



No.2999
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION NO.271 OF 2006

REPUBLIC..... APPLICANT

AGAINST

MAKUENI DISTRICT LAND DISPUTES TRIBUNAL1ST RESPONDENT

MAKUENI SENIOR RESIDENT MAGISTRATE'S COURT..... 2ND RESPONDENT

JOYCE KATAMBO MBEVI INTERESTED PARTY

EX-PARTE:

**KIASYO MUSAU
WANDIA MUSAU
MUANGE MUSAU
MWATU KIASYO**

**IN THE MATTER OF THE MAKUENI DISTRICT LAND DISPUTES
TRIBUNAL CASE NO.42 OF 2006
AND**

**IN THE MATTER OF THE MAKUENI SENIOR RESIDENT MAGISTRATE'S COURT AND
LAND DISPUTES TRIBUNAL CASE NO.29 OF 2006**

RULING

By way of Notice of Motion dated 8th January, 2007, the ex-parte applicants sought the following orders of Judicial Review:

“1.That an Order of certiorari do issue to bring into this hounourable court and quash the proceedings and decision made by the Makueni District Land Disputes Tribunal in case No.42 of 2006 which was forwarded, read and made judgment of the court in the Senior Resident Magistrate’s court at Makueni on 19.7.2006 in L.D.T.C. No.29 of 2006.

2. That an Order of Prohibition do issue directed at the Respondents and interested party prohibiting them from implementing the decision of the Makueni District Land Disputes Tribunal in Tribunal case No.42 of 2006 which decision was read and entered as judgment by the Makueni Senior Resident

Magistrate's court in L.D.T.C. 29 of 2009.

3. That the Respondents and/or interested parties do pay the costs of this application.”

The Notice of Motion was expressed to be brought under Order LIII rule 3 of the Civil Procedure rules and section 8 of the Law Reform Act. The application was filed pursuant to leave granted by **Sitati J.** on 20th December, 2006.

From the documents filed, the dispute revolves around land parcel **Nzani/Kawala/914**, hereinafter “**the suit premises**”. **Musau Mwatu**, deceased was the father of the 1st, 2nd and 3rd ex-parte applicant's and a grandfather to the 4th ex-parte applicant. The deceased was the registered proprietor of the suit premises. However, he sold 5 acres thereof to the interested party-in 1988. Apparently, this was done without the knowledge, consent and or permission of the ex-parte applicants and other family members. The suit premises were agricultural land governed by the provisions of the Land Control Act. No transfer having been effected within six (6) months of the agreement, the ex-parte applicants contend that the transaction thereby became void. When the ex-parte applicants tried to take possession of the suit premises in the occupation of the interested party, they were sued before the 1st respondent. However, they contend that having not obtained a grant of letters of Administration with regard to the estate of the deceased, they lacked capacity to be sued in the Tribunal. Accordingly, the 1st respondent lacked jurisdiction to entertain the Dispute by virtue of the provisions of the Law of Succession Act. The action too was time barred as a suit to recover Land cannot be brought after the expiry of twelve years from the date when the cause of action arose, i.e. 1988. All in all the 1st respondent acts were *ultra vires* and its decision dated 30th June, 2006 was illegal, null and void. Hence the need to have it quashed by an order of certiorari.

Though the application was served on all the respondents and interested party, only the interested party bothered to respond. She took the view that she was the claimant in the 1st respondent case number 42 of 2006 in which she had sued the ex-parte applicants. She successfully prosecuted the claim and the award was made in her favour in terms:-

“i. The objectors desist from interfering with the disputed parcel of land promptly.

ii. When beneficiaries of the late Musau Mwatu estate (land) are being registered in the High Court the names of Mutua Syomwenzwa to be included for ease of obtaining land title deed.

iii. The objectors to meet the costs of the suit.”

The award was subsequently filed with the 2nd respondent and read to the parties on 19th July, 2006. The award was properly made. She had bought a portion of the suit premises from the deceased. After the purchase the same was set aside for her and marked with euphorbia trees and the applicants were not only aware of the said sale but had in fact never utilized the land since the purchase. The applicants had made it difficult for the interested party to develop her portion of the suit premises. The applicants cannot be heard at this late stage to complain that they lacked capacity to be sued when their activities precipitated the proceedings before the 1st respondent and in which they actively participated. Further at no time did they raise the issue. They are therefore estopped from raising the issue of capacity to be sued at this stage. In any case the 1st respondent did not order that the suit premises be transferred to the interested party immediately but only after Grant of Letters of Administration intestate. The issue of the consent of the Land Control Board cannot therefore arise. The interested party's claim was not statute barred as claimed by applicants. The cause of action arose only after the ex-parte applicant stopped her from developing and entering into the suit premises and not from the time when it was purchased. Therefore the 1st respondent acted within the law and at no time did it exceed the powers granted to it. Its decision was therefore proper and it should be upheld by this court.

