REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 230 OF 1993

JULIUS NTOGAITI METHANG'ATHIA & 4 OTHERS.....APPLICANTS

VERSUS

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER

MERU NORTH (NYAMBANE) DISTRICT & 3 OTHERS.....RESPONDENTS

RULING OF THE COURT

The first Notice of Motion is dated 16th February, 1999 seeking to join the applicants as parties to HC Misc Application No 230 of 1993 and is brought under section 3A Civil Procedure Act and order L rules (1) and (12) of the Civil Procedure Rules.

The second Notice of Motion before us is dated 21st March, 2000 and brought under order XLIV rule 1 and order L rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act wherein the main prayers before us are prayers (2) and (3). In prayer (2) the applicants are asking for a stay of the implementation of the decision made in HC Misc Application No 230 of 1993 until the hearing and determination of this application. In prayer (3) the applicants ask:

"That this Court do review its judgment made in Misc Application No 230 of 1993 by honourable A B Shah JA & M Ole Keiwua J and delivered on the 23rd of July, 1994 and that the said judgment together with the decision in the African Court Case Number 10 of 1960 be set aside."

It be noted that Misc Application No 230 of 1993 is the HC Misc Application No 230 of 1993 referred to above and that the applicants are also referred to as interested parties.

The grounds in support of the second application as given in the body of the application are:

(a) That new and important matters of evidence have come to light.

(b) That the applicants herein are interested parties and have not been given an opportunity to be heard, neither have they been served with any and or any valid notice of proceedings.

(c) That the decision of the Court has been based on deliberate misinformation and misinterpretation of facts on the part of the respondents and should the said decision be implemented there shall be

miscarriage of justice in that the applicants will be divested of their land which they have occupied since time immemorial and they will be rendered landless.

(d) The respondents have concealed facts before this honourable Court."

That application is supported by the affidavit of Julius Ntogaiti M'ethang'atha dated 21st March, 2000 wherein he states that he has deponed the said affidavits on his own behalf and on behalf of the other four interested parties who have authorized him to do so. Mr Julius Ntogaiti M'ethang'atha is named as the first interested party.

We must point out here that parties are creating confusion in this matter with regard to the capacity in which each party is appearing, right from the start to-date. They do not seem to be keen in ensuring that each time each party is appropriately described as to the capacity in which it is appearing in respect of each application. Yet several applications are being made. Furthermore, names are carelessly written so that it is not easy for the Court to know whether a particular party is omitted or included in a particular application or in a particular affidavit or in an annexture.

As we have said earlier, before us are two Notices of Motion. One is brought under order L while the other Notice of Motion is brought under order XLIV. As such, the applicants, also referred to as interested parties, should have been clearly designated at the top of each Notice of Motion as:

Julius Ntogaiti M'ethang'atha.....1st applicant/

interested party

Henry Ethaiba.....2nd applicant/

interested party

Jason Kiiru Mbeeria.....3rd applicant/

interested party

M'Iguatha M'Kiriti .....4th applicant/

interested party

Aggrey M'ethang'atha .....5th applicant/

interested party

The name of Samuel M'Mukiri should not therefore have appeared as the applicant as that was wrongly done. We have no evidence to show that he is an applicant before us. On the contrary, evidence is that the orders the applicants wish to stop and set aside are substantially orders in his favour.

He should have been named as one of the respondents in addition to the three respondents who have been properly designated. They are:

The District Land Adjudication and) .....1st respondent

Settlement Officer: Meru North)

(Nyambene) District)

The Honourable Attorney General .....2nd respondent

The Administrator of the Estate of the

Late M'Mutua M' Ikombo .....3rd respondent

and we add

Samuel M'Mukiri .....4th Respondent

Perhaps it is not realised that the way parties are designated in an ordinary Notice of Motion or any other application including Chamber Summons, is different from the way parties are designated in a Notice of Motion or Chamber Summons asking for prerogative orders under order L III of the Civil Procedure Rules. HC Misc Application No 230 of 1993 having been brought under order LIII, parties in subsequent applications filed under different rules of the Civil Procedure Rules are, wrongly designating themselves as they were parties in the first application which was a Notice of Motion seeking prerogative orders.

Having said the above, it is better to try and set out the position in this matter as we understand it before we consider the merits of the Notices of Motion before us dated 16th February, 1999 and 21st March, 2000 consolidated for hearing.

Mr Wagara and Miss Kamau appeared for the applicants/interested parties while Miss Kimani appeared for the first and second respondents, Mrs Wambugu for the third respondent and Mr Kathurima M'Inoti for Samuel M'Mukiri to whom we are referring as the fourth respondent. In terms of the provisions of the Land Consolidation Act or the Land Adjudication Act, the land adjudication and settlement officer is simply referred to, sometime in these proceedings, as the land adjudication officer.

Parties have loosely talked about the Land Consolidation Act (Cap 283) and the Land Adjudication Act (Cap 284) without explaining how the two different statutes apply to the suit piece of land and this is regrettable because a suit, like this one, should be within the context of the relevant statute so that the implementation of the court's decision order, ruling or judgment is not only understood but is also easy and free from inconsistencies in relation with provisions of the statute.

It has been stated that the piece of land consists of 200 acres in Uringu area of former Nyambene district, now known as Meru North district. Despite the fact that it is occupied by a number of families each claiming ownership of the portion he occupies, early in 1960's two of the residents commenced court proceedings against one another each claiming ownership of the entire 200 acres to the exclusion of the other. The two individuals were M'Mutua M'Ikombo and Samuel Mukiri also written as Samuel M'Mukiri. It is not clear why they ignored the rest of the people said to have been residing on portions of the 200 acres perhaps each person claiming ownership of the portion he occupied.

The two individuals went ahead and whether or not each was representing his family only or was representing his clan has not been made clear to us. It was M'Mutua M'Ikombo who started the ball rolling as a plaintiff against Samuel Mukiri in Miathene lower court Case No 10 of 1960. From that Court, the two parties moved on appeal to the African Appeal Court in Case No 8/B/of 1961. There was a

further appeal from that Court to the District Officer Meru in Case No 10/L/of 1962 and thereafter, an application for review to the Provincial Commissioner in MDR No 23/9 of 1962.

The end result of that litigation was that M'Mutua M'Ikombo was awarded 2/3 of the disputed 200 acres while Samuel Mukiri was awarded 1/3 of the area. Apparently that was before the Land Consolidation Act or Land Adjudication Act were applied to Uringu area and nobody cared to ascertain a complete boundary covering the 200 areas. Moreover, one party's interpretation of the court judgment was different from the other party's interpretation and the shares of 2/3 and 1/3 did not come out as such until much later.

It is not revealed when Uringu area was declared an adjudication area by the Minister under section 2(1) of the Land Consolidation Act. But there is no dispute that Uringu was declared an adjudication section by the land adjudication officer, under section 7 of the Act on 4th June, 1966. As a result a land committee and an arbitration board were constituted and started working in the section in conjunction with demarcation officers and recording officers to ascertain existing land rights of people in the adjudication section under African customary law.

It was during the recording of existing rights and land demarcation that land adjudication process run into a problem respecting the suit piece of land. Both M'Mutua M'Ikombo and Samuel Mukiri wanted to use the court judgment in their land case referred to above to establish their existing rights. That was proper as the existence of a prior court judgment was and is good evidence to be considered during land consolidation or adjudication for the parties concerned to establish their respective existing rights to land. But as we have said, there was a problem.

First there had been no complete boundary demarcation, during the judgment, of the extent and limit of the 200 acres.

Secondly the two parties to the court judgment gave the judgment different interpretations.

Thirdly there came up other people, who had not been parties to the case from which the judgment had been obtained, but claimed ownership of respective portions they occupied within the 200 acres covered by the judgment. They were in effect directing their respective claims against M'Mutua M'Ikombo whose elder brother Ithinyai Ikimbo did not want to take it lying down. We are not told whether by then M'Mutua M'Ikombo had died. Although subsequent proceedings seem to suggest he was still alive.

The said Ithinyai Ikobo therefore filed the following committee cases against the people he thought had encroached onto the portion of land awarded by the court judgment to his brother.

No 911/68/69 - *Ithinyai Ikombo -vs- Enny Ethaiba*

No 912/68/69 - *Ithinyai Ikombo -vs- Limberia*

Mwirebua

No 913/68/69 - *Ithinyai Ikombo -vs- Samuel Mukiri*

No 914/68/69 - *Ithinyai Ikombo -vs- E'thang'atha*

Mwirebua

No 915/68/69 - *Ithinyai Ikombo -vs- Francis Rukunga*

No 916/68/69 – *Ithinyai Ikombo -vs- Iguatha Nkiriti*

As we expressed our concern about carelessness in writing names, we find it difficult to reconcile the above six names with the names of the applicants as given before us. But we think what we have said serves to convey the general situation as it was.

The land committee found it very difficult to resolve the three problems we have mentioned above. There followed an interpretation of the court judgment by the district magistrate Miathane. That interpretation appears to have been of some assistance and the land committee was able to determine Cases No 913/68/69 and No 915/68/69. It was from that interpretation that it was determined that the court judgment which was being interpreted with different meanings meant that M'Mutua M'Ikombo was to have 2/3 while Samuel Mukiri was to have 1/3 of the 200 acres in dispute between the two.

That interpretation by the district magistrate was however, concerned with the dispute between M'Mutua M'Ikombo and Samuel Mukiri only. It was not concerned with the dispute between Ithinyai Ikombo and the six defendants he was appearing with before the land committee. I have said the land committee decided two of the cases. But that was not the end of the two decided cases. All those six cases therefore went before the arbitration board. The land committee referred to the board four of the cases while the parties in the decided two cases had the right to appeal to the arbitration board and did appeal.

On the other hand implementation of the court judgment between M'Mutua M'Ikombo and Samuel Mukiri still proved difficult even after the land committee and the arbitration board as well as the land adjudication officer accepted the, Miathene district magistrate's interpretation of the court judgment. Determining the boundary of the 200 acres proved to be a big headache to the adjudication machinery.

At the same time Samuel Mukiri perhaps hoped to get more than what the district magistrate Miathene had given him through the interpretation of the African court judgment.

With all those problems, land adjudication process concerning the 200 acres seemed to have come to a halt.

As a result the director of land adjudication and settlement in the Ministry of Lands and Settlement headquarters, Nairobi, asked the Provincial Land Adjudication and Settlement Officer Eastern province, to give and the latter gave a report on 11th September, 1989 in which he set out the history of the dispute and recommended four ways to resolve the dispute for the benefit of all the families who lived together in the area affected.

The Provincial Land Adjudication and Settlement Officer, Mr Riungu, said in his report that the African court judgment was unimplementable because the sketch map on which it was based was faulty. In his first recommendation, he wanted a special arbitration board to deal with the six cases commenced by Ithinyai Ikombo ignoring the Court judgment which talked of 2/3 and 1/3.

