REPUBLIC OF KENYA

High Court at Bungoma

Miscellaneous Application 107 of 2010

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN MATUNGU LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

EXPARTE.....ELECTINA WANG'ONA

AND

SALOMEKUSA ALI.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

The application

[1] The court was moved through an application made by the Ex parte Applicant; Electina Wang'ona by way of a Notice of Motion dated 10th August 2010 seeking for:

a. ***An order of certiorari to remove into this court and quash the decision of the Matungu Land Dispute Tribunal which was read and adopted as judgment of the court on 21st April 2010 vide MUMIAS SRMC LDT NO. 7 OF 2010, together with the said adoption order.***

b. Costs of this application be provided for

[2] The said application is grounded on the affidavit of Electina Wang'ona (hereafter Ex parte Applicant) sworn on 10th August 2010, the statements filed on 14th July 2010 and other grounds contained in the submission which shall be examined later in this judgment.

Leave to file the application for order of certiorari was granted on 22nd July 2010.

THE JURISDICTION OF THE HIGH COURT

[3] Although the jurisdiction of the court has not been questioned, for obvious reasons as shall soon be borne out, I wish to reinforce the jurisdictional grounding of this court on this matter.

[4] First of all, this case relates to land parcel number N.WANGA/KHOLERA/911. And we are in a transition where courts under Article 162(2) of the Constitution have been established, particularly relevant herein, the ***Environment and Land Court*** has been established by Parliament in the Environment and Land Court Act, 2011. The said court is the one that is vested by the Constitution with jurisdiction to hear and determine disputes relating to environment and use and occupation of, and title to land. But that court is not fully operational, yet, there are existing cases pending before the various courts which must be accordingly dealt with to avoid causing a lapse in the administration of justice. In a transition such as this, transitional arrangement is, in my view, inherently necessary in the administration of justice in land cases. The fact that courts other than the ***Environment and Land Court*** will assume jurisdiction over some matters relating to land will, as it has already done, invite jurisdictional difficulties as well as objections thereto from litigants and lawyers**.**

[5] Second; my being alive of these transitional difficulties, impels me to define the court's jurisdictional bounds on this case that relates to land. More reason to so define the jurisdictional bounds of the court is found in the fact that existing cases are at different stages of progress, and each category will attract different treatment. In some categories, the court will have jurisdiction, and in others it will not. For instance, the High court has jurisdiction over cases where the hearing has concluded, or are awaiting judgment or are partly heard, as opposed to those where hearing is yet to commence. Thus, the Practice Directions, Issue No 1/2012, Gazette Notice No 13573 dated 4th October 2012 were made by the Chief Justice to stand in this gap.

[6] Parties had to grapple with the question of jurisdiction but, this court after hearing the parties on 8th October 2012 made the following order;

Parties have already made their arguments through the written submissions they have filed and so this is a matter that was part heard as at the time the Practice Directions were made by the CJ on 4th October 2012 regarding matters pending in the High court which relate to land. In light thereof, this court has jurisdiction to proceed and determine the matter in accordance with Direction No 3 by the CJ on part heard cases.

[7] The jurisdiction of the court is properly grounded within the transitional arrangements in accordance with the Constitution and the Environment and Land Court Act, 2011**.** The authority which the Chief Justice exercised in making the Practice Directions is derived from section 22 of the Sixth Schedule of the Constitution, and section 30 read together with section 31 of the Environment and Land Court Act, 2011.

[8] The particularly relevant Practice Direction to this case is No 3 that;

3. All part heard cases relating to the environment and use and occupation of, and title to land pending before the High court shall continue to be heard and determined by the same court.

The Ex parte Applicant had already filed written submissions on 11th July 2012, before the said Practice directions, and it is therefore safe to conclude that this matter is part heard. That rendition is just but a reinforcement of the jurisdiction of the court which, invariably, is *sine qua non* the adjudication of any justiciable dispute.

FACTUAL SITUATION OF THE APPLICATION

[9] The original record of the lower court **MUMIAS SRMC MISCELLANEOUS AWARD No.7 of 2010** was not produced in court. However, it is discerned from the record that, annexures EW2 and EW3 in the affidavit of the Ex parte Applicant sworn on 10th August 2010, are records of the proceedings of Matungu Land Disputes Tribunal held from 17th November 2009 to 12th January 2010 when the Tribunal read its award, and of **MUMIAS SRMC MISCELLANEOUS AWARD No. 7 of 2010** adopting the award by the Tribunal, respectively.

