



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO. 220 OF 2012**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE EASTERN PROVINCIAL APPEALS COMMITTEE .....1<sup>ST</sup> RESPONDENT**

**MAKUENI SENIOR RESIDENT MAGISTRATES .....2<sup>ND</sup> RESPONDENT**

**MAKUENI DISTRICT LAND DISPUTES TRIBUNAL.....3<sup>RD</sup> RESPONDENT**

**JERIMIAH MBATI NDAYA.....INTERESTED PARTY**

**JACKSON KINYAMASYO KIANGI.....EXPARTE APPLICANT**

**JUDGMENT**

1. Leave to apply for orders of certiorari and prohibition was granted to the *exparte* applicant on the 3rd October 2007; the same was to operate as a stay order.

2. Pursuant to leave granted the *exparte* applicant, **Jackson Kinyamasyo Kiangi** by way of Notice of Motion seeks orders of;-

i. Prohibition to issue directed at the 2nd respondent prohibiting it from enforcing/executing its judgment, decree or order entered in LDTC No. 74 of 2006 arising from the 1st respondents proceedings and award in case no. 7 of 2007.

ii. Certiorari to quash the proceedings and decisions of the 1st and 2nd respondents dated 11th July 2007 and any other subsequent proceedings of the said respondents subsequent thereto.

3. In a statement of facts in support, it is stated that the Interested Party (**Jeremiah Mbat Ndaya**) was sued by the *Exparte* Applicant before the **Makueni District Land Disputes Tribunal** in **Case No. 92 of 2006** for trespassing onto the applicants land where an award and subsequent judgment was entered in favor of the applicant on 10th January 2007; being dissatisfied with the judgment, the interested party appealed to the 1st respondent which adopted the award and judgment of the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent was biased against the applicant as it refused to give him a hearing despite his presence during the proceedings.

4. The application is also based on grounds that: the tribunal proceedings are a nullity in law, because the tribunal lacked jurisdiction and acted ultravires; The Appeals Committee acted in breach of both law and public policy; ordering a fresh hearing was a misdirection on the part of appeals committee and that the tribunal acted in breach of rules of natural justice by condemning the applicant unheard.

5. In an affidavit in support of the application the applicant reiterated what he stated in the statement of facts.

6. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents filed grounds of opposition. They stated that this court has no jurisdiction to grant prayers sought as the same can only be granted under **Section 8 (2)** of the **Law Reform Act** whose rules of natural justice have been breached and there is no evidence of such breach; the application is irregular as it has included grounds in support of the application, thus **Order 50 rule 3** of the Civil Procedure Rules having been complied with that is contrary to Order 53 of the Civil Procedure Rules; the court has no jurisdiction to grant the prayers sought as the court function is to decide whether the process leading to the decision of the tribunal was proper but not to adjudicate on the merits of the decision and the **Makueni District Land Dispute Tribunal** at its sitting acted within the jurisdiction emanating from the **Land Disputes Tribunal Act No.18 of 1990**.

7. When jurisdiction is questioned, the court has to deal with it first before going into the merit and demerit of the suit. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" –v- Caltex Oil (Kenya) Ltd [1989] KLR 1** where **Justice Nyarangi** of the Court of Appeal held as follows

*"Think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

8. The respondents have questioned the jurisdiction of this court to grant prayers sought which they claim can only be granted under **Section 8(2)** of the **Law Reform Act**. The said provision provides that:

*"In any case in which the High Court in England is, by virtue of the provisions of [section 7](#) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order."*

9. This provision grants this court the mandate to issues orders of prohibition and certiorari as sought by the *exparte* applicant in this case. Indeed as argued by the respondents, there are grounds upon which judicial review is applicable, including breach of natural justice, however, the court reserves the right to preside over judicial review matters and obtains such jurisdiction from **Section 8** of the **Law Reform Act** and **Order 53** of the **Civil Procedure Act**. It is while embracing this mandate that the court determines whether there has been breach of natural justice.

10. It is important to identify the issue that prompted the parties to attend the tribunal which was basically trespass. According to **Section 3** of the **Land Disputes Tribunal** which lays out the jurisdiction of the tribunal, it is limited to three disputes only, they include:

- a) the division of, or the determination of boundaries to land, including land held in common;
- b) a claim to occupy or work land; or

c) trespass to land.

11. In this particular case, the dispute arising was due to trespass by the interested party on the *ex parte* applicant's land. The tribunal therefore acted within its mandate in adjudicating on the matter.