The suggestion to ignore the court judgment may look improper, but in our view it was proper for two reasons. First, land adjudication and consolidation machinery in Uringu adjudication section had found that the African court judgment was unimplementable. Secondly even if the judgment were implementable, a court judgment is produced during land adjudication as a mere piece of evidence to be considered together with other piece of evidence in support of or in opposition to a claimant's case.

Though persuasive, the judgment is not binding and can therefore be lawfully accepted or rejected when the adjudication process takes into account other pieces of evidence based on customary law which officials conducting the adjudication process are obliged to follow in accordance with section 11, if the process is under the Land Consolidation Act, or section 20, if the process is under the Land Adjudication Act.

We are reenforced in saying that because, if the adjudication process is under the Land Consolidation Act, that Act is silent about the application of the Civil Procedure Act and Rules. In a similar situation where the Land Adjudication Act says nothing about the application of the Civil Procedure Act and Rules in relation to the powers of the Minister in handling appeals under section 29 of the Land Adjudication Act, the Court of Appeal for East Africa in the case of *Timotheo Makenge v Manunga Ngochi* [1979] KLR 53 held that the Minister in deciding appeals under the Land Adjudication Act, was not bound to follow the procedure laid down for hearing civil suits and was justified, whilst bearing previous decisions (which included decisions of land committee, arbitration board, land adjudication officer as well as court decisions) in mind, in giving no effect to them.

The principle of *res judicata* did not therefore apply in the appeal before him. This is what Law JA said of the Minister:

"He had in mind the previous litigation, but gave no effect to it. In my view, he was justified in doing so."

The second reason which made the Court of Appeal reject *res judicata* in that has to take place, shifting around, not only boundaries but also whole parcels of land, then the point the Court of Appeal was making in the case of *Timotheo Makenge* is more stronger under the Land Consolidation Act than it is under the Land Adjudication Act which also unlike the Land Consolidation Act, requires the land adjudication officer in section 12 in

"So far as is practicable, to follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a Court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord."

Moving to the second recommendation made by Mr Riungu, he wanted Samuel Mukiri to be left out of future deliberation because there was no party aggrieved by his possession of the 1/3 portion he gained out of the court judgment. That suggests the land committee cases mentioned above were all on the side of he 2/3 portion of the judgment.

Mr Riungu recommended that if the first recommendation were not acceptable, the whole matter could be sorted out traditionally by the performance of a "*Nthenge* oath carried out by "*Njuri Ncheke*".

His final recommendation was the implementation of the court judgment "by approximate use of the sketch map prepared by the Court and which map was being disputed by one party.

By a letter dated 6th September, 1990 the director of land adjudication and settlement advised that recommendation No 3 be implemented ie the matter be sorted out traditionally by performing a "*Nthenge* oath" to be carried out by the *Njuri Ncheke* elders. We think that was within the sphere of section 11 of the Land Consolidation Act to adjudicate upon and determine the claim on any individual person to any right or interest in any land within the adjudication section in accordance with African customary law.

Mr Riungu had said in his report that during fragment gathering, people were asked to gather their fragments of land as per their developments on the land. He had said that letters attached to pleadings showed that the entire land about 200 acres was all developed with permanent houses, fruit trees and many other developments. He had added that even if the extent of the 2/3 portion could be known, it would be extremely unfair to evict any party from the disputed land. He had lamented that when M'Mutua M'Ikombo filed the case against Samuel Mukiri, he did not join the people Ithinyai Ikombo was up against in the land cases. He had expressed the opinion that alternatively M'Mutua M'Ikombo should have filed separate cases against those people.

It means that the African court judgment in the case between M'Mutua

The Attorney General .....- 2nd respondent

M'Mutua M'Ikombo .....- 3rd respondent

praying for an order of *certiorari* to bring into the High Court and quash the decision of the *Njuri Ncheke* elders and directing the district land adjudication officer, Meru, to adjudicate over the applicant land in accordance with the finding/orders of the Court in Civil Case No 10 of 1960, at the African court and land Case No 8 /B/61 in the African Appeal Court and the subsequent decisions on appeal and in accordance with the provisions of the Land Consolidation Act and all other enabling provisions of law. Apparently by then the district land adjudication officer for the previous Meru district was still in charge of land adjudication process in the present Meru North district.

Other prayers in the application were for an order for a stay of the implementation of the decision.

These orders were granted by the High Court, with consent of all the parties, as can be seen in the court's judgment delivered on 23rd July, 1994 by Shah J and Ole Kewua J as they then were.

We have not see the terms of reference of the case to *Njuri Ncheke* elders. But it is clear the *Njuri Ncheke* elders had concentrated on the dispute between M'Mutua M'Ikombo and Samuel Mukiri which has been decided by the African Court, and had rejected the court's decision and awarded all the 200 acres to M'Mutua M'Ikombo. At the same time they completely over looked the land dispute between M'Mutua M'Ikombo jointly with his brother Ithinyai Ikombo against the people Ithinyai Ikombo had sued before the land committee.

Following the judgment of the High Court delivered on 23rd July, 1994 in HC Misc Application No 230 of 1993, Samuel Mukiri and generally the parties in that application appear to have been satisfied. But when the land adjudication officer went in November, 1995, to implement the judgment he met with opposition from the applicants who felt they had not been given the opportunity to claim their respective interests in the suit piece of land. They pointed out that at no stage were they informed of the cases between M'Mutua M'Ikombo and Samuel Mukiri either in the African Courts or in the High Court. They said they were occupying portions of the suit piece of land on which they had permanent houses and had carried out various developments.

