



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Civil Application 18 of 2011

REPUBLICAPPLICANT

VERSUS

1. THE KILUNGU SENIOR RESIDENT MAGISTRATE
2. MAKUENI DISTRICT LAND DISPUTE TRIBUNAL RESPONDENT
AND

LUKA MUSOMBA MUTIO INTERESTED PARTY

EX PARTESILA NDOLO

R U L I N G

The **Notice of Motion** dated 22/2/2011 is premised on **Order 53 rule 3 (1)** of the **Civil Procedure Rules**. The *ex parte* applicant, **Sila Ndolo** (hereinafter applicant) has applied that an order of *certiorari* do issue to remove this court and quash the 1st Respondent's decision, order and decree dated 25/08/2010 in **Kilungu SRMC Misc. No. 13 of 2005**.

The applicant's case according to his verifying affidavit is that the claim filed before the **Makueni** Land Disputes Tribunal (hereinafter Tribunal) had already been heard and determined by the Court of appeal. The applicant asserted that when the award of the Tribunal was filed in the magistrate's court, the **Hon. B.M. Kariuki RM** rejected the award and remitted the same back to the Tribunal to constitute a fresh panel to hear the claim. The applicant's complaint is that following the transfer of **Hon. B.M. Kariuki RM**, the case was taken over by **Hon. H. Nyakweba SRM** who on 25/5/2010 proceeded to adopt the award. It is this adoption order that the applicant wants to be quashed. According to the applicant, he was not given an opportunity to be heard otherwise he would have pointed out to the court that the award had already been rejected.

The application is opposed to as per the replying affidavit sworn on 27/4/2012 by the Interested Party, **Luka Musomba Mutio**. The Interested Party's contention is that both the Tribunal and the magistrate's court acted within their mandate and their actions were not *ultra vires*. The Interested Party further stated that the Tribunal was properly constituted and that the Tribunal did not adjudicate over any matters that were the subject of the dispute before the Court of Appeal. According to the Interested Party, the case that was before the High Court was settled by the consent of both parties and he thereafter bought the land the subject matter of this case from one **Joseph Musyimi Lele Ndolo**.

B.N. Musyoki Advocates appeared for the applicant while **Kamolo Advocates** appeared for the Interested Party. The application was canvassed by way of written submissions which I have duly considered. The role of the magistrate's court is spelt out under **Section 7 (2)** of the **Land Disputes**

Tribunal Act which provides as follows:-

“(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.”

B.M. Kariuki RM had no jurisdiction to rule on whether the Tribunal was properly constituted or not, leave alone remitting the award back to the Tribunal. The parties had their right of appeal under **Section 8 (1)** of the **Land Disputes Tribunal Act** to the Appeals Committee and thereafter to the High Court under **Section 8 (9)** of the **Land Disputes Tribunal Act**.

Be as it may, the decision by Hon. **B.N. Kariuki RM** rejecting the award remained on the record and required to be dealt with before the succeeding magistrate, **Hon. H. Nyakweba SRM** could purport to adopt the award.

On whether the parties were given an opportunity to be heard before **Hon. H. Nyakweba SRM** before the adoption of the award on 28/8/10, I note that the orders rejecting the award had been on record since 3/7/2007. It was the responsibility of the dissatisfied party to have taken steps to remedy the situation.

The application is properly before the court and was filed in court within time. The orders complained of were made on 28/08/2010 and these proceedings were commenced on 10/2/2011, a period of less than six months. I am persuaded by the holdings in the cited authorities, that is:-

1. *Republic –vs- Chairman Kaukuya Land Disputes Tribunal Court, Ex parte Thamson Namunyu Njibwakale & Ano. (2005) e KLR.*

2. *Republic –vs- Lemmy Bindan Njiru & 6 Others, Ex parte Guidio Kaunyangi Nabea (2006) e KLR.*

It is clear from the said authorities that failure to cite the provisions of **Section 8** and **Section 9** of the **Law Reform Act** is not fatal to the application.

With the foregoing, my conclusion is that the decision by **Hon. H. Nyakweba SRM** dated 25/08/2010 was made without jurisdiction. Consequently, I quash the said decision as prayed. Each party to bear its own costs.

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B. THURANIRA JADEN
JUDGE

Dated and delivered at Machakos this 26th day of March 2013.

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B. THURANIRA JADEN
JUDGE