



REPUBLIC OF KENYA



**Chairman, Nyakiambi Water Project v Mbugua (Judicial Review
78 of 2010) [2023] KEHC 22610 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW 78 OF 2010
HM NYAGA, J
SEPTEMBER 25, 2023
IN THE MATTER OF AN APPLICATION FOR ORDER OF
JUDICIAL REVIEW BY WAY OF CERTIORARI
AND
IN THE MATTER OF BAHATI LAND DISPUTES TRIBUNAL
CASE NO.171 OF 2009
AND
IN THE MATTER OF NAKURU CHIEF MAGISTRATE'S COURT
LAND DISPUTE CASE NO.5 OF 2010**

**BETWEEN
CHAIRMAN, NYAKIAMBI WATER PROJECT INTERESTED PARTY
AND
PATRICK MUKUNDI MBUGUA APPLICANT**

RULING

1. By a Notice of Motion dated 8th July, 2010 brought under Section 8 & 9 of the *Law Reform Act* and Rules 3 and 4 of the *Civil Procedure Rules*, the Applicants seeks for an order of Certiorari to remove to this Court for purposes of being quashed the proceedings and ruling of Bahati Land Disputes Tribunal in Land Dispute Case No.171 of 2009 and Nakuru Chief Magistrate's Land Dispute Case No. 5 of 2010.
2. The grounds upon which relief is sought are: -
 1. That the Land Dispute Tribunal had no jurisdiction to determine the claim that was based on contract.



2. That the Land Dispute Tribunal acted ultra vires in determining a claim based on contract.
 3. That the Land Dispute Tribunal Ruling dated 21st April,2010 lacks legal basis.
 4. That the Land Dispute Tribunal has acted unlawfully and without good or lawful excuse.
 5. That the Chief Magistrate has no power to enter and adopt the award of Bahati Land Disputes Tribunal as judgement of the court the said award was arrived at by the Tribunal without jurisdiction.
3. The Application is supported by an affidavit of Patrick Mukundi Mbugua sworn on 8th July, 2010. He deponed therein that he is the registered owner of LR Bahati/Bahati Block 1/109 after purchasing the same from one Kenneth Maina Muhoro as an innocent purchaser of value vide a sale agreement dated 14th August,1996.
 4. He averred that by a letter dated 13th July,2009, the interested party herein instituted proceedings vide case No.171 OF 2009 at Bahati Land Disputes Tribunal claiming to have proprietary rights and or interest over the suit land and vide an award dated 21st April,2010 the said tribunal allowed the interested party's claim and ordered cancellation of his title, and that the interested party thereafter applied to court for adoption of the award as judgement of the court.
 5. The Interested party opposed the Application via replying Affidavit sworn by its Chairperson one Samuel Nduati Wanja on 6th September,2023.
 6. He deponed that the Application is fatally defective and grossly incompetent and should not be entertained by this court.
 7. He averred that as per the court order issued on 9th July,2010 the ex-parte Applicant was to file and serve the substantive application within 15 days of the said order but to date he is yet to be served with the substantive application. That on this basis alone this judicial proceeding ought to be dismissed since as per order 53 Rule 3(1) of the *Civil Procedure Rules*,2010 the ex-parte applicant by law had 21 days to file and serve the substantive application and which he failed to do.
 8. He averred that the relief sought can only be issued within 6 months but it is now over a decade and as such the instant application is overtaken by events and time barred.
 9. It was his deposition that this Honourable court lacks jurisdiction to entertain and hear this matter since the issues raised mainly relates to land ownership between the ex parte applicant and the interested party and which disputes are a preserve of the Environment and Land Court.
 10. He averred that it is not in dispute that the suit property known as Bahati/Bahati Block 1/1019 was and to date been reserved as a public utility for water tank/project and this was the intended purpose and there has never been change of user to date.
 11. He deposed that it is obvious the ex-parte applicant through the back door is attempting to overturn the tribunal's findings and has failed to prove that there was any procedural lapse by the tribunal.
 12. He also averred that the ex-parte applicant has not demonstrated why the decision of the tribunal ought to be quashed and why the said decision is unreasonable.
 13. The Application was canvassed through written submissions.