Although they requested the land adjudication officer, Nyambene, for consent to file a court suit in respect of their interests in the suit piece of land, the land adjudication officer was reluctant. The applicants filed a Notice of Motion seeking orders to compel the said land adjudication officer issue his consent. The result has been kept away from us. We presume that should have been consent to file afresh and separate court suit as we doubt whether such consent was necessary in order to file the applications the applicants/interested parties have been filing in relation to this HC Misc Application No

230 of 1993 where Samuel M'Mukiri had obtained the land adjudication officer's consent to filing of the case.

If the applicants/interested parties succeded in that court case for consent, we presume they should have proceeded to file a new and separate court suit in accordance with their intention. If they were not successful in obtaining consent, they should have gone back to land adjudication officials to lawfully and peacefully fight for their land rights through the land adjudication process which, where the process is under the Land Adjudication Act, ends with appeals to the Minister responsible for land and settlement with a possibility, whether the process were under the Land Consolidation Act or under the Land Adjudication Act of reaching the High Court on the basis of judicial review under the Law Reform Act and order LIII of the Civil Procedure Rules. That is, there were two alternatives for the applicants to select one.

At first the applicants ignored both alternatives. Instead, in their fight against the decision of *Njuri Ncheke*, they chose to put their case directly before the director of land adjudication and settlement through correspondent and otherways. As a result, some letters were exchanged between the applicants and the directors of land adjudication and settlement and there were also visits, by the applicants or some of them, to the office of the director of land adjudication and settlement in Nairobi. But this course of action, on the part of the applicants, seems to have brought no change in the decision of *Njuri Ncheke*.

The applicants were still persisting in that course of action when they were rudely awaken by the fact that the Court to which one of their members as defendants before *Njuri Ncheke* namely Samuel M'Mukiri, had gone, had produced results not only over-turning the decisions of *Njuri Ncheke* but also adversely affecting the applicants interests in the disputed piece of land.

It was that awakening which made the applicants abandon their direct dealing with the director of land adjudication and settlement in order to turn to the Court.

However, they turned to the Court, not to adopt the first alternative of filing a new and separate case but to seek prerogative orders against the implementation of the judgment of the High Court dated 23rd July 1994 and obtained by Samuel M'Mukiri as a result of his action in HC Misc Application No 230 of 1993. That was a third alternative they thought was going to see them through. They are therefore still in this Court in that same case now before us. It means they have adopted a third alternative and have ignored the two alternatives we have referred to above either to file a new and separate Court suit or to go back and fight for their land rights through the land adjudication process.

The applicants first came to this Court in connection with this matter when they filed their two applications, one HC Misc No 1296 of 1995 and the other HC Misc Application No 1346 of 1995 both asking for orders of *certiorari*, prohibition and *mandamus*. The two applications were ordered consolidated by Lady Justice Aluoch and heard by Justice G S Pall, then judge of the High Court. He dismissed both applications on the ground that no leave to file the applications had been obtained from the Court prior to the filing of the applications. An appeal against that ruling was dismissed by the Court of Appeal.

Thereafter another application, HC Misc Application No 600 of 1997 seeking orders by way of judicial review, directed at the district land adjudication officer, Nyambene, to prohibit him from re-allocating or otherwise disposing off the applicant's parcels of land and/or implementing the decision in HC Misc Application No 230 of 1993 or any other decision thereof, was filed apparently leave to file the said application having been obtained. The same was transferred to the High Court, Meru for hearing and

was registered there as Meru High Court Misc Application No 58 of 1997.

Justice J V Juma dismissed that application stating that by issuing the order of prohibition, the High Court at Meru would in effect be sitting on its own appeal from HC Misc Application No 230 of 1993 at Nairobi. He said it would be improper for the High Court to issue another order stopping the implementation of the previous order. He suggested that that could only be done by way of review. He added that since the district land adjudication officer was only implementing the orders of the High Court, in law the officer could not be stopped from carrying out such orders except by another order from the same court or the Court of Appeal.

It was after the ruling, delivered on 2nd November, 1998, that the applicants came back to this Court and filed the present Notices of Motion, one dated 16th February, 1999 and the other dated 21st March 2000 both in HC Misc Application No 230 of 1993. We have heard both applications together and this ruling decides both applications.

Regarding the Notice of Motion dated 16th February 1999 for the applicants to be joined as parties, they must qualify to be made parties before they are allowed to be parties to HC Misc Civil Application No 230 of 1993. Section 3A of the Civil Procedure Act and order L rules (1) and (12) of the Civil Procedure Rules are cited to support the application for joinder of the applicants. Section 3A of the Civil Procedure Act concerns inherent powers of the Court, and properly should not be used where there are specific provisions of the law dealing with the issue in question. Order L rules (1) and (12) provide for the manner in which applications should be made. They should be by motion except when it is otherwise expressly provided for under the Civil Procedure Rules; and no application should be taken and none should be refused simply because the relevant order, rule or statutory provisions under or by virtue of which the application is made has not been stated.

The applicants have avoided order 1 rule (13) and order XXX rules (1) and (4) which are applicable instead of section 3A.

The first problem the applicants face, in their application to be joined as parties is that they purport to join the administrator of the estate of the late M'Mutua M'Ikombo. They have not named that administrator, or named the administrators if they are more than one. But even if they had named the administrator or administrators, the applicants should have made an application for substitution. No such application has been made. It is therefore improper to prosecute this application without the substitution of the late M'Mutua M'Ikombo having been done.

The second problem the applicants face in their application to be joined as parties is that joinder of parties may only be allowed before the trial or at the trial of the suit to be joined. This is a joinder of a party as opposed to substitution of a party which may be done even after the trial has ended. HC Misc Civil Application No 230 of 1993 was fully heard, determined and judgment delivered on 23rd June, 1994. There is no trial pending. The applicants are therefore seeking to be joined when it is too late.

