



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 46 of 2010

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY ROBERT MWANGI
MBUGUA FOR ORDERS OF CERTIORARI**

IN THE MATTER OF: THE CONSTITUTION OF KENYA

IN THE MATTER OF: LAND PARCEL NUMBER LOC. 3. MUKANGU/207

**IN THE MATTER OF: LAND DISPUTE TRIBUNAL ACT NUMBER 18 OF 1990 LAWS OF
KENYA**

**IN THE MATTER OF: LAND DISPUTES TRIBUNAL IN CASE NUMBER 100 OF 2002 AT
KANDARA**

**IN THE MATTER OF: THE RESIDENT MAGISTRATE COURT THIKA IN D.O. CASE
NUMBER 62 OF 2002**

IN THE MATTER OF: PREROGATIVE ORDERS OF CERTIORARI

THE REPUBLIC.....APPLICANT

VERSUS

1. CHIEF MAGISTRATE THIKA.....1ST RESPONDENT

2. THE CHAIRMAN LAND DISPUTES TRIBUNAL AT KANDARA.....2ND RESPONDENT

3. REBECCA WANJIRU MBUGUA.....3RD RESPONDENT

EX PARTE

ROBERT MWANGI MBUGUA.....APPLICANT

JUDGEMENT

By a Motion on Notice dated 3rd July 2010, the ex parte applicant herein seeks the following orders:

i) An Order of Certiorari to quash the entire proceedings and record relating to the Kandara land disputes Tribunal case number 100 of 2002 between Robert Mwangi Mbugua and Rebecca

Wanjiru Mbugua and all consequent orders.

ii) An order condemning the 3rd respondent to pay costs of application for leave and costs of this application.

The Motion is based on the following grounds:

- a. That Robert Mwangi Mbugua is the registered owner of title number Loc. 3/Mukangu/207.**
- b. That the Land Dispute Tribunal acted without due regard to the law and principles of natural justice.**
- c. That the land dispute tribunal at Kandara had no jurisdiction to hear and purport to determine the purported dispute over the ownership of land reference number Loc. 3/Mukangu/207.**
- d. That the land dispute tribunal acted ultra-vires and its award is a nullity.**
- e. That it is in the interest of justice to quash the proceedings and award of the land dispute tribunal and all consequent orders by the Chief Magistrate Court at Thika in D.O case number 62 of 2002.**
- f. Judicial review is not barred by the availability of appeal proceedings under the Land disputes Tribunal Act judicial review is speedy and more effective in the circumstances.**

The same Motion is supported by Statutory Statements filed together with the Chamber Summons herein and the verifying affidavit sworn by the applicant on 16th June 2010.

The applicants' case from the said documents is that vide the Kandara Land Disputes award and the provincial land dispute appeal committee decision read on the 1st April 2003 it was adopted and confirmed by the 1st respondent on the 22nd July 2003 wherein it was ordered that the respondent gets 1.4 acres from the suit herein leaving the applicant with 2.5 acres. The applicant appealed against the award in central provincial land disputes appeals committee which upheld the decision of the Tribunal in their award. Consequently, the respondent is now in the process of subdividing the suit land with the help of the executive office in Thika Law Courts so that new titles may be issued. The applicant is however advised that the Kandara Land Dispute Tribunal has no power to deal with ownership and title to the land registered under the Registered Lands Act chapter 300 Laws of Kenya but must confide to the powers under section 3 of the Land Dispute Tribunal and that their decision is therefore a nullity for lack of jurisdiction.

In opposition to the application, Rebecca Anjiru Mbugua, the 3rd respondent swore an affidavit on 21st May 2012, in which she stated that the suit as filed is frivolous, unmeritorious, vexatious and an abuse of the court process and fatally defective as the applicant ought have filed an Appeal against the decision by the Kandara Land Disputes Tribunal and not proceeding by way of judicial review as the law provides for an Appeal and not otherwise. According to her that the Applicant is her younger brother in a family of four (4) children though both our parents are deceased. Although she is unmarried she has five (5) children and have lived on the suit property since her childhood days. The applicant being the only brother the father had his land LR No. Loc.2/Mukangu/207 transferred in favour of the Applicant in early 1980's or late 1970's in trust for the four (4) siblings during the lifetime of the mother. By the time of the father's demise around 1984 the applicant was not married but the mother passed away he was married and it was after her death that the applicant began to be incited by his wife to take over the entire land in spite of the fact that the deponent was residing in the same compound in the suit property in a duly demarcated portion. Following the death of the mother the applicant started assaulting the deponent physically by beating her in a bid to chase her out of the property and which assaults made me make several complains to the police. As a result of the frequent antagonism between the deponent and the applicant the deponent was advised by the village elders to seek redress from the area chief and

