



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**MISC. APPLICATION NO.169 OF 2010**

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION BY PATRICK MANG'ARA WASIKE FOR JUDICIAL REVIEW ORDERS**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHAIRMAN NAITIRI LAND DISPUTES TRIBUNAL.....RESPONDENT**

**VERSUS**

**JOHNSTONE NABIBIA MUSE ..... INTERESTED PARTY**

**FREDRICK MAYENDE WANYONYI.....INTERESTED PARTY**

**BENJAMIN WASIKE WESONGA..... INTERESTED PARTY**

**EXPARTE**

**PATRICK MANG'ARA WASIKE.....APPLICANT**

**JUDGMENT**

1. The ex parte applicant filed a notice of motion on 17<sup>th</sup> December 2010 which was later amended on the 7<sup>th</sup> June 2013. In the motion, the applicant sought for orders of prohibition and certiorari to remove into the court and quash the decision of Naitiri Land Disputes Tribunal in dispute no. 8 of 2009 which was read and adopted as judgment of the court at Kimilili on 14<sup>th</sup> September, 2010 vide Kimilili SRMC land case no. 18 of 2009. He also prayed for costs of the application. The tribunal vides the award dated

4<sup>th</sup> April 2009 made the following orders;

- (1). Patrick M. Wasike to transact and transfer to:
  - (a). Fredrick M. Wanyonyi 2.385 acres
  - (b). Johnstone N. Muse 2 acres
  - (c). Benjamin W. Wesonga – 4 acres

From plot no. Bungoma/Naitiri/782.

2. The court Executive Officer to sign the transfer if the objector refuses.
3. That the right of appeal 30 days from the date of adoption.

2. The Land Disputes Tribunal derives its jurisdiction from section 3(1) of the Land Disputes Tribunal Act (*repealed*). The applicant submits that the tribunal exceeded this jurisdiction when it made an award sharing the applicant's land between four people as it did not have jurisdiction to make such kind of an award.

3. The 2<sup>nd</sup> interested parties opposed the motion and filed respective grounds of opposition in which the 2<sup>nd</sup> interested party stated that the motion violated the provisions of Order 53 rule 3 of the Civil Procedure Rules. He also said the application is frivolous, vexatious and an abuse of the due process of the law. The other two interested parties have not filed any documents to challenge the motion.

4. The respondent also opposed the application and filed their grounds of opposition. They listed nine grounds *inter alia* that the suit is time barred and there is no decision apparent to quash as the tribunal award ceased to exist once it was adopted as the judgment of the court. He also faulted the application to join the SRMC Kimilili in the application for leave. The respondent stated the application incompetent and tally defective.

5. The 2<sup>nd</sup> interested party submits that the failure to annex the order adopting the Tribunal's award was fatal to the application. He also submits the *ex parte* applicant failed to comply with Order 8 rule 7 (I) of the Civil Procedure Rules. Finally it is his submission that the tribunal had jurisdiction to entertain this claim. He cited the case of **Mwanahawa Juma Kizianda & 3 others *ex parte* Muriuki Mburu MBS Hc Misc. Civ. Appl. no. 83 of 2000** which determined the issue of extension of time to file an application for judicial review orders.

6. The respondents also submitted this application was filed outside the stipulated time under Order 53 rule 3 (1) of the Civil Procedure Rules. To fortify this point, he relied on the case of **Kitale HC Misc. Civ. Appl. No. 76 of 2008, R Vs. Cheparia Land Disputes Tribunal & 3 others**. He also submitted that Order 53 rule 1 (2) does not allow for amendment of the substantive notice. The respondent submits further that the court which adopted the award ought to have been joined in these proceedings and failure to do so render this application incomplete. They have cited case law of **Nyeri Hc. Misc. Civ. App. no. 112 of 2008 and Busia HC Misc. Civ. Appl. no. 127 of 2012**.

7. I have considered the respective submissions and issues raised in the pleadings. The substance of objections by the 2<sup>nd</sup> interested party and the respondent are partly of form. To start with, this court granted the *ex parte* applicant leave to amend the notice of motion by a ruling delivered on 4<sup>th</sup> June 2013. When the application for leave to amend came up for hearing, there was no appearance for the respondent. They have not applied for review or appealed that decision. It is therefore too late in the day for the respondent to object on the issue of amendment. The case of **Dickson Miricho Muriuki vs. Central Land Disputes Tribunal & 6 others [2008] e KLR** does not therefore apply as if I was to refer to it, I be sitting on appeal on my decision. I also hold that leave to amend does not mean the same

thing as seeking extension of time. It follows therefore that the cases of **Mwanahawa Juma Kizianda and R Vs. Cheparenia Land Disputes Tribunal & 3 others** cited are distinguishable.

8. The other issue raised is the failure by the applicant to join the Magistrate's court which issued the orders sought to be quashed. Secondly that the ex parte applicant failed to refer to the order which granted him leave to amend the motion in the amended notice of motion filed. On the later issue, the 2<sup>nd</sup> page of the motion, date of amendment is provided. I am of the view that failure to refer to the order granting leave is not fatal as no prejudice is occasioned by such omission. On the former, the respondent contends that the failure to enjoin the magistrate's court was fatal as the decision of the tribunal ceased to exist upon its' adoption by the court. It has been previously held by this court in the case of **Republic ex parte Enock Barasa Wanyonyi Bungoma HC Misc Civ Application no 390 of 2005** that failure to enjoin the magistrate's court is not fatal in applications seeking to quash the decision of Land Disputes Tribunal. This is justified by the fact that the magistrate's courts role is purely administrative on adopting such awards.

9. Finally I consider the merits of the application. The award of the tribunal directed the applicant to subdivide the land in question and transfer the respective portions to each of the interested parties. This award while being executed will result into cancellation of the title to land **Bungoma/Naitiri/ 782**. The effect of the award gave the interested parties ownership rights to the suit land so it is not true as put by the 2<sup>nd</sup> interested party that his claim was only to occupy land. In the case of **Beatrice M'Marete Vs. Republic & 3 others [2004] e KLR** the Court of Appeal held that the Land Disputes Tribunal lacked capacity to issue awards which when executed results in cancellation of a title. I am thus in agreement with the ex parte applicant's submissions that the tribunal exceeded jurisdiction in making of the award to share his land to the interested parties. I find the notice of motion is merited and I allow prayer 1 (a). Each of the parties to bear their respective costs of the motion.

**DATED and DELIVERED** at Bungoma this 27<sup>th</sup> day of **October 2014**.

**A. OMOLLO**

**JUDGE.**