The matter is made worse from the fact that HC Misc application No 230 of 1993 was a mere application for a judicial review with the purpose of reviving a court judgment in a different case in African Court case No 10 of 1960 resulting in African Appeal Court Land Case No 8/B/ of 1961 resulting in appeal to district officer, Meru Case No 10/L of 1962 and application for review to the Provincial Commissioner MDR No 23/9/ of 1962 culminating in District Magistrate's Court, Miathene – review of boundaries and the interpretation of the aforementioned court judgments on 17th September, 1969. No doubt in that case, there had been a full trial followed by a judgment which was challenged and considered during the aforementioned appeals before the judgment was left to exist up to 7th March,

1992 when *Njuri Ncheke* wholly rejected it and this Court in its final decision of 23rd July 1994 restored it. Since the applicants were not parties in that case and have not applied to be and cannot humanly and legally be made parties in that African Court case even if they applied to be, we think the joinder of the applicants in this HC Misc Application No 230 of 1993 would be meaningless, irregular and legally wrong.

That being the position, the application dated 16th February, 1999 for the applicants to be joined as parties fails thereby rendering the subsequent application dated 21st March, 2000 for a review incompetent and both applications should be dismissed at this state.

But supposing we are wrong, and it is therefore ruled that the applicants' application dated 16th February 1999 be granted, how far do we go with the second application dated 21st March 2000"

First there is the question of jurisdiction. Miss Kimani has, with the approval of counsel for the other respondents', submitted that this Court has no jurisdiction to entertain this application as order XLIV of the Civil Procedure Rules cannot be applied to review already done under section 8(5) of the Law Reform Act. She relied on section 8 of the Law Reform Act, Cap 26 Laws of Kenya, and cited case authorities starting with the case of *Kuria Mbae vs The Land Adjudication Officer, Chuka and another*, HC Misc Application No 257 of 1983 (unreported).

An order of *certiorari* had been granted in the absence of the respondent who subsequently obtained another order relying on section 3A of the Civil Procedure Act, possibly quashing or nullifying the order of *certiorari* on the ground that when *certiorari* was granted the respondents had not been served with the *certiorari* proceedings and were therefore absent. The subsequent order quashing or nullifying the order for *certiorari* had in turn been obtained in the absence of the applicant for the first *certiorari*.

In an application by the applicant for the first *certiorari* to set aside the order which purported to set aside the order for the first *certiorari*, it was held by Mbito J sitting with the late Mango J granting the application, that the High Court had no jurisdiction to subsequently stay, arrest, recall, review, set aside or quash an order of *certiorari* once the Court has made the order. The aggrieved party can however appeal to the Court of Appeal.

The order purporting to quash or nullify the order of *certiorari* was therefore set aside the Court relying on section 8 sub sections (3) and (5) of the Law Reform Act, and stating that section 3A of the Civil Procedure Act and provisions of the Civil Procedure Rules, including order XLIV did not apply and the Court had therefore had no jurisdiction to quash or nullify the order of *certiorari*.

In the *Commissioner of Lands vs Kunste Hotel Limited*, Civil Appeal No 234 of 1995, (unreported) the Court of Appeal stated as follows with regard to prerogative orders of *mandamus*, prohibition and *certiorari* in relation to s 8 of the Law Reform Act:

"So s 8(1) (sic) denies the High Court the power to issue orders of *mandamus*, prohibition and *certiorari* while exercising civil or criminal jurisdiction. What that then means is that notwithstanding the wording of s 13A, (sic), which talks of proceedings, in exercising the power to issue or not to issue an order of *certiorari* the Court is neither exercising civil nor criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of s 136(1) of the Government Lands Act, and also, s 13A of the Government Proceedings Act, which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that s 13A, (sic), when read closely, its wording, clearly shows that a suit within the meaning of the term suit in s 2 of the Civil Procedure Act is envisaged."

The Court said that because it was the *Commissioner of Land's* Case, and that of the interested party in that case, that the Notice of Motion asking for an order of *certiorari* was an action and that the Commissioner of Lands being a government servant, notice under section 136(2) of the action and the cause thereof must have been given the commissioner one month before the commencement of the action. Since that had not been done, the Notice of Motion seeking the order of *certiorari* was incompetent. The same was said with regard to section 13A of the Government Proceedings Act. The word "Action" is from subsection (1) of section 136 which states:

"136(1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards."

Neither the Government Lands Act, the Government Proceedings Act, nor the Civil Procedure Act and Rules made thereunder, have a definition of the term "action". But it is defined under section 3 of the Interpretation and General provisions Act, Cap 2 Laws of Kenya as:

"any civil proceedings in a Court and includes any suit as defined in section 2 of the Civil Procedure Act."

When that definition is looked at together with the provisions of section 8 of the Law Reform Act, it is discernible that an application for an order of *certiorari* or any of the prerogative orders is not an action. Section 8(1) states:

"8(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of *mandamus*, prohibition or *certiorari*."

By virtue of the provision of section 7 of the Administration of Justice (Miscellaneous provisions) Act, 1938, of the United Kingdom, which is applicable in this country by reason of section 8(2) of the Law Reform Act, prerogative writs were changed to be known as "Orders", except for the writ of *habeas corpus*.