When the application came up for interpartes hearing before **Lenaola J.** on 3rd June, 2009, he

directed that the same be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. By then however, **Lenaola J.** had left the station on transfer. The task of crafting and delivering the ruling then fell on his successor **Waweru J.** On 28th July, 2010, he indicated that he would deliver the ruling on 11th March, 2011. However, this was not to be as on 17th November, 2011 the good judge returned the file without crafting the ruling following his transfer to the High Court of Kenya at Nairobi.

On 30th November, 2011, I invited the parties involved in the matter to address me on the fate of the application. They were all unanimous that since all of them had filed and exchanged written submissions I should proceed to act on the same, craft and deliver the ruling. It was so ordered.

I have carefully read and considered the written submissions and authorities cited. The application is bound to fail on the following grounds; firstly I note that the award was read and adopted as a judgment of the court on the 19th July, 2006. Once that was done, the award ceased to exist on its own and therefore capable of being quashed. That being the case I cannot see how an order of certiorari can issue to quash a non-existent award.

Secondly, prohibition looks to the future as opposed to the past. The award having been read and made a judgment of the court, there is nothing left to prohibit the respondents from doing. The interested party is an individual and cannot be the subject of an order of prohibition in her personal capacity. Again the 1st and 2nd respondents cannot be barred from performing their statutory duties unless it is demonstrated that they exceeded their powers when they heard and determined the dispute, that the rules of natural justice were not observed during the hearing and or that they had no jurisdiction to hear the dispute. On the material before me, none of the above has been demonstrated.

Thirdly, I do not think that, the ex parte applicants are serious when they claim that the interested party's claim was time barred. The cause of action arose when the ex-parte applicants refused to allow the interested party possession and use of her portion of the suit premises in 2006 thereby compelling the interested party to sue them in the 1st respondent. It is therefore clear that the proceedings before the 1st respondent were not statute barred as they were within the 12 year limitation period as provided for in the Limitation of Actions Act.

Fourthly, no doubt the suit premises were agricultural land. Section 6 of the **Land Control Act** provides that any dealing in such land is void for all purposes unless the Land Control Board of the area in which the land is situate gives its consent to the transaction. But I do not think that, that is really an issue here, since the Land Dispute Tribunal act allows a beneficial owner to bring a claim. The Interested Party was such beneficial owner. In any event and as correctly submitted by counsel for the interested party, the issue of legality of the sale could only come in play if the 1st respondent had ordered for the transfer of the portion of the suit premises to the interested party. The 1st respondent was alive to the provisions of the Law of Succession Act and that is why it only ordered that a person who was in possession be included in the succession proceedings.

Fifthly, section (1) of the Land Disputes Tribunal Act sets out the disputes that should be determined by a tribunal. Those disputes include the division of or determination of boundaries to land, including land held in common, claim to occupy or work land, or trespass to land.

The interested party's claim before the 1st respondent was that she had been denied by the ex-parte applicants to occupy or work a portion of the suit premises that she was in possession of. A person so claiming can only sue the person who has denied her that right in this case, the ex-parte applicants. Further, the interested party was not suing for the ownership of the suit premises. The contention that the letters of administration had not been taken or proceedings thereof commenced could only arise if the claim was for ownership which the 1st respondent had no jurisdiction to deal with and indeed did not venture into. The claim by the interested party being one for occupation and to work land, the fact that the ex-parte applicants had not obtained a grant of letters of administration for the estate of the deceased is immaterial. In any event, it cannot be used to allow the ex-parte applicants to interfere

with the interested partys' lawful possession of a portion of the suit premises.

Sixthly, I do not think that the award by the 1st Respondent is capable of even being quashed. The 1st Respondent did not purport to distribute the estate of the deceased. All that the 1st respondent did was to order the ex-parte applicant to stop interfering with the portion of the suit premises in the occupation of the interested party. It also recommended that **Mutua Syomwenzwa** who was occupying and working the said portion of the suit premises be included in the succession proceedings. Courts do not give orders in vain. Even if the orders of certiorari and prohibition were to issue, they will not change situation on the ground. It simply means that the status quo obtaining prior to the interested party taking the ex-parte applicants to the 1st respondent shall revert.

The application lacks merit and is accordingly dismissed with costs to the interested party.

Dated and delivered at Machakos, this 16th day of January, 2012.

ASIKE-MAKHANDIA
JUDGE