



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL MISCELLANEOUS CASE NO. 13 OF 2010

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW BY DANIEL WAMBUA,

MUTISO KULUKA, MUTHEE NZAMALU KULUKA AND KULUKA NZAMALU

AND

**IN THE MATTER OF TITLE NOS MITABONI/MUTITUNI/592, MITABONI/THINU/1102,
MITABONI/191, MITABONI/MITABONI/76, MITABONI/MITABONI/82 AND
MITABONI/NGELANI/1919**

BETWEEN

CHAIRMAN KATHIANI LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MUSYOKA KIMIL.....1ST INTERESTED PARTY

NZIOKI KIMIL.....2ND INTERESTED PARTY

MUSYIMI KIMIL.....3RD INTERESTED PARTY

KIIO KIMIL.....4TH INTERESTED PARTY

AND

EXPARTE APPLICANTS

1. DANIEL WAMBUA

2. MUTISO KULUKA

3. MUTHEE NZAMALAU KULUKA

4. KULUKA NZAMALU

RULING

1. Having obtained leave to Institute Judicial review Proceedings, the *exparte* applicants filed a substantive Notice of Motion dated 29th March 2010. The relief sought is:-

i. An order of Certiorari to quash the Proceedings, Award, consequent Judgment, Order and Decree made in the **Kathiani Land Disputes Tribunal Case Number 129 of 2007**, and **Case Number, 128 of 2007** and adopted by the **Chief Magistrate, Machakos in Miscellaneous Civil Application Number 96 of 2008** on the 1st December, 2009.

ii. An order of prohibition to prohibit the respondents and their servants, agents, and /or employees from implementing the decision or dealing with Land Parcel Numbers;-

a. Mitaboni/Mutituni/592;

b. Mitaboni/Ngelani 1917

c. Mitaboni/Mitaboni/76;

d. Mitaboni/Mitaboni/91; and

e. Mitaboni/Thinu/1102 (*suit premises*).

2. In support of the application is the statement of facts where it is stated that the applicants are the absolute registered owners of the suit premises. The interested parties instituted Case Numbers. 129/2007; /128/2007 and 96/2008 against the applicants before the **Kathiani Land disputes Tribunal**. The contention between the parties is the ownership of the suit premises which was land registered under the **Registered Land Act (now repealed)**. The tribunal delivered its findings on the 1st August, 2008. This was in the absence of the parties. (Applicants and interested parties), the tribunal had had no jurisdiction to hear and determine the claim in regard to ownership as it was contrary to **Section 159** of the **Registered Lands Act** and **Section 3(1)** of the **Land Disputes Tribunal**.

3. In a verifying affidavit deponed by the 4th Exparte Applicant with authority of his co-exparte applicants they stated that the interested parties claimed that they had beneficial interest in the suit premises because the parcels of land belonged to their deceased grandfather and the ex parte applicants were holding the land in trust for them.

4. The interested parties filed a Notice of Preliminary Objection on the grounds that the application was incompetent and bad in law which ought to be struck out with costs.

5. Judicial Review proceedings under **Order 53** of the **Civil Procedure Rules** are special in nature, they have their own procedure. Other provisions by the **Civil Procedure Act and Rules** cannot be applied for this is not a civil suit. What the law requires is for the application to be supported by a verifying affidavit which is on record. The Preliminary Objection is therefore dismissed.

6. The Interested Parties herein filed a suit before the **Land Disputes Tribunal** claiming the suit premises. They argued that the land belonged to their grandfather and the *ex-parte* applicants held the same in trust for them. The *exparte* applicants on the other hand refuting the claim stated that the land is registered in their names.

7. The **Land Disputes Tribunal** having considered the matter before it ruled that the land was an ancestral one which was inherited by the Interested Parties from their grandfather, **Kasomba Muthiani**. It was ordered that the land be divided amongst the 8 Interested Parties.

8. The mandate of the **Land Disputes Tribunal** was provided for by **Section 3(1)** of the **Land Disputes Tribunal Act (now repealed)**. According to the jurisdiction of the Tribunal it could only hear cases of a civil nature concerning-

1. the division of, or the determination of boundaries land, including land held in common;
2. a claim to occupy or work land ; or
3. trespass to land ;

shall be heard and determined by a Tribunal established under **section 4**.

9. The claim by the interested parties does not fall within the ambit of the jurisdiction of the Land Dispute's Tribunal. Their claim was of ownership of land that was registered and hence had title. The 1st respondent had no jurisdiction whatsoever to preside over such a case. The court that was seized of jurisdiction to hear such a case was the High Court.

10. The decision of the 1st respondent was therefore null and void. In the premises, the orders of *certiorari* and *prohibition* shall issue as prayed.

11. The interested Party shall bear costs of the application.

12. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE