



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION JR ELC NO. 114 OF 2011

TANAKO MELITA..... APPLICANT

AND

KAJIADO LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE KAJIADO. 2ND RESPONDENT

AND

MOSES SUTEK..... INTERESTED PARTY

JUDGEMENT

By a Motion on Notice dated 6th February 2012, the ex parte applicant, **Tanako Melita**, seeks the following orders:

1. That, an order of certiorari be issued to remove the proceeding and ruling of the 1st Respondent in tribunal case No. 663/07/2011 dated 15th September 2011 to this Honourable Court for the purposes of being quashed.
2. That an order of certiorari be issued to remove the proceeding and ruling and order of the 2nd respondent in tribunal case No. 97 of 2011 and read on 8th December 2011 to this court for purposes of being quashed.
3. An order of prohibition prohibiting the respondents by themselves, agents, employees, servants or otherwise howsoever from implementing or enforcing the said order and ruling.
4. That the cost of this application be provided for.

The Motion is based on the following grounds:

- a. That the 1st Respondent acted in excess of its jurisdiction while arbitrating over the matter.
- b. That, the tribunal acted without due regards to the provisions of the law establishing it.
- c. That the tribunal acted arbitrarily and without due regard to the law.

The same Motion is supported by a verifying affidavit sworn by the *ex parte* applicant on 29th December 2011 and the Statutory Statement of dated the same day. I must however point out that the said verifying affidavit was with due respect rather economical in terms of the facts relied upon and I wish to set out its four paragraphs herein below:

1. **That I am the applicant herein and hence competent to swear this affidavit.**
2. **That what is stated in the statement of facts filed herein is true to the best of my knowledge and belief.**
3. **That I produce a copy of the Order/Ruling made on the 9th September 2011 given by the 1st Respondent herein {annexed and marked TN 1 is a copy of the said Order/Ruling}.**
4. **That what is deponed herein is all true to the best of my knowledge, information and belief and is to verify my statement in support of my application for judicial review.**

The Court of Appeal in Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000 restated the law which position has been affirmed in several decisions thereafter that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the ex parte applicant ought to ensure that the verifying affidavit contains all the factual information that he intends to rely upon.

Secondly the application itself is not properly intitled. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.

The rationale for this was given in Mohamed Ahmed vs. R [1957] EA 523 where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

However in Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

I however must state that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

In the applicant’s view the Tribunal’s decision that the parties obtain the consent to sub-divide and transfer from the Land Control Board; that the surveyor does enter into land parcel no. KJD/KAPUTEI-CENTRAL and annex forty (40) acres for **Moses Sutek**; and that the registrar registers 40 acres in the name of **Moses Sutek** while the remaining in the name of **Tanako Melita** was without jurisdiction and that the Tribunal exceeded its jurisdiction under section 3 of the repealed Land Disputes Tribunal Act No. 18 of 1990. In his oral highlight **Mr. Lompoo**, learned counsel for the applicant submitted that the matter that was before the Tribunal was a contractual matter and hence ought not to have been adjudicated upon by the Tribunal.

On behalf of the interested party it was submitted that the dispute was in respect of a land sale agreement between the interested party and the applicant and hence was based on a contract entered into by the said parties. As the dispute was with respect to the breach of the said contract, the interested party contended that the application ought not to be granted as the parties ought to fulfil what they agreed upon when they entered the said land sale agreement.

From the foregoing, it is agreed that the dispute that was before the Tribunal was contractual. The issue for determination is therefore whether the Land Disputes Tribunal was empowered under the said provisions to deal with disputes revolving around allegations of breach of contract. A similar dispute arose in **Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003** in which **Ochieng, J** expressed himself as follows:

“This appeal either succeeds or fails on the basis of section 3 of the Land Disputes Act because the original dispute did not relate to either:

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

as envisaged under section 3(1) of the Act.

From the evidence tendered the dispute was about whether or not the appellant had fulfilled the terms of the Agreement for Sale, as between himself and the father to the respondent. On the other hand, the appellant insisted that he did pay the full purchase price, whilst on the other hand, the respondent insisted that the appellant only paid one half of the purchase price and therefore offered to refund to the appellant the money, which the appellant had paid to his father. However the appellant would have none of that, because he believes that he had paid the full purchase price. The bottom line appears to be a contractual dispute, over which the Tribunal had no jurisdiction. Therefore, by upholding a decision, which was made without jurisdiction, the Appeals Committee erred in law. In the result, the appeal is allowed, the decision by the Appeals Committee is set aside and the decision by the Divisional Land Disputes is set aside, for want of jurisdiction.”

Similarly, **Ouko, J** (as then was) in **Solomon M’mirura Mathiu vs. Stanley M’ikingu M’ikiara Meru HCCA No. 52 of 2003** held:

“The claim was based on an agreement dated 27th January 1997 in which the appellant agreed to sell to the respondent the suit land at a consideration of Kshs 20,000/=. That claim was clearly in excess of the Tribunal’s jurisdiction under section 3 the Act. The Appeal Committee, on the other hand, did not dismiss the appeal but made a substantive order concurring with the Tribunal. It relied on the fact that all the necessary procedures for a transfer were complied with and proceeded to uphold the Tribunal’s decision. The Appeal Committee too, exceeded its jurisdiction.”

Apart from the foregoing the Tribunal found as a fact that the disputed land belonged to the ex parte applicant herein but proceeded to order that 40 acres of the same be registered in the name of the interested party. The Court of Appeal in **Jotham Amunavi vs. The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2002** held that if the implementation of the decision of the tribunal entails the subdivision of the suit land into two parcels opening a register in respect of each sub-division and thereafter the transfer of the sub-division of half acre, it is clear that the proceedings before the tribunal related to both title to land and to beneficial interest in the suit land and such a dispute is not within the provisions of section 3(1) of the Land Disputes Tribunal Act as such disputes can only be tried by the High Court or by the Resident Magistrate’s Court in cases where such latter court has jurisdiction.

It is clear that the effect of Kajiado Land Dispute Tribunal decision made on 15th September 2011 is the subdivision of the land registered in the ex parte applicant’s name into two parcels opening a register in respect of each sub-division and thereafter the transfer of the sub-division of part thereof, a decision that was clearly outside the jurisdiction of the said Tribunal as conferred under the provisions of section 3(1) of the Land Disputes Tribunal Act.

In the result the Notice of Motion dated 6th February 2012 succeeds and an order is hereby issued

removing the proceedings and ruling of the Kajiado Land Dispute Tribunal in Tribunal Case No. 663/07/2011 dated 15th September 2011 as well as the proceedings, ruling and order of the Senior Resident Magistrate Court Kajiado in Tribunal Case No. 97 of 2011 and read on 8th December 2011 to this Court and are hereby quashed. I further prohibit the respondents from implementing or enforcing the said order and ruling. The costs of this cause are awarded to the ex parte applicant.

Dated at Nairobi this 28th day of January 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Liko for Mr Lompoo for the Applicant