Applicant's Submissions

14. The Applicant submitted that it is not in dispute that the applicant is the registered owner of the suit land and has a title deed in possession. It is also not in dispute that the issue before the tribunal was over the ownership of Bahati/Bahati 1/1019
15. It was submitted that pursuant to the Provisions of Section 3 of the [Land Disputes Tribunal Act](#) No.18 of 1990 the tribunal had no jurisdiction to determine ownership of Land.
16. The Applicant submitted that the high court in Mombasa Mis. Criminal Appl.No.1058 Of 2006 –[Christine Schneider v District Land Dispute Tribunal](#); Eldoret Misc.Appl. No.43 Of 2006- [Republic v The Chairman Keiyo Division L.d.t & Another](#); & Mombasa Misc. Civil.Appl. No 14 Of 2007- [Pekeshe Ndeje Ndara v The Kaloleni Land Dispute Tribunal](#) held that a Land Dispute has no jurisdiction to determine ownership of the land particularly where a title deed has been issued.

Interested Party's Submissions

17. On whether this Honourable Court has jurisdiction to entertain this matter, the interested party submitted that this matter involves land and therefore the court with exclusive jurisdiction to determine it is the Environment and Land Court.
18. In support of its submissions, the interested party relied on the cases of [National Land Commission v Afrison Export Import Limited & 10 others](#) [2019] eKLR where the court expounded on the broad jurisdiction of the Environment and Land Court; [Christopher Ngusu Mulwa & 28 others v County Government of Kitui & 2 others](#) [2017] eKLR where the court held that it is only the ELC that has jurisdiction to consider a dispute relating to land; & [Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi](#) (2020) eKLR where the court stated that in any litigation, jurisdiction is central and a court cannot validly take any step without jurisdiction.
19. In regards to whether the suit property is a public utility land, the interested party submitted that the annexed copy of the greed card for the suit property and an extract of the area map clearly show that the suit property is a public utility land reserved for a water tank and to date the same has never changed.
20. With respect to whether the Applicant has established any ground(s) to warrant issuance of judicial review remedies, the interested party referred to the case of [Republic v Kenya Power & Lighting Company Ltd & another](#) [2013] eKLR where the court observed that

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”
21. The interested party also referred to the case of [Konton Trading Limited v Kenya Revenue Authority & 3 others](#) [2018] eKLR where the court held inter alia that ;

“Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference..”



22. The interested party then submitted that in the instant case, the Applicant has not addressed the pertinent issue that the suit property was indisputably a public utility and which was at the inception reserved water tank.
23. On whether the Application is merited and the prayers sought ought to be allowed, the interested party submitted that the exparte applicant has not demonstrated any of the grounds he has alleged in their statutory statement. It contended that the applicant has not proved any illegality, irrationality and or procedural impropriety and therefore his claim ought to fail. In support of its submissions, the interested party relied on the cases of Republic v Commissioner of Customs Services Ex-Parte Africa K-Link International Limited [2012] eKLR where the court observed *inter alia* that judicial review is concerned with the process a statutory body employed to reach its decision and not the merits of the decision itself & Konton Trading Limited v Kenya Revenue Authority & 3 others (supra) where the court *inter alia* stated that the grant of orders of certiorari, mandamus and prohibition is discretionary and that the court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.
24. In regards to whether costs should issue, the interested party prayed that this application be dismissed with costs. It placed reliance on the case of Orix Oil (Kenya) Limited v Paul Kabuu & 2 others [2014] eKLR for the proposition that costs follow the event.

Analysis & Determination

25. The issues that arise for determination are: -
 - a. Whether this court has jurisdiction to hear and determine this matter.
 - b. Whether this Application has been overtaken by events.
 - c. If the answer to the above issues is in the negative, whether the Ex parte Applicant herein is entitled to the orders of certiorari.

Jurisdiction of the Court

26. The interested party contended that the matter herein relates to land ownership and therefore the court with exclusive jurisdiction to determine it is the ELC.
27. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.
28. In Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”



29. That Jurisdiction is so central in judicial proceedings is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

‘Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...’

30. This Court is established under Article 165(1) of the *constitution*. Its jurisdiction is donated by Article 165(3) which provides; -

- “(3) Subject to clause (5), the High Court shall have—
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this *Constitution* including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this *Constitution*;
 - (ii) the question whether anything said to be done under the authority of this *Constitution* or of any law is inconsistent with, or in contravention of, this *Constitution*;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

31. Article 165(6) of the *Constitution* provides that the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or a quasi-judicial function but not a superior court.

32. What the ex parte Applicant seeks to achieve through this Application is for this Court to quash the decision of the land dispute tribunal. He believes that the decision lacks legal basis as the tribunal did not have jurisdiction to determine ownership of the land. The Applicant is not challenging the ownership of the subject land.



