



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Miscellaneous Application 30 of 2008

(FORMERLY NAIROBI MISC. APPLICATION NO. 538 OF 2007)

REPUBLIC..... APPLICANT

-AGAINST-

1.

MAKUENI DISTRICT LAND DISPUTES TRIBUNAL

2. MAKUENI SENIOR RESIDENT MAGISTRATE'S COURT RESPONDENTS

KASANGA MUINDI 3RD RESPONDENT/INTERESTED PARTY

***EX-PARTE* - JOSEPH MUTANGILI KYAMBU
AND**

**IN THE MATTER OF CASE NO. 9 OF 2005 OF MAKUENI DISTRICT LAND DISPUTES
TRIBUNAL**

AND

**IN THE MATTER OF LDTC NO. 69 OF 2006 OF MAKUENI SENIOR RESIDENT
MAGISTRATE'S COURT AT MAKUENI**

J U D G M E N T

This is a Notice of Motion filed by the *ex-parte* applicant on 20th June 2007. It was initially filed in Nairobi. It seeks orders, that:-

- 1. (Spent).**
- 2. An order of prohibition directed at the respondents do issue prohibiting the respondents, their agents and/or licensees prohibiting them from executing the award of the 1st respondent which was**

made by the 2nd respondent on 10/1/2007

3. **That an order of certiorari to bring into this court for the purposes of quashing the proceedings and award of the 1st respondent in case No. 9 of 2005 and judgment entered in respect thereof by the 2nd respondent on 10/1/07.**

4. **(Spent).**

5. **That the respondents pay the costs of this application.**

The application is grounded on the statement filed with the Chamber Summons for leave dated 18th may 2007, as well as the verifying affidavit sworn by the *ex-parte* applicant on the same date.

The application is opposed both by the Attorney-General on behalf of the respondents and by the interested party. The *ex-parte* applicant, the respondents, and the interested party filed written submissions through their respective counsel.

It is worth to note at the outset, that all the parties agree that the subject land was registered under the Registered Land Act (Cap 300 of the Laws of Kenya). It is also worth to note that the decision of the Tribunal (the 1st respondent), which was adopted by the 2nd respondent, was in the following terms:-

“This court has awarded the claimant with a piece of land in parcel No. Nzai/Nziu/345. The boundaries made by the chief and clan members should be followed in presence of the District Surveyor. The objector shall also pay for damages and charges.”

Under section 3 of the Land Disputes Tribunal Act No. 18 of 1990, the jurisdiction of the Tribunal is very specific and restricted. The section defines the jurisdiction as follows:-

“3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

- (a) the division of, or the determination of boundaries to land, including land held in common,**
- (b) a claim to occupy or work on land,**
- (c) trespass,**

Shall be heard and determined by a Tribunal established under Section 4.”

The *ex-parte* applicant maintained that the Tribunal lacked jurisdiction and violated the principles of natural justice.

He claims that he was not served with the process.

The Attorney-General, for the respondents, has argued that the issue here was trespass. He contends that the Tribunal had jurisdiction to deal with trespass whether or not the subject land was registered. Reliance was placed on the case of **Wamukoya –vs- Kipsaina Land Disputes Tribunal (2003) KLR 59** where Tunya J, stated:-

“the applicant had moved into part of the suit land claiming entitlement of 5 acres. Under Section 3 (c) of the Act, the Tribunal had jurisdiction to determine whether or not in the circumstances, the applicant was a trespasser, it was immaterial that the suit land was registered.”

The above is a persuasive decision of the High Court. I am not bound by the same. I however agree with the above reasoning. I also agree with Khamoni J’s, views **Wamwea –vs- Catholic Diocese of Muranga Registered Trustees (2003) KLR 389, 393** where the learned Judge stated:-

“Section 159 of the Registered Land Act (Cap 300 Laws of Kenya) as read with Section 3 (1) of the Land Disputes Tribunals Act, make clear the jurisdiction of the Tribunals and Land Disputes Appeals Committee under the Land Disputes Tribunal Act. Disputes over title to land are not within the jurisdiction of Tribunals and Land Disputes Appeals Committees. It can also be said that disputes over contracts are not under the jurisdiction.”

The interested party has submitted that the *ex-parte* applicant has admitted, in his affidavit, that he is the administrator of the estate of the deceased Kyambu Sambuli. He supported the respondents’ position that the tribunal had jurisdiction and did not breach the principles of natural justice.

I will start by considering the issue of violation of the principles of natural justice.

Section 3(4) of the Act provides for mandatory service. It states:-

“3(4) Every claim shall be served on the other party or where there are more than one, on each of the other parties to the dispute and the provisions of the Civil Procedure Act as regards service of summons shall thereafter apply.”

Though the interested party, who was the claimant in the Tribunal, filed a replying affidavit, he merely stated as follows with regard to service:-

“13. The ex-parte applicant was duly served with the Tribunal’s summons but he deliberately failed to participate in the proceedings.”

The interested party does not give any particulars on how the service was effected, when, and how it was acknowledged. In addition, there is no record in the Tribunal proceedings that the *ex-parte* applicant was served and refused to attend the sessions. There is only a note at page 4 of the Tribunal’s proceedings, after evidence was given, that summons was to be issued both to the claimant and the objector to appear in court on 20/11/2006.

One of the principles of natural justice is that a party must be given an opportunity to be heard. If someone is not given notice or adequate notice of proceedings, he cannot be said to have been given an opportunity to be heard. Where there is a violation of the principles of natural justice, the judicial review court may intervene to correct the situation. I find and hold that the *ex-parte* applicant was not availed an opportunity to be heard. There is no evidence that he was served with notice before evidence was tendered. Therefore the proceedings before the Tribunal were irregular as he was not given a fair hearing. An order for certiorari is called for.

On jurisdiction, the Tribunal is invested with powers only to deal with matters which were included in the Act. The powers relate to determination of boundaries to land, a claim to occupy or work on land, and trespass. Section 3 of the Act, which I have already highlighted is relevant. It does not have powers to award land. When the Tribunal awarded a part of parcel of land Nzau/Nziu/345, they were in effect conferring ownership. That was outside their area of jurisdiction. The Tribunal went beyond its jurisdiction. Their decision was *ultra vires*, and calls for quashing through *certiorari*. The case of **Wamukoya –vs- Kipsaina** Land Disputes Tribunal (supra) does not apply and is clearly distinguishable, as it dealt with trespass.

The applicant also asks for prohibition against execution of the award. Prohibition looks at the future. In my view, this prayer is justified, in order to remove any doubt as to whether further steps may be taken in furtherance of the Tribunal’s decision. I will grant the prayer for prohibition.

Consequently, I find that the application has merits. I allow the application and grant prayers 2 and 3. The respondents and interested party will pay the *ex-parte* applicant’s costs of these proceedings.

It is so ordered.

Dated and delivered at Machakos this 7th day of **June** 2012.

George Dulu

Judge

In presence of:-

Ms. Ngatia holding brief for Mr Mulei for Mr Ndungi for the Interested Party

Nyalo – Court clerk.