From the above discussion relating to the jurisdiction of this Court therefore it is clear that proceedings for prerogative orders are not an action; but are proceedings of a special jurisdiction and therefore when the High Court is seized of those proceedings, it is neither exercising its civil nor its criminal jurisdiction and provisions of the Civil Procedure Act and Civil Procedure Rules relating to civil proceedings, including order XLIV, as well as provisions of the Criminal Procedure Act relating to criminal proceedings do not apply; except that rules under order LIII of the Civil Procedure Rules relating to prerogative orders do apply. It is further clear that the High Court has no jurisdiction to stay, arrest, recall, review, set aside or quash a prerogative order which has already been made or granted. Such an order is final and subject only to the right of appeal conferred by section 8(5).

Although section 8(5) talks of "the civil jurisdiction", section 8(3) seems to allow appeals against prerogative, orders to be done under section 8(5). Mr Wagara, for the applicant, belatedly concluded his replying submissions, under pretext from Miss Kimani, by arguing that section 8 subsections (3) and (5) of the Law Reform Act do not apply to those proceedings because this matter is not concluded. He said that the matter is still open because the Court said in the judgment of 23rd July 1994 that the parties could apply.

Miss Kimani raised objection because that point was not one of the grounds given in support of this application and it was no where in the supporting affidavits and therefore the respondent's side had not been given the opportunity to submit on that point especially since Mr Wagara had raised it after all

counsel representing respondents had concluded that submissions and had no right to reply Mr Wagara regarding that new ground. We think that objection was properly taken and we uphold it.

Otherwise we do not think the new ground, even if accepted, will see the applicants through. This is because if the matter is still open, it is open between the parties only. It is not open to those who were not parties to the application for orders of *certiorari* which the learned judges were handling. In other words it was open to the parties in the proceedings at the time the learned judges delivered their judgment on 23rd July 1994. The applicants were not parties and cannot therefore benefit from that openness.

On the other hand, in what terms did the learned judges put that openness" They stated as follows:

"There will be liberty to apply generally by way of mention."

Thus the liberty to apply given was to be by way of mention. It was not to be by way of notices of motion like the ones before us in this matter.

Furthermore that order for liberty to apply must be read together with subsections (3) and (5) of section 8 of the Law Reform Act so that if it is found to be inconsistent with or contradicting those provisions of the law, the provisions of the law must prevail. It would therefore be wrong to say that in those circumstances, it is the provisions of the law which cease to apply. It follows that if in law the High Court has no jurisdiction to review a prerogative order which has already been made or granted, a mere order of that Court giving the parties liberty to apply cannot confer upon that Court the jurisdiction to review which the Court does not have.

From the foregoing, this Court should dismiss the Notice of Motion dated 21st March, 2000 for lack of jurisdiction. But in case we are wrong again, we now look closer at the said Notice of Motion.

Prayer (2) seeking a stay was granted by Githinji J on 3rd April 2000 more or less when he ordered status quo as of that day to be maintained. In the absence of an order of a stay between November 1995 and 3rd April 2000, a number of things may have happened as the applicants were frantically running to this Court. Told to go to the High Court Meru, and subsequently bouncing back to this Court with these two applications. But a stay was granted on 3rd April 2000.

We therefore remain with prayer (3) and looking at ground (a) which states that new and important matters of evidence have come to light, although order XLIV rule (1) says that:

"Any person considering himself aggrieved."

May apply for a review, we do not see how the applicants can be properly included in the words. "Any person".

This is because such a person must be one.

"Who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made."

In other words the applicant must have been involved or have taken part in the proceedings from which the decree or order to be reviewed was passed or made. The applicants, in the instant application,

were not involved or did not take part in HC Misc Application No 230 of 1993 and the African Court cases cited earlier. The question of their exercise of due diligence did not and does not arise. The question of any evidence not having been within their knowledge or being impossible to produce at the time when the decree was passed or order made did not and does not arise. That being the position, the applicants/interested parties cannot properly make this type of application relying on the reason they put in ground (a).

But if they could make the application relying on the reason stated in ground (a), they had the duty to strictly prove that ground. The applicants claim they have been on the suit piece of land from the time immemorial and are over 300 families. True they were not parties to suits and had not been served. But with due diligence, it is difficult to see how over 300 families of the applicants/interested parties could not have been aware of the litigation which was going on between M'Mutua M'Ikombo and Samuel M'Mukiri from 1960 to 1995 a period of 35 years. These were sensitive land cases which were being conducted in open Courts of law and African Courts used to be local courts seen and talked about locally and openly, manned in rural areas by local court officials or staff-freely mixing with local residents. Unless the applicants settled in that area in 1995 just before the land adjudication officer moved in to implement the judgment of the High Court in November that year, the applicants could have been aware of the litigation and could, by then, have said what they are saying to-day claiming interests in the suit piece of land and therefore wanting to be joined. But for some reason not revealed to us the applicants chose to keep quiet until to-day to say it in the applications before us.

Samuel had been together with them when Ithinyai Ikombo took them before the land committee and the arbitration board. He was on their side against Ithinyai Ikombo and that remained the position even when they went before "*Njuri Ncheke*". Samuel must have relied upon the existence of those court cases and the relevant judgments in all his land disputes with M'Mutua M'Ikombo and Ithinyai Ikombo and must have made his submissions before the land committee, the arbitration board and "*Njuri Ncheke*" in the presence and hearing of the applicants together with a number of the other over 300 families said to reside on the suit piece of land.

Following proceedings before "*Njuri Ncheke*" from which the applicants must have, at least in 1992, learned that there had been court litigation between M'Mutua M'Ikombo and Samuel M'Mukiri concerning the suit piece of land, the applicants, for example, chose to deal with the director of land adjudication and settlement as Samuel M'Mukiri took M'Mutua M'Ikombo back to Court to fight for his interest in the land up to 23rd July 1994 as proceedings continued to be public in the Court.