33. Section 9(1) of the *Fair Administrative Action Act* provides that a person aggrieved by an administrative action may apply for Judicial Review of such a decision in the High Court or subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution* 2010. The court's jurisdiction is not to deal with the merits of the decision, but to determine if the tribunal had the jurisdiction to hear and determine the matter in the first place.
34. Having said so, I do not have any doubt in my mind that this Court is seized of the requisite jurisdiction under Article 165(3)(6) of the *Constitution* and Section 9(1) of the *Fair Administrative Action Act* to deal with this matter. The question on that issue is thus answered in the affirmative.

Whether the Application was Time Barred by Law.

35. The Interested party averred that the order of certiorari can only be issued within 6 months of the decision. That it is now over a decade and as such the application has been overtaken by events.
36. The interested neither cited any law provision nor precedence to buttress its averment.
37. Section 9(3) of the *Law Reform Act* provides for the period in which an application of this nature ought to be filed. It provides as follows;

“(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the 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 proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

38. Further, Order 53 Rule 2 of the *Civil Procedure Rules* provides as follows;

‘Time for applying for certiorari in certain cases [Order 53, rule 2.]

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by 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.’

39. What is clear from the said Rule is that no leave can be granted for an order of certiorari unless the application for leave is made not later than 6 months after the cause of action arose. The tribunal award was made on 21st April, 2010 and this application was brought about 4 months from the time the impugned award was entered. i.e. 9th July, 2010 and is therefore not statute barred.
40. The application herein therefore has not been overtaken by events. There is no time limit set on the court to make a decision. The argument to that effect is thus flawed.



Whether the Ex parte Applicant Herein is Entitled to the Orders of Certiorari.

41. 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.
42. 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.
43. In *Peter Ouma Mitai v John Nyarara* Kisii HCCA No. 297 of 2005, Musinga, J (as he then was) following the decision in *Zedekiah M Mwale v 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. If 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.”
44. In the instant case, it is not in dispute that the subject matter of the claim lodged before the Bahati Land Dispute Tribunal and on 21st April 2010 the tribunal rendered its decision as follows: -
 - a. The land Ref Bahati/Bahati Block 1/1019 is a public utility which was reserved by Bahati Mutukanio Company to develop it in future like any other farms which owned by the company.
 - b. The land Bahati/Bahati Block 1/1019 belongs to the Nyakiambi Community Water Project. The title deed which was issued to Kenneth Maina Muhoro and later sold to Mr. Patrick Mbugua through dubious way the Bahati Land Dispute Tribunal request the Hon. Court to cancel the title deed Ref. Bahati/Bahati Block 1/1019 under the name Mr. Patrick Mukundi Mbugua and be issued to Nyakiambi Community Water Project.
45. This application was filed before the tribunal’s award was adopted by the lower court.



46. In *David Kimani Karogo v Thika Land Disputes Tribunal & 2 others* [2017] eKLR the court while dealing with a similar issue held that;

“It is evident that both Tribunals acted without jurisdiction and/or exceeded their jurisdiction when they arbitrated matters registered under Cap 300 and which dispute was over competing titles. Therefore, the said tribunals acted ultra vires or in excess of their jurisdiction. was land registered under the *Registered Land Act*, Cap 300 Laws of Kenya (repealed)”.

47. The exparte applicant has annexed a title deed showing that he was the registered owner of Land Parcel No. Bahati/Bahati Block 1/1019 whose title was challenged by the interested party before the tribunal. By dint of Section 3 of the *Land Disputes Tribunal Act* No 18 of 1990 (Repealed) the said Tribunal had no jurisdiction to make a determination over registered land such as the suit land herein. Consequently, the subordinate court adopted a decision that was made without jurisdiction.

48. In determining the issue of ownership of the suit property when it had no power to entertain such a claim the said tribunal exceeded its jurisdiction under the *Land Disputes Tribunal Act*, No.18 of 1990 and therefore its award was a nullity.

49. Flowing from the above, I hereby allow this Application and proceed to quash the decision of the Land Disputes Tribunal dated 21st April, 2010 and all the subsequent orders.

50. It is important to note that this court has not gone to the merits of the case in any way. This ruling is restricted to the question of the jurisdiction of the Land Disputes Tribunal to hear the matter that was presented to it.

51. Having done so, I find that the dispute between the parties ought to be resolved by the Environment and Land Court (ELC) which is mandated by Article 162 (2) (a) the *Constitution* to deal with all matters relating to the use and occupation of and title to land, or the magistrate’s court, where it has requisite pecuniary jurisdiction.

52. I also award costs to the Applicant, to be paid by the interested party.

53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 25TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA

JUDGE

In the presence of;

Ms Wangari for Waiganjo for the Applicant

N/A for interested party