12. Upon making its decision, it is a requirement that the said decision be filed in the magistrate's court, as was done in this case, which court shall adopt the award and enter judgment in accordance with the decision of the tribunal after which a decree is issued. However, the interested party was aggrieved by the decision and rightly so appealed to the 1<sup>st</sup> Respondent. **Section 8** of the **Land Disputes Tribunal Act** lays out the procedure to be followed where a party is dissatisfied with the decision of the tribunal. He is required to appeal to the set up committee, which committee will offer fair hearing to both parties and come up with a decision. Its decision is final as far as the facts are concerned. However, if there is an issue with the law, then the parties have the right to appeal to the High Court. This is the extent of the jurisdiction of the High Court as far as the appeal goes. The respondents are therefore wrong in proposing that the courts function is to only verify whether the procedure followed leading to the decision by the tribunal was proper and not to adjudicate on the merits of the decision.

13. The respondents also argue that the application is irregular as the applicant has included grounds upon which the application is brought thus complying with **Order 50 Rule 3** that is contrary to **Order 53**. This ground of opposition is incomprehensible. I have looked at the substantive application which in my view is properly done.

14. The court record clearly illustrates that the *ex parte applicant* sought leave vide an application filed on 2<sup>nd</sup> October 2007 and thereafter filed the substantive application on 9<sup>th</sup> October 2007. He was well within the stipulated period provided in **Order 53** of the Civil Procedure Rules. The application is competent.

15. Having said that, I will review the decision by both the Tribunal and Appeals Committee. From the facts of the case the dispute rose between the *ex parte* applicant and the interested party when the interested party trespassed on his land. The parties were heard by **Makueni District Land Disputes Tribunal Kaiti Division**. According to the proceedings, the tribunal observed that the *ex parte* applicant was absent severally and the tribunal ruled that it had no option than to proceed in his absence. The tribunal ruled that the interested party had trespassed and they determined the boundary where they planted sisal to mark it. The *ex parte* applicant aggrieved by the decision appealed and the matter was heard by the appellate committee. According to the proceedings, both the *ex parte* applicant and the interested party were present as they were sworn in Kamba. However, only the interested party was heard by the appellate committee who ordered that the matter be heard by **Makueni District Tribunal**.

16. **Section 8(7)** of the **Land Dispute Tribunal Act** is clear that the Appeals Committee shall give each party an opportunity to state his case and then it shall determine the appeal giving reasons for its decision. In this case, the committee only heard the interested party and failed to give an opportunity to the *ex parte* applicant to respond. It thereafter ruled that the matter be re- heard by the **Makueni District Tribunal** without giving reasons for this decision. This was prejudicial to the *ex parte* applicant and it was against the rules of natural justice as the *ex parte* applicant ought to have been heard before any decision was made. In the Court of Appeal case of *Prime Sart Works Ltd vs. Kenya Industrial Plastics Ltd [2001] E.A. 528*, observed that:-

***“... implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be judge of his own cause and that no man shall be condemned unheard, that these two principles of natural justice must be observed by the courts save where their application is expressly excluded.”***

17. Prerogative orders sought are of prohibition and certiorari. An order of prohibition would ordinarily issue to forbid by authority of law the subordinate court from doing something that is prohibited by the law. In the instant case, I have been asked to issue the order directed at the **Senior Resident Magistrate, Makueni** from executing its judgment and decree emanating from the award made

by the Appeal Committee.

In the case of *Republic versus Chairman, Kajiado Central Land Tribunal & 2 Others Exparte Timaiyi Kirtari [2012] eKLR, Makhandia, J* (as he then was) held that:-

*“The award has since been made a judgment of the Senior Resident Magistrate’s Court, Kajiado. Once that is done, the award ceases to have a life of its own capable for being brought to an end or quashed. It is no longer an independent award capable for being quashed or prohibited. This is how Khamoni, J, delivered himself on the issue in a similar situation in the case for Wamwea versus Catholic diocese of Muranga Registered Trustees [2003] KLR 389;-*

*“The decision of the Tribunal or Appeals Committee adopted by the Magistrate’s Court in accordance with the provisions of Land Dispute Tribunal Act becomes a decision of the magistrate’s Court and ceases to exist as a separate entity challengeable alone”.*

18. In the instant case the court did enter judgment in accordance with the decision of the Tribunal; therefore, it is not independent from the order sought to be quashed. In the promises it will be irregular for me to issue the order sought.

19. However, from the forgoing it is apparent that the Appeal committee failed to uphold natural justice in the course of its proceedings. I therefore remove to this court the award of the 1<sup>st</sup> Respondent in Case No. 7 of 2007 and judgment entered in that respect by the 2<sup>nd</sup> Respondent on the **11/7/2007** and consequently quash and set it aside.

20. Each party shall bear its costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 20<sup>TH</sup> day of JANUARY, 2015.**

**L.N. MUTENDE**

**JUDGE**