The applicants still ignored those court proceedings until November 1995 the time the judgment of the Court obtained on 23rd July 1994 was being implemented.

In such a situation, we do not think it correct to say that the judgment of 23rd July 1994 shut out the applicants. It is apparent they had not been interested in Samuel M'Mukiri's litigation with either M'Mutua M'Ikombo or Ithinyai Ikombo.

Perhaps it was a question of thinking that court litigation between M'Mutua M'Ikombo and Samuel M'Mukiri was not going to adversely affect the interests of the applicants in the suit piece of land. Now having realized that they are adversely affected, they have come to this Court claiming they were not aware of the court litigation because they had not been parties and had not therefore been served to participate in those court litigations. In other words, the applicants are saying they had to be joined and be served in the litigations by M'Mutua M'Ikombo or Samuel M'Mukiri in order for the applicants to go and fight for their land rights in Court. Since neither M'Mutua M'Ikombo nor Samuel M'Mukiri joined and served the applicants, the applicants are saying they can now turn round to blame M'Mutua

M'Ikombo and Samuel M'Muriti and stop implementation of the judgment dated 23rd July 1994 on the ground that the judgment shut the applicants out of the litigations.

That may be so, but in our view, it is not convincing. As people claiming ownership of portions of the 200 acres, Mutua Ikombo and Samuel Mukiri were litigating about in Court, the applicants had the duty to go to Court also and make their claims. They were free to go either by filing separate suits or by applying to be joined in African Court Case No 10 of 1960. They did not have to wait for the benevolence of either Mutua M'Ikombo or Samuel M'Mukiri to join them. The two litigants, may not have thought the presence of the applicants on the suit piece of land threatened the interests of the two litigants.

From what we are saying therefore, we are not satisfied that the applicants have strictly or sufficiently proved the reasons they put in ground (a) in support of their application.

The grounds left for the Notice of Motion under order XLVI are:

(i) "Mistake or error apparent on the face of the record"

or

(ii) "for any other sufficient reason"

The ground of mistake or error apparent on the face of the record – has not been pleaded.

The following further grounds have however, been pleaded:

"(b) That the applicants herein are interested parties and have not been given an opportunity to be heard, neither have they been served with any valid notice of proceedings.

(c) That the decision of the Court has been based on deliberate misinformation and misinterpretation of facts on the part of the respondents and should the said decision be implemented there shall be miscarriage of justice in that the applicants will be divested of their land which they have occupied since time immemorial and they will be rendered landless.

(d) The respondents have concealed facts before this honourable Court."

The three grounds (b), (c) and (d) above could perhaps be said to be under the third category of grounds for review we have identified as (ii) "for any other sufficient reason". But would that really be correct."

Ground (b) clearly suggests the applicants are not parties and are seeking to be made parties. It is therefore a ground to support an application for a joinder of the applicants rather than being a ground for a review, especially in proceedings to which applicants have not been parties.

Grounds (c) and (d) are grounds to support an appeal and not an applicationfor review especially in proceedings to which applicants have not been parties. Those complaints are not being raised by any of the parties to HC Misc Application No 230 of 1993 or parties to the African Court case.

Moreover there is no appeal, to the Court of Appeal, against the judgment delivered on 23rd July 1994 in HC Misc Application No 230 of 1993. It means, for us to accept what the applicants are saying we will be sitting on an appeal against a judgment of our own Court. We have no jurisdiction to do that.

It follows from what we have been saying, that grounds (b), (c) and (d) in support of the applicant's application herein do not fall under the third category of grounds for review we have identified as (ii). The Notice of Motion dated 21st March 2000 for review is not therefore properly within the provisions of order XLIV rule (1) of the Civil Procedure Rules. Section 3A of the Civil Procedure Act cannot be used to grant the orders sought.

Otherwise applicants are being accused of laches by the respondents and our comments on the grounds the applicants advanced in support of the Notice of Motion dated 21st March 2000 are consistent with that accusation. Up to 1995, it was 35 years delay from 1960. Mr M'Inoti talked of 40 years delay. On the basis of "*Njuri Ncheke*" elder's decision in 1992, it is three years delay. On the whole, it is undue delay. Applicants may have been chasing justice but since they came to the route taken by Samuel M'Mukiri too late, they unduly delayed.

In any case the evidence before us is to the effect that the applicants do not claim any land from Samuel M'Mukiri's 1/3 of the 200 acres suit piece of land and Mr Wagara has emphasized that fact in his closing submissions. That was why the provincial land adjudication and settlement officer had recommended to the Commissioner of Lands in the report referred to earlier that the 1/3 portion the Court had awarded to Samuel M'Mukiri be excluded. The Commissioner of Lands did not exclude that portion. But "*Njuri Ncheke*", like the Court's that had handled the dispute before, decided the case between M'Mutua M'Ikombo and Samuel M'Mukiri only. That is what the High Court did late when it quashed the decision of "*Njuri Ncheke*".

It means that if the applicants had a claim against M'Mutua M'Ikombo and/or Samuel M'Mukiri, the applicants could file a separate and fresh court suit against the two or any of the two persons. Of course that is subject to provisions of the law permitting the applicants so to sue and where the applicants go to file such a case is up to them and their lawyers and their inability to file such a suit or the impropriety in filing the suit cannot and should not be used as a ground to say that the applicants/ interested parties must be in HC Misc Application No 230 of 1993 as that is not only years and legally too late, but is also irregular, if not improper.

