ballot No. 1999 & 1998 respectively).**

**3. Cost of this application be provided for.**

2. The application is premised on the grounds that the Makuyu Land Disputes Tribunal (hereinafter referred to as the Tribunal) did not have jurisdiction to entertain and arbitrate on the parcels of land which were registered under the Registered Land Act, Cap 300 Laws of Kenya (repealed); that the Tribunal contravened the provisions of **Section 3(1)** of the Land Disputes Tribunal Act No. 18 of 1990 (repealed) and that the tribunal breached the rules of natural justice in that she was not accorded a fair hearing.

3. The application is supported by the affidavit of the *ex parte* applicant sworn on **6th January, 2012** in which the *ex parte* applicant has reiterated the grounds on the face of the application. In addition to reiterating the grounds on the face of the application, the *ex parte* applicant has deposed that she was not served with the claim as per the provisions of **Section 3(4)** of the Land Disputes Tribunal Act, No.18 of 1990; that whereas the interested party claimed the parcels of land herein on behalf of Kiuru Kirori, there is nothing in the proceedings of the Tribunal capable of proving that the interested party was an administrator of Kiuru Kirori.

4. Terming the action of the Resident Magistrate in Murang'a Resident Magistrate's Court Land Disputes Tribunal Case No.15 of 2011 of receiving and adopting the award of the Tribunal as the judgment of the court *ultra vires*, the *ex parte* applicant contends that the award was erroneously received and adopted by statutory bodies that had no jurisdiction whatsoever of hearing and determining matters that were outside their mandate under the Registered Land Act and that the entire proceedings should be quashed for being a nullity.

5. In reply, the interested party filed the grounds of opposition dated **22nd March, 2012** and **21st April, 2015**. Vide those grounds of opposition, the interested party contends that there is no proof that the *ex parte* applicant was the 1st registered proprietor of the parcels of land herein; that the application is statute barred and that the *ex parte* applicant's recourse was to appeal against the decision of the Tribunal within 30 days from the date of the decision of the Tribunal (6th October, 2009). The interested party further contends that the *ex parte* applicant cannot seek to quash the order of the Murang'a court because the court merely adopted the award of the Tribunal.

6. With regard to the prayer for costs, the interested party has submitted that there being no fault cited against him, should the court find the application to be merited, he should not be condemned to pay costs of the application.

7. When the matter came up for hearing, counsel for the applicant **Mr. Omwenga** reiterated the contention that the Tribunal had no jurisdiction to entertain and arbitrate the dispute preferred before it. Mr. Omwenga submitted that the implication of the decision of the Tribunal, which was adopted by the court, is that the applicant has no title to the parcels of the land herein.

8. Concerning the grounds of opposition filed by the interested party, counsel for the *ex parte* applicant submitted that the interested party has nothing to show that he is the owner of the parcels of land in question or what his interest in the parcels of land is.

9. Counsel for the interested party, **Mr. Mbugua**, submitted that the Tribunal did not make any decision capable of being quashed. In this regard he contended that the Tribunal merely gave an advisory opinion to the Registrar (he submitted that the Tribunal did not make reference to title or indicate what mistakes were to be corrected by the Registrar).

10. Pointing out that the Tribunal did not order cancellation of the title held by the *ex parte* applicant, Mr. Mbugua, submitted that the issue of cancellation of titles is being raised from the bar without any basis.

11. Mr. Mbugua further pointed out that the award was made in 2007 and the application made on 23rd January, 2012 and reiterated the contention that the application is time barred. With regard to the 1st prayer, he submitted that the lower court did not make the impugned decision, but merely adopted it.

12. Mr. Mbugua also submitted that the court is being asked to quash a decision made by a none existent body.

13. In a rejoinder, counsel for the *ex parte* applicant explained that his client only learnt about the award at the time of adoption and submitted that the application was brought within six months from the time of adoption.

14. With regard to the contention that the applicant seeks to quash a decision of a none existent body, he submitted that the award was made when the Tribunal was in existence.

### **Analysis and determination**

15. From the pleadings filed in this matter and the submissions by counsels for the respective parties, the issues for determination are:-

- (i) Whether the Tribunal had jurisdiction to hear and determine the dispute preferred before it?
- (ii) Whether the claim by the *ex parte* applicant is statute barred?
- (iii) Whether the applicant has made up a case for been granted the orders sought?
- (iv) What is the order as to costs.

16. With regard to the first issue, it is trite law that an order of *certiorari* will issue where the court is satisfied that the impugned decision was made without or in excess of jurisdiction, or where the rules of natural justice have not been complied with. In this regard see **Kenya National Examination Council V. Republic Ex parte Geoffrey Gathenji Njoroge and others**, Civil Appeal No. 266 of 1996.

17. In this matter, it is not in dispute that the subject matter of the claim lodged before the Tribunal was land registered under the Registered Land Act, Cap 300 Laws of Kenya (repealed).

18. Under **Section 3** of the repealed Land Disputes Tribunal Act, the second respondent's jurisdiction is restricted to hearing and determining cases involving:-

- (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) a claim on trespass to land.