[10] Worth of note, no objection was raised as to the propriety of the said annexures as reflecting the

record of the Tribunal as well as of the Mumia's SRM court. Indeed both parties speak to these annexures as record of the Matungu Land Disputes Tribunal and the Mumia's SRM court. In a pointed manner, the Interested Party in the submissions dated 2/10/2012 and filed in court on 8/10/2012 by her advocate M/s Mutenyo Wattimah & Co. Advocates says thus:

"The award made by the Respondent and which is sought to be quashed has already been adopted as judgment of the court vide Mumias SRM LLDT No.67 (sic) of 2010 on the 21/4/2010 as shown in the applicant's exhibit marked EW3"

[11] The parties herein in their submissions and other pleadings, at different times and placements, though erroneously, have used ***Mumias SRMCC LDT No.7) of 2010 or Mumias SRM LLDT No.67 (sic) of 2010*** to refer to ***MUMIAS SRMC MISCELLANEOUS AWARD No. 7 of 2010*** which adopted the award by Matungu Land Disputes Tribunal. Therefore, there is no doubt that the subject matter of this proceeding is ***MUMIAS SRMC MISCELLANEOUS AWARD No. 7 of 2010***. Thus, I will presume that the annexed proceedings are the proceedings to which the instant application relates, and shall be treated as such.

The order of the Magistrate was rendered in the following terms;

a) The Land Parcel be divided into two portions of one acre for the objector (ELECTINA WANG'ONA, ASMAN, ISMAIL, WANG'ONA'S) family and the rest of it goes back to the claimant SALOME KUSA (BLASIO MAKOKHA WANINGU'S) family.

b) SALOME KUSA and or BLASIO MAKOKHA WANINGU's family are allowed to process the succession of this land parcel jointly with ELECTINA WANG'ONA (ASMAN WANG'ONA'S) family. If they may agree. If they do not agree to go together, then SALOME KUSA ALI may do it, but observe clause (a) above now.

c) Each party bear own costs

d) Right of Appeal 30 days

[12] According to the proceedings of the Tribunal, the factual situation that emerges is that:

Sometimes in 1976 the late Henry Wesonga Waningu, a brother to Blasio Makokha Waningu, deceased, sold parcel No. Kholera/488 measuring approximately 0.98 ha to Hasmani Wetiko Wang'ona (alias Ismail Wang'ona), who is also deceased. The consideration for the said sale is not disclosed in the entire proceedings although the figures of Kshs. 40, 000 and Kshs. 30, 000 have been variously mentioned as being expenses incurred by Ismail Wang'ona on the purchase of the suit land. The said parcel of land was later assigned a new number being N/Wanga/Kholera/911 measuring approximately 0.98 ha.

[13] When Blasio Makokha Waningu learned of the above sale, he made a report to the Chief's Baraza in 1989. It is alleged that in that Baraza, the late Hasmani Wetiko Wang'ona accepted that he had bought the land wrongly and was willing to restore it to Blasio upon refund of Ksh.40,000/= being his costs on the purchase transaction. According to the late Hasmani Wetiko Wang'ona, Henry Wesonga Waningu sold him the suit land in order to pay for his wife's treatment. The Baraza then ordered Blasio to pay Ksh.30, 000/= and not Ksh.40, 000/= to Hasmani Wetiko Wang'ona. It seems there is another portion of land that had been sold to one Mr. Lusaka but that is not the suit property and I will therefore not be concerned with it for purposes of this judgment.

[14] Hasmani Wetiko Wang'ona died in 1999 and Blasio Makokha Waningu died not long thereafter. No certificates of these deaths are exhibited but the fact of the deaths is not disputed. The Ex-parte Applicant is the widow to the late Hasmani Wetiko Waningu and the Interested Party is the widow to the late Blasio Makokha Waningu.

ISSUES TO BE DETERMINED

[15] From the pleadings in this case, and the submissions of the parties, the court is of a considered opinion the following are the issues for determination by the court:

1) Whether incorrectly instituted application for leave renders; the substantive application for judicial review, i.e. the Notice of Motion, incompetent; and orders therein incapable of being granted. This to be weighed against the proper constitutional control on technicalities under Article 159(2) (d) of the Constitution.

2) Whether the Matungu Land Disputes Tribunal had jurisdiction to determine the subject matter that was before it. Depending on the answer to this question, the court should render a finding on whether the decision of the Matungu Land Disputes Tribunal was in excess of jurisdiction, thereby making the award of the said Tribunal a nullity.

3) Whether, in law, the decision of a tribunal can be challenged independent of or separate from the order of the court adopting the award of the Tribunal. Ultimately, the court to determine; whether the applicant has sought to quash the decision of the Mumias SRMC MISC AWARD NO 7 OF 2010 made on 21/4/2010 adopting the award of Matungu Land Disputes Tribunal.

4) Whether the Ex Parte Applicant and the Interested Party were proper parties before the Matungu Land Disputes Tribunal.

5) What orders should be made on costs?

[16] Some matters which had been framed by parties as issues for determination have an extremely tenuous difference from the major issues. In fact, they are inextricable and incidental strands to the main issues, in particular, issues No (b) and (c). They have however been captured within the main issues in order not to lose sight of them. This way, each is given due prominence, and will be fully considered with proper proportion of importance being accorded.

[17] Before these issues are fully considered, I will first set out the case advanced by the parties.

THE EX-PARTE APPLICANT'S CASE

[18] From the pleadings filed by the Ex-parte applicant, that is to say, the Notice of Motion dated 10th august 2010, the Supporting Affidavit sworn on 10th August 2010 together with all annexures thereto, and the submissions dated 10th July 2012, the Ex-parte Applicant is seeking an order of Certiorari to remove and quash the decision of the Matungu Land Disputes Tribunal which was read and adopted as a judgment of the court on 21st April 2010 vide Mumias SRM CC LDT No.7 of 2010, together with the said order of adoption. The Ex-parte Applicant is also asking for costs to be provided for.

[19]. The Ex Parte Applicant has stated the following as the major grounds for seeking the order of Certiorari:

1) The order of the Tribunal was made without jurisdiction thus in excess of jurisdiction.

2) The order of the said Tribunal is unreasonable and amounts to purported exercise of power not conferred by law.

3) The said order is a nullity and seeks to affect rights of third parties without recourse to the rules of natural justice.

4) The said orders are a nullity, and run counter to the provisions of the Registered Land Act, the law of Succession Act and the Lands Disputes Tribunal Act.

[20] The grounds were elucidated upon by the Ex-parte Applicant, who, in her submissions filed in court

contends the order of the Tribunal that was adopted by the Mumias SRM court:

1) Ordered subdivision of the parcel of land into two portions one for objector and the other for interested party,

2) Ordered that the objector and interested party carry out succession proceedings and in default, interested party to do so singlehandedly (sic).

3) Overruled payment of Ksh.30, 000/=.

[21] The Ex-parte Applicant urges further that from the certified copy of the register, the suit land was not registered in the names of either of the parties but in the name of Hasmani Wetiko Wang'ona, deceased- who is the same person known as Asman Wetiko Wang'ona. The submissions also observe that none of the parties before the tribunal, i.e. Ex Parte Applicant and the Interested Party, were legal representatives of the estate of the deceased persons herein as envisaged in the Succession Act, Chapter 160 Laws of Kenya. The Ex Parte Applicant then poses the question whether the order of the tribunal would, in the circumstances, be competent? The Ex Parte Applicant has answered the question in the negative.

[22] Before I set out the full rendition of their answer to the question immediately foregone, what is the case put forth by the Interested Party?

THE INTERESTED PARTY'S CASE

[23] The Interested Party opposes the application by the Ex Parte Applicant. She has filed a Replying Affidavit sworn on 5th June 2012 and written submissions dated 2nd October 2012. In her said Replying Affidavit, she broadly avers that, according to information given by her advocate on record, this application is not properly before the court, it is incompetent and otherwise an abuse of the process of the court.

[24] A more specific attack on the competence of the application is however launched in paragraph 4 of her Affidavit thus:

4. THAT the application for leave was incompetent for having been made in the name of the Republic instead of that of the Exparte (sic) applicant since the Republic can only be made a party in a substantive application after leave is granted.

[25] The Interested Party further avers in paragraph 5 of her said Affidavit that, in accordance with the information given by her advocate on record, the Matungu Land Dispute Tribunal had full jurisdiction to determine disputes touching on a registered land, particularly the suit land which had been sold without her consent. And that as a consequence, the Ex-parte Applicant remained a licensee on the land no matter how long she had stayed on the land. The Interested Party concludes this aspect of the argument in paragraph 7 of her Affidavit:

7. THAT the Ex-parte applicant being a trespasser, fraudulently subdivided and transferred portions of the suit land and she is estopped from claiming violation of rights over land as he (sic) did not legitimately have any and the law of limitation cannot come to her aid.

According to the Interested Party, the Tribunal had the jurisdiction to determine the matters before it, and therefore the Ex-parte Applicant has not satisfied the conditions set for granting an order of certiorari.

[26] In her submissions, the Interested Party has reiterated the contents of her Affidavit save, has emphatically urged that the Ex-parte Applicant has not sought to quash the decision of the court which adopted the decision of the tribunal; instead the Ex-parte Applicant has sought to challenge only the decision of the tribunal. According to her that is not possible in law.

DISPOSAL OF THE ISSUES BY COURT

[27] At this juncture, the court is well grounded on the facts and the issues in this matter. It is the appropriate moment to consider each and every issue framed above. In doing so, the court will take into account all arguments set out by both parties, the circumstances of the case as well as the relevant applicable law thereto. This way repetition will be avoided, thus ensuring clarity and coherence of thought.

COMPETENCE OF THE APPLICATION FOR CERTIORARI

[28] The Interested Party submitted that … ***the application for leave was incompetent for having been made in the name of the Republic instead of that of the Exparte (sic) applicant since the Republic can only be made a party in a substantive application after leave is granted.*** This defect according to the Interested Party makes the application for certiorari incompetent.

[29] From this statement, two issues emerge. One is on how pleadings in judicial review should be instituted. The other is on the effect of incorrectly instituted application for leave on the substance of the substantive application for judicial review. These issues are critical and are of practical significance particularly when parties are drafting pleadings for judicial review. They will therefore receive a deep consideration later in this judgment.

[30] The Ex-parte Applicant dismisses the objection on the competence of the Notice of Motion as one of form thereby, not a meritorious. She posits that the application is competent and correctly brought in the name of the Republic. She further urges that, the challenge on the competence of the application for leave is a side show with no foot on which to stand since there is no application before the court to set aside the leave. I pose. The subject as to how leave can be terminated is quite elusive and merits some treatment at least.

[31]. Ordinarily, a respondent applies, for the leave granted to the *Ex-parte* Applicant to be set aside under Order 51 Rule 15 of the Civil Procedure Rules (CPR). Rule 15 of Order 51 of the CPR provides;

'' The court may set aside an order made ex parte''.

[32] Once the ex parte order that granted the leave is set aside, the leave is withdrawn and the proceeding is effectively terminated. But such application must be well grounded and ascertain the reasons for applying. The grounds for such application include, that the leave; 1) was obtained through misrepresentation or non-disclosure of material facts or for ulterior motive; or 2) is prejudicial to the Respondent or other parties; or 3) is no longer necessary. This approach enables the court to fully consider all relevant factors in determining whether leave should be set aside. The very effect of setting aside the leave, sounds the death of the judicial review application, which makes it extremely necessary that an application is made before the court, and is properly founded on ample grounds for setting aside of the leave.

[33] There are ample authorities on this procedure; **MINISTRY OF FOREIGN AFFAIRS, TRADE AND INDUSTRY V VEHICLE AND SUPPLIES LTD [1991] 4 All ER 65, R V SECRETARY OF STATE-EX PARTE HERBAGE [1987] 1 All ER 324, NJUGUNA V MINISTER FOR AGRICULTURE [2000] 1 EA 184** and **GRAIN BULK HANDLERS LTD V J. B. MAINA & CO LTD AND 2 OTHERS [2006] e KLR.** The case of **NJUGUNA V MINISTER FOR AGRICULTURE** was quoted with approval by the Court of Appeal in the latter case, that;

The Appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court, to the judge who granted leave, to set aside such leave.

[34] Accordingly, I agree with the Ex-parte Applicant that an application is necessary for the court to consider a challenge leveled against leave that has been granted in a judicial review proceeding. There is no sufficient application for that purpose before me; what there is, is mere mention of the incompetence of the leave on a ground that is really feeble; an approach, with due respect, is quite a casual manner to

raise a serious juridical issue as this. On that account, that aspect of the arguments by the Interested Party fails.

[35] The rather hotly argued matter by the Interested Party, and has caught the attention of the court is on non-adherence to procedural rectitude on instituting of the application for leave, which according to the Interested Party, produces fatal results to the substance of the substantive application for judicial review orders.

[36] It bears restating, without doubt, procedural law is necessary in the administration of justice. It is through the laid down procedures that the substantive law is put into motion, its objects and essentials are realized. It is through the laid down procedures that an orderly, regular and smooth running of the legal machinery and operation of due process is ensured. It is also through procedural law that fair trial is achieved. A great deal could be said about the invaluable benefits of procedural law.

[37] However, the practical irony, I have observed in the practice of law by practitioners, and sometimes by some courts, is that, procedural law has frequently been used to defeat substantial justice. The situation is worse where you have procedural requirements on a similar subject being resident in different legislation, and there has been no harmonization thereof by Parliament or the court. Such proliferation of procedural law only helps to serve the consumers of justice with meagre pinches of bird seed instead of substantial meal. Scarcely do parties who stand to benefit from a technicality evince brevity to forego such procedural technicalities. Instead, they emphasize and put a tab on only such of the procedural law that is most apt for their case without regard to the substantial justice of the case. That practice, at some point or other, became rampant and headlong amongst most practitioners, and innumerable cases which merited substantial justice were decided on technicalities; something that grieved many litigants, increased public cry and spoliation.

[38] This state of affairs, I believe, impelled the people of Kenya to provide in Articles 159 and 259 of the Constitution in the manner they did; the sweetest canticle; ***justice shall be administered without undue regard to technicalities, and court to always develop the law, respectively***. I need not overemphasize, judging cases on merits is, and should be most favored.

[39] But the utter misconception that must be avoided is to think that all procedural requirements have been rendered obsolete. In spite