We have been told that the land adjudication process in Uringu adjudication section is still held up at the stage of land demarcation, allegedly because of this case. The Meru North district land adjudication and settlement officer in his letter Ref LA/Adm/111/29 dated 13th July 2000 addressed to the Attorney General and produced in Court by Miss Kimani, explains that demarcation stage is the stage.

"Where the plots are surveyed and fixed on the ground."

This officer did not say whether that demarcation was under the Land Consolidation Act or under the Land Adjudication Act.

We have said that Uringu area was declared an adjudication section by the land adjudication officer under section 7 of the Land Consolidation Act on 4th June 1966. If to-date the land adjudication process is at the stage of land demarcation, where the plots are surveyed and fixed on the ground, it means

"the record of existing rights in respect of"

Uringu adjudication section has been completed and certified under section 16 of the Land Consolidation Act and the notice of such completion given including the place or places within the adjudication section at which the record could be inspected.

It also means that objections to "the record of existing rights" have been lodged and the procedure for resolving those objections gone through under sections 15, 18, 19 and 20 of the Land Consolidation Act.

Consolidation must have followed under section 21, and 22 of the Act and demarcation must therefore be going on under sections 23 and 24 so that consolidation and/or demarcation are not yet completed as required under section 25 of the Act.

We have not been told whether that is the position in respect of every parcel of land, including the 200 acres in dispute in this suit, in Uringu adjudication section. Parties were silent on this. They had even been silent on the stage at which the land adjudication process in that adjudication section had reached generally until we interjected to specifically inquire resulting in the letter from the district land adjudication and settlement officer referred to above. Further the parties have been silent on whether the adjudication process in Uringu adjudication section has remained under the Land Consolidation Act chapter 283 or has been taken over by the Land Adjudication Act, chapter 284. We are however assuming that the adjudication process is still under the Land Consolidation Act.

If therefore demarcation is going on and is yet to be completed under section 25 and the 200 acres in dispute in this suit are involved, it means the applicants still have the opportunity to lodge objections under section 26 and have those objections sealed before the adjudication register is declared final under section 27 of the Land Consolidation Act.

If on the other hand the adjudication process in Uringu adjudication section has been taken over by the Land Adjudication Act, and this is possible pursuant to the *proviso* to section 3 (1) (c) of the Land Adjudication Act if at the time of application of the Land Adjudication Act, a record of existing rights had not been completed and certified under section 16 of the Land Consolidation Act, then demarcation stage.

"Where the plots are surveyed and fixed on the ground"

would be under sections 14 to 19 of the Land Adjudication Act. That is when three officials, namely, the recording officer, the demarcation officer and the surveyor would be active in the adjudication section ascertaining interests in land and having those interests recorded, relevant boundaries demarcated and surveyed in accordance with African customary law.

Since it is during this stage, under the Land Adjudication Act, that land committees and arbitration boards came into play in respect of land disputes referred to land committees by the recording officer or the demarcation officer, it would mean that the applicants may still be having the opportunity to go to the relevant land committee or arbitration board.

In any case, the applicants will still have the opportunity of lodging objections to the land adjudication officer under section 26 of the Land Adjudication Act after the completion of the adjudication record and the adjudication register when the land committee and the arbitration board are through with their respective assignments.

After the land adjudication officer has determined the objection, if lodged under section 26, the applicants, if still dissatisfied, will further have the opportunity to appeal to the Minister under section 29 of the Land Adjudication Act.

From our consideration of the law in both Acts therefore, whether land adjudication work is being

done under the Land Consolidation Act or under the Land Adjudication Act, the land consolidation and adjudication machinery to settle this dispute are not yet closed to the applicants, and this, as we have said elsewhere, is the alternative way open to the applicants instead of them filing another court suit between this stage of land demarcation and the stage of the finality of land adjudication and consolidation work.

In that respect therefore, one may wonder what the applicants were doing between November 1995 and April 2000 if one remembers that although the applicants started complaining about the High Court judgment dated 23rd July 1994 in November 1995, it is only on 3rd April 2000 when they obtained an order for status quo and that was as from that day. That is a period of almost five years. Did the district land adjudication officer,

without a court order, restrain his officers, committee and board from working on the suit piece of land" If the answer is in the negative, have the applicants, and the rest of the over 300 families said to be in the area, not been participating, as owners of land or residents in the area, in the land adjudication process" Have they been mere on lookers as the work progressed from the recording of existing rights, through to land consolidation, and now at the land demarcation stage, where the district land adjudication and settlement officer says the work has reached" True the applicants were frantically running to and fro this Court with their applications referred to earlier but did they and the rest of the families, ignore the adjudication process which was going on the ground"

In any case, it should not be forgotten that whether the adjudication process in Uringu adjudication section ends under the provisions of the Land Consolidation Act or under the provisions of the Land Adjudication Act, the applicants if still dissatisfied with the final decision of the land adjudication officer, in the case of the former Act, or the final decision of the Minister, in the case of the later Act, could still have the opportunity to go to the High Court for prerogative orders as may be appropriate. All is not yet lost.

From the totality of what we have been saying therefore, it is our considered opinion that the High Court judgment dated 23rd July 1994 in HC Misc Application No 230 of 1993 be left for the implementation the applicants/ interested parties should not interfere with. It means the Notice of Motion dated 21st March 2000 must fail.

In conclusion: having found that the Notice of Motion dated 16th February 1999 must fail and that even if it does not fail, the Notice of Motion dated 21st March 2000 must nevertheless fail, we do hereby order each one of them dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 26th day of October 2000.

S.M.AMIN **J.M.KHAMONI**

JUDGE **JUDGE**