REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

Miscellaneous Civil Application 257 of 2006

REPUBLIC ……..APPLICANT
AGAINST

MAKUENI DISTRICT LAND DISPUTES TRIBUNAL…..……1ST RESPONDENT

MAKUENI SENIOR RESIDENT MAGISTRATE……..…….....2ND RESPONDENT

AND

MUNYWOKI KISESE…….....….....1ST INTERESTED PARTY

MUNINI KIOKO…….....….....2ND INTERESTED PARTY

PAUL M. KIOKO……..…….3RD INTERESTED PARTY

MORRIS MULI……..……..4THINTERESTED PARTY

<span style="\"line-height:" 115%;="" font-family:="" "cambria","serif";\"="" lang="\"EN-US\"">5. MUKULU KAVISI

RULING

Before me is a Notice of Motion dated 11th December, 2006 seeking *interalia*-

"1. That an order of certiorari do issue to bring into this honourable court and quash the proceedings and decision made by the Makueni District Land Disputes Tribunal in Case No. 26 of 2004 which was forwarded, read and made judgment of the court in the Senior Resident Magistrate's Court at Makueni on 11/10/2006 in L.D.T.C No. 39 of 2006.

2. That an order of prohibition do issue directed at Respondents and/or interested parties prohibiting them from interfering with the applicant's rights, control and peaceful possession and enjoyment of Land Titles Numbers; Nzaui/Mumbuni/210, Nzaui/Mumbuni/211,Nzaui/Mumbuni/214, Nzau/Kilili/616, Nzaui/Mumbuni/212 and Nzaui/Mumbuni/471

3. That the respondents and/or interested parties do pay the costs of this application".

The application was supported by the statement of facts as well as the affidavit of David Muia. The application is expressed to be brought under Order LIII rule 3 of the Civil Procedure and all other enabling provisions of law. Of course the application was filed before the civil Procedure Act and

the rules made thereunder were amended.

The genesis of this application is a claim filed by the the interested parties in the year 2004. In their statement of claim dated 12th October, 2004 they accused the applicants of-

"a. Encroachment into our land

b. Interference of the original boundaries

c. Occupying and working on our land

d. Trespassing on our land"

Basically the dispute involved boundaries to land parcels Numbers;Nzaui/Kilili/610,Nzaui/Mumbuni/210, Nzaui/Mumbuni/211, Nzaui/Mumbuni/214, Nzaui/Kilili/616, Nzaui/Mumbuni/212 and Nzavi/Mumbuni/471. Having heard the dispute, on 13th October, 2006, the 1st respondent rendered its verdict. It essentially allowed the interested parties claim and directed-

"The surveyor to draw the boundary as it is on the ground (see No. 3 above)".

The award was subsequently transmitted to the 2nd respondent and was on 11th October, 2006 read to the parties and adopted as the judgment of the court. The right of appeal within 30 days to the Provincial Land Disputes Appeal Committee was explained to the parties.

The applicants did not choose the appellate route. Instead they commenced this judicial review proceedings on 28th November, 2006 seeking prayers already alluded to at the commencement of this ruling. On 23rd November, 2006, Onyancha, J duly granted the applicant leave to commence these proceedings. He directed the substantive motion to be filed within 21 days. He further directed that leave so granted do operate as stay until 25th January, 2007. Lenaola, J later extended the stay to last until the hearing and final determination of these proceedings.

The basic complaint by the applicant is that the 1st respondent had no jurisdiction to entertain the claim since the boundary dispute touched on parcels of land registered in the names of deceased persons, that the 1st respondent acted without jurisdiction by hearing a dispute relating to determination of boundaries to land registered under the Registered Land Act when such jurisdiction was vested in the Land Registrar, the claim was time barred and finally that there was breach of rules of natural justice, since the award affected land parcel Nzaui/Kalili/1623 registered in the name of Kavoi Kanyaa who was not a party to the proceedings. He was thus condemned unheard.