eventually the matter ended up at Kandara land disputes Tribunal leading to the verdict in issue delivered on 30th July 2002 by the said Tribunal. Pursuant to the decision of the Kandara Land Disputes Tribunal which recommended that I should be given a portion measuring 1.4 acres out of LR No. Loc. 2/Mukangu/207 while the applicant was to retain 2.5 acres which decision was subsequently confirmed by the Chief Magistrate's Court Thika on 17th march 2004 in Thika Chief Magistrate's Court D.O's Case No. 62/2002. Subsequent to the said confirmation the property known as LR No. Loc.3/Mukangu/207 was sub-divided and the deponent was issued with a title in respect of the portion now known as LR No. Loc.3/Mukangu/1094 while the other portion belongs to the Applicant. As a result of frequent harassments and assaults by the Applicant, the deponent was forced to sell the said property LR No. Loc.3/Mukangu/1094 to one Jasan Macharia Muriithi around April 2011 and he is therefore the current registered owner. The deponent thereafter bought another piece of land where she resides free from harassments and assaults from the Applicant thus the motive behind her reluctant sale of the property was to enable her keep a distance from the Applicant as the fact that we were residing near each other despite the formal sub-division of our respective portions of land was still a source of hug conflict all fanned by the Applicant. According to her the Applicant did not purchase or contribute to the purchase of the now sub-divided LR No. Loc. 2/Mukangu/207 and therefore has no higher right over myself and/or the other children of the late Mbugua Maina our late father and thus those of his children who would want a share out of his estate are entitled to such share in equal priority with the Applicant. In her view the prayers by the Applicant have been overtaken by events and/or are inconsequential as LR. N. 2 Mukangu/207 is no longer in existence but has rather been sub-divided into two (2) portions and separate Titles issued. It is therefore contended that the Applicant's remedy (if any) against the award by the Kandara Land Dispute's Tribunal did not and does not lie in the nature of the suit filed and further that there is no explanation why the Applicant never appealed against the said Tribunal's award in time or at all.

Apart from what is stated in the affidavit in reply the 3rd respondent contends that since the substantive motion was filed in the file in which the leave was granted the application is incompetent and relies on the case of **Republic vs. Funyula District Lands Disputes Tribunals & 3 Others [2004] 1 KLR 1**. This decision is in contrast to that of **G B M Kariuki, J in Republic vs. The Chairman Kabras Land Disputes Tribunal & Another Ex Parte Jeremiah Luchombo Kakamega HCMA No. 112 of 2006** where the Court was of the view that the substantive Motion filed subsequent to the grant of leave ought to be filed in the same file. On my part, I associate myself with the latter decision. It would be cumbersome where the leave is granted after the commencement of the Motion for the Court to revert to a different file. It makes sense that the Motion be filed in the same file so that if there is a challenge to the leave, the Court may deal with the whole judicial review proceedings rather than determination the matter piecemeal.

In this case, it is contended, which contention is not challenged that Land Parcel No. Loc.3/Mukangu/207 ceased to exist when the impugned decision was implemented and the same subdivided. It follows that the orders sought by the applicant herein are incapable of being granted taking into account the fact that that a third party has since acquired interest in the disputed portion of land which party is not joined in these proceedings. This is not a suit for rectification of tile hence the Court's decision will not have the effect of reinstating the title to the ex parte applicant.

Apart from that there is a procedure provided for in challenging the decision of the Appeals Committee. Whereas the existence of an alternative procedure does not necessarily bar the remedy of certiorari, the fact that a remedy exists which has not been resorted to is a factor which the Court takes into account in deciding whether or not to award the discretionary remedy of certiorari.

Where therefore the property has changed hands, it is my view that certiorari is not the most efficacious remedy in the circumstances more so where the present registered proprietor is not a party to these proceedings and the Court ought not to exercise its discretion in granting the same.

In the premises, I am unable to grant the orders sought herein hence the same are disallowed. However, since it appears that the original order may have been made in ignorance of the jurisdiction of the Tribunal, I make no order as to costs.

Dated at Nairobi this 28th day of February 2013

G V ODUNGA
JUDGE

Delivered in the absence of the parties