

IN THE HIGH COURT OF KIRIBATI 2013

CIVIL CASE NO. 143 OF 2011

	[KABOTAU NAKAU FOR HIMSELF [AND FOR THE ISSUES OF KABAUA [TANGIMATE	APPLICANTS
BETWEEN	[[AND [
	[ATTORNEY GENERAL IRO [DIRECTOR OF LANDS	RESPONDENT

Before: Hon Chief Justice Sir John Muria

2 September 2013

Ms Batitea Tekanito for Applicants
Mr Moon Mweretaka for Respondent



JUDGMENT

Muria CJ: This is an application dated 7 June 2011, by the applicants for leave to bring proceedings for judicial review for an order of mandamus against the respondent.

The applicant's case is that in 2007 in CN TTT 15/07 the Magistrates' Court determined that one Nei Kabaua Tangimate be registered over the land Tekatibeka in Ambo subject to the confirmation by the Director of Lands, the respondent. The applicant argued that the respondent has since refused to exercise its power under section 59 of the *Magistrates' Court*

Ordinance. The applicant further deposed to in his affidavit that up to the present time the respondent has refused or taken no action following the decision of the Magistrates' Court in 2007.

Ms Tekanito of Counsel for the applicant referred to sections 59 and 64(1)(a) of the *Magistrates' Court Ordinance* and submitted that the respondent has refused to exercise his statutory duty as provided under those provisions.

Section 59 of the *Magistrates' Court Ordinance* is in the following terms:

"59. The court may, subject to the approval of the Chief Lands Officer, register or cause to be registered in the register of native lands any title to native land which it finds to have existed at the time of the inquiry of the Commission held on the island but which was not registered by the Commission:

Provided that no judgment or order of the Commission shall thereby be revised or amended" .

Section 64 deals with the registration and maintenance of registers by the Court of matters dealt with by the Magistrates' Court. Subsection (1)(a) provides as follows:

64. (1) Each magistrates' court shall keep registers in the form prescribed by the Chief Justice and shall therein register or cause to be registered—

(a) all transfers of titles to land approved by the court;

It was argued for the applicant that the Court minutes of CN TTT 15/07 was given to the respondent to comply with it but that the respondent "*withheld his approval*" since then. In CN TTT 15/07, evidence was produced in the Magistrates' Court that one Nei Kabaua's name was recorded in 1903 and 1924 over the land Tekatibeka in Ambo. However her name did not appear in the Lands Commission's lands distribution for registration in the 1948 Lands Commission. Armed with the evidence of the 1903 and 1924 registration, the Magistrates' Court stated that the "*Land commission 1948 forgot to register the name of Nei Kabaua*" over the land Tekatibeka in Ambo. As a result the Magistrates' Court decided that Nei Kabaua be registered over the said land, subject to Director of Land's approval".

Mr Mweretaka of Counsel for the respondent relied on section 59 of the *Magistrates' Court Ordinance* and submitted that the respondent has discretion under the section to give his approval or withhold approval of the registration in the register of native lands "*any title to native land*" not registered by the Commission. Counsel further intimated that as the power under section 59 is discretionary, the respondent cannot be compelled to exercise it.

By a letter dated 17 February 2011, the respondent, in response to the letter from the applicant's lawyer dated 5 January 2011, wrote to the applicant's lawyer pointing out that the ownership of the land Tekatibeka had already been established in Land Appeal Case No. 15/75. That case was between Katarake Tekabu and Government of the Gilbert and Ellice

Islands Colony. Since then the Director of Lands has not yet given his approval.

The case for the applicant is that the respondent has withheld his approval and as such leave should be granted to enable the applicant to apply for mandamus to direct the respondent to perform his statutory duty. By not granting the approval, the applicant argued that the respondent has refused to comply with the Court's decision.

The tenor of the submission of Counsel for the applicant is that section 59 of the *Magistrates' Court Ordinance* obliges the Director of Lands to give approval to have the applicant's name registered over the land in question, having been adjudged by the Magistrates' Court as being so entitled. In my view, section 59 does not oblige the Director of Lands to give his consent to have the applicant registered over the land. The word "*consent*" used by the applicant and the Magistrates' Court is misleading. Consent implies that the applicant must have the approval and that the Director of Lands must not withhold it unreasonably. That is not what section 59 entails.

Properly construed, section 59 of the *Magistrates' Court Ordinance* allows the Court to register the applicant's name over the land subject to the "*approval*" of the Director of Lands. That in my view suggests that the registration is depended on the approval or agreement of the Director of Lands. If he does not approve it, no registration will take place. [It may well be that in the circumstances of this case, one can safely assume that he has not given his approval].

Should the Director of Lands be ordered to grant approval as prayed for by the applicant? The land in question had not been the subject of the 1948 Land Commission. So no order or judgment of the Commission would be affected. Thus the judgments affecting the land in question are Case 54/64, Land Appeal 15/75 and now CN TTT 15/07. Case No. 54/64 and Land Appeal 15/75 gave the land to the people of Banraeaba and now CN TTT 15/07 adjudged that the applicant should be registered over the same land. In such circumstances, it can hardly be objectionable for the Director of Lands not to give his approval for the registration of the applicant's name over the land in question. The applicant would have to do more to gain approval to have his name registered over the land in view of the decisions in Case 54/64 and Land Appeal 15/75.

In the circumstances leave is refused. However, even if leave is granted, the Court will refuse to issue order of mandamus against the respondent. This is because the circumstances of the case and in particular, the conflicting decisions over the land, justify the respondent not to give his approval under section 59 of the *Magistrates' Court Ordinance*.

Application for leave to issue proceedings for mandamus is refused with costs to be taxed if not agreed.

Dated the 20th day of September 2013


SIR JOHN MURIA
Chief Justice

(Seal of the High Court of Kenya, Nairobi is partially visible behind the signature)