When the application was served on the parties, the interested parties responded through the 1st interested party by saying that the 1st respondent had jurisdiction to hear the dispute since it was a boundary dispute; they sued the applicants as opposed to the deceased, since they were the ones committing the acts of interfering with boundaries and trespassing into their parcels of land and that the claim was not time barred as the tort of trespass continues and thus the issue of limitation does not arise. Thus the 1st respondent had jurisdiction and its award was therefore valid and binding upon the applicants.

On the part of the respondents, the Attorney General entered appearance and filed grounds of opposition. The respondents were of the view that the orders of a court of law can only be challenged by way of an appeal in the premises the application was *null ab initio* and finally, that the application was unmentorious and ought to be dismissed on that account.

When the application came before Kihara Kariuki, J (*as the then was*) on 13th July, 2011, for the *inter parties* hearing, parties agreed to canvass the same by way of written submissions. However, it was not until 8th December, 2011 that all the submissions were on board; by which time, Kihara Kariuki , J had left the station on transfer. The task of concluding the application then fell on me. Mr. Ndungi and Mr. Mulei learned counsel for the applicants and interested parties respectively agreed that I should continue with the application from where Kihara Kariuki,J had left. Essentially my task was to act on the submissions on record, craft and deliver the ruling.

From the wording of prayer one, of the Notice of Motion, the applicants are basically asking for an order of *certiorari* to quash the proceedings and decision made by the 1st respondent in Case Number 26 of 2004 and which was forwarded, read and made a judgment of the court by the 2nd respondent on 11th October, 2006. I do not think that this is possible on the following grounds.

The 1st respondent filed the award with the 2nd respondent as it was then required by the provisions of the law now repealed Land Disputes Tribunals Act. That award was on 11th October, 2006 adopted as a judgment of the court. Having been subsumed as it were and becoming a judgment of the court, it ceased to exist independently as to be capable of being quashed by an order of *certiorari*. Confronted with a similar situation, Khamoni, J emphatically stated in the case of Wamwea vs Catholic Diocese of Muranga Registered Trustees [2003] KLR 389.

"Any decision of the Tribunal or Appeals Committee adopted by the Magistrate's Court in accordance with the provisions of Land Disputes Tribunal Act becomes a decision of the Magistrate's Court and ceases to exist as separate entity challengeable alone"

I am in total agreement with the judge's elucidation of the law above. Accordingly, since the award ceased to exist independently on its own the moment it was adopted and became a judgment of the court, there is nothing left as an award, that is quashable by an order of *certiorari*.

Accordingly, the prayer for grant of orders of *certiorari* to quash the proceedings and decision of the 1st respondent is to that extent misconceived.

The story may perhaps have been different had the applicants also sought to quash the order of adoption of the award by the 2nd respondent aforesaid. However, this is not the case here.

As regards the order of *prohibition*, again the same is not available to the applicants. The 1st respondent having arrived at its decision within its statutory mandate and the 2nd respondent having adopted the same as required by statute, I do not think that orders of *prohibition* can rightly issue against the respondents. Indeed they cannot issue in particular against the 1st respondent, since it has already discharged its mandate. *Prohibition* looks to the future as opposed to the past. It can only issue to prevent what is about to happen and not what has already happened. Again even for the 2nd respondent, it too has already discharged its statutory duty of adopting the award as a judgment of the court. There is nothing left to *prohibit.* There is no evidence in any case that the respondents are about to interfere with the applicants' right, control and peaceful possession and enjoyment of land parcel number Nzaui/Mumbuni/210, 211, 212, 471 and Nzaui/Kilili/616. If I may ask, in what capacity will the respondents be so doing? As regards the interested parties, they are not public bodies to whom orders of *prohibition* can be directed at

Obviously, the entire application was ill conceived. It is dismissed with costs to the interested parties.

RULING DATED, SIGNED and DELIVERED at MACHAKOS, this 30TH day of JULY, 2012.

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ASIKE-MAKHANDIA

JUDGE

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