19. Disputes relating to title or the possession of land registered under the Registered Land Act, Chapter 300 (repealed) Laws of Kenya (as in this matter) are the preserve of the High Court or the Resident Magistrate's courts depending on the monetary value of the suit property. See **Section 159** of the Registered Land Act (repealed).

20. It is not in dispute that the issue before the 2nd respondent and subsequently before the 1st respondent related to ownership of the suit property which was at the material time registered in the name of the *ex parte*. In determining the issue of ownership of the suit property when it had no power to entertain a claim concerning land registered under the registered Land Act, the the 2nd respondent (the Tribunal) exceeded its jurisdiction under the Land Disputes Tribunal Act, No.18 of 1990.

21. Having found that the Tribunal had no jurisdiction to entertain the claim on the aforementioned grounds, I now turn to the legally recognized mechanisms for dealing with the wrong decision of the Tribunal. These are filing an appeal as contemplated in **Section 8(1)** and **(9)** of the Land Disputes Tribunals Act or bringing an application for judicial review, as the applicant herein did.

22. In the circumstances of this case, the applicant had two options of challenging the impugned decision of the Tribunal. These were, to, within six months, apply for quashing of the decision of the Tribunal or to, within six months apply for quashing of the judgment or order of the lower court adopting the award of the tribunal. In this regard see the case of **Republic v. Kajiado North District Land Disputes Tribunal & another ex parte Caroline Wambui Ngujiri & 2 Others (2014) eKLR** where **Odunga J.** observed:-

**“Where a decision of the Tribunal has been adopted by the Court the law is that the former is subsumed into the latter and the former ceases to exist with the result that the only decision that can be quashed is the Magistrate’s adoptive decision..... In my view if the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since a decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void. This is in line with the celebrated decision in Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 to the effect that that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break- down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse....Apart from that the applicant contended that he was never afforded an opportunity of being heard. Denial of the right to be heard is one of the recognized grounds for granting judicial review orders. Accordingly on that score the applicant is entitled to the order quashing the 1<sup>st</sup> Respondent’s decision....With respect to the order for costs it must be noted that the 2<sup>nd</sup> Respondent was simply implementing the decision of the 1<sup>st</sup> Respondent. In Zedekiah M Mwale vs. Bikeke Farm Directors & Another Kitale HCCA NO. 25 of 1998 the Court held which holding I associate myself with that a magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a Land Disputes Tribunal’s award filed in court as section 7(2) only compels the magistrate to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.**

Similarly, in Peter Ouma Mitai vs. John Nyarara Kisii HCCA No. 297 of 2005, Musinga, J (as he then was) following the decision in Zedekiah M Mwale vs. Bikeke Farm Directors & Another (supra) expressed himself as follows:

**“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate’s court. That provision of the law does not leave any room for a magistrate to**

**review, alter, amend or set aside the Tribunal’s award. In any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise.”**

23. In the circumstances of this case, the decision of the Tribunal subsumed into that of the Resident Magistrate from the date it was adopted as a judgment of the Resident Magistrate court. That being the case, it is the decision of the Magistrate’s court only that can be the subject of these proceedings.

**(i) Whether the claim by the *ex parte* applicant is statute barred?**

24. With regard to the contention that the application is statute barred, upon review of the pleadings and the documents filed in this matter, I note that the decision was made on 6<sup>th</sup> July, 2011 and the current application brought on 19<sup>th</sup> December, 2011 barely five months from the date of the impugned judgment.

25. Under **Section 9** of the Law Reform Act (Cap 26) Laws of Kenya as read with **Order 53 Rule 2** of the Civil Procedure Rules, an application for *certiorari* must be brought within six months from the date the decision/judgment/order sought to be quashed was made.

26. Having found that this application was brought barely five months from the time the impugned judgment was entered, I find and hold that the application, as far as it relates to prayer 1, is not statute barred.

27. With regard to prayer 2, I find the same to be bad in law on the ground that once the award of the tribunal was adopted, the award ceased having separate existence from the judgment. In other words, it got subsumed in the judgment of the lower court. See the case of **Republic v. Kajiado North District Land Disputes Tribunal & another** *supra*.

28. On whether the applicant has made up a case for being granted the orders sought, having found the decision of the 2<sup>nd</sup> respondent which was adopted by the 1<sup>st</sup> respondent to have been a nullity, and being of the view that the sentiments expressed by **Odunga J.** in the case of **Republic v. Kajiado North District Land Disputes Tribunal & another** (*supra*) capture the right legal position concerning this matter, I return a positive verdict to this question.

29. On the issue of costs, since the interested party’s plea not to be condemned to pay the costs of the application was not contested, I order that each party bears its own costs.

**Dated, signed and delivered at Nyeri this 29th day of February, 2016.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. Omwenga for the applicant

Mr. Njoroge h/b for Mr. Mbuva for interested party

N/A for the respondents

Court assistant - Lydia