REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION 258 OF 2008

REPUBLIC …......………………………………………………………………… APPLICANT

VERSUS

MAKUENI DISTRICT LAND DISPUTES TRIBUNAL

MAKUENI SENIOR RESIDENT MAGISTRATE'S COURT ……..............……….….. RESPONDENT

NDUME KYONGO KITEMA …………………………... 3RD RESPONDENT/INTERESTED PARTY

1. MWILU NGUI

2. KAMETI MAKANDA

3. MAKITI MUILI

4. KITEMA MASESI ………………………………………………..… *EX PARTE* APPLICANTS

AND

IN THE MATTER OF CASE NO. 11 OF 2008 OF MAKUENI DISTRICT LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF LDTC No. 17 of 2008 OF MAKUENI SENIOR RESIDENT MAGISTRATE'S COURT AT MAKUENI

R U L I N G

Before me is a Notice of Motion dated 2nd December 2008 filed by the *ex-parte* applicants Mwilu Ngui, Kameti Makanda, Makiti Muili, and Kitema Masesi. It was filed under Order LIII Rule 3 of the Civil Procedure Rules and section 8 and 9 of the Law Reform Act (Cap 26). The prayers are three, as follows:-

1. THAT an order of certiorari do issue to bring into this court for purposes of quashing the proceedings and decisions of the 1st and 2nd respondents dated 22/10/2008 and any other subsequent proceedings of (the) said respondents subsequent thereto.

2. An order be issued prohibiting, enforcing/executing the judgment, decree or order entered in LDTC No. 11 of 2008 arising from the 1st respondent's proceedings and award in claim No. 11 of 2008.

3. Costs of these proceedings.

The application is grounded on the STATEMENT dated 20th November 2008 and verifying affidavit sworn on the same date, both filed with the Chamber Summons for leave, as required by the law.

The applicants through their advocate M/s O.N. Makau & Company filed written submissions on 28th June 2011. It was contended that leave to file judicial review proceedings was properly sought and that the grounds of opposition should be rejected, as they are untenable. It was contended that the *ex-parte* applicants were right to come to court and contest the order issued by the 1st respondent for their eviction from the subject land. It was contended that the interested party had no right to sue on behalf of the registered owner, and that the judgment of the 2nd respondent was a nullity for being based on a void award. It was contended that letters of administration in the estate of the deceased (registered proprietor) had to be obtained first before proceedings could be taken by anybody on the subject land.

The application is opposed. The respondents through the Attorney – General filed grounds of opposition in the following terms:-

1. The application is incompetent and incurably defective as it offends the mandatory provisions of Order LIII Rule 1 of the Civil Procedure Rules.

2. The application is incompetent and incurably defective as it offends the mandatory provisions of Order LIII Rule 4 of the Civil Procedure Rules.

3. The orders sought cannot be granted as the issues therein are not amenable to judicial review.

4. The application is misconceived and an abuse of the court process.

5. The application offends the provisions of the Land Disputes Tribunal Act.

The respondents also filed written submissions on 8th October 2009. It was contended that the application was defective, as the facts are in the STATEMENT rather than the verifying affidavit. Secondly, the *ex-parte* applicants filed a supporting affidavit, which was not allowed in law. In those two respects, the application is incurably defective and should be dismissed, as affidavits other than those filed with the application for leave could only be field with leave of the court. In addition, it was contended that *certiorari* can only come into play, when a decision is in excess of jurisdiction. In the present case, the decision was within the provisions of the Land Disputes Tribunal Act, and the jurisdiction donated to the Tribunal.

It was also contended that the learned magistrate could not be said to have acted in excess of his powers by adopting the award. It was contended that granting prohibition orders would be tantamount to contravening the provisions of section 7(1) and (2) of the Act, which donated powers to court to adopt the award, and to enforce the same. It was also contended that the applicants should have appealed from the decision of the Tribunal, rather than come to the High Court through judicial review proceedings.

The interested party, Ndume Kyongo Kitema, filed a replying affidavit on 10th February 2009. It was deponed that the claim was one of trespass in terms of section 3 of the Act. Therefore, the Tribunal had jurisdiction. It was also deponed that the interested party was authorized by the family members to sue

and defend on their behalf.

The interested party also, through his advocates, M/s Kisongoa & Company filed written submissions. It was emphasized that the claim was for trespass to land. The issue was not in relation to title to land. Reliance was placed on the case of **Muhia –vs- Mutura (1991) EA 209.**

Counsel for the parties relied on submissions filed.

I have considered the application, documents filed as well as the submissions. The Attorney-General has raised several technical issues. In my view, most do not go to the root of the application. The supporting affidavit filed with the Notice of Motion can be, and has been ignored by this court. It does not make the application incurably defective.

As for the issue of the facts being in the STATEMENT rather than the verifying affidavit, I agree that the facts are in the wrong document. The law specifically states that the STATEMENT should contain the name and description of the applicant, and the relief (s) sought, and the grounds for the reliefs. All these are in the STATEMENT. However, the statement herein purports to contain facts in contravention of the law.

The verifying affidavit herein does not contain the facts but purports to **"verify the truthfulness of such facts …..of the statement…."**. As the STATEMENT by law cannot contain facts, and as the facts are required to be in the verifying affidavit, this omission or mistake by the applicants, means that the application does not have facts. It stands without facts. It cannot therefore succeed, as it is a blank and hollow application – *See* **African Auto Supplies Ltd –vs Attorney General Nairobi HC Misc. Appl. 286 of 2005 (2006) e KLR**. On this ground alone, the application has to be dismissed.

The above technical finding means that there is no application to be considered. I find it unnecessary to delve into the other grounds raised by parties, as there is no valid application that can stand without facts to support it.

In the result therefore, the Notice of Motion is hereby dismissed. Costs to the respondents and the interested party.

Dated and delivered at Machakos this **27th** day of **June** 2012.

George Dulu
Judge

In presence of:-

N/A for Parties

Nyalo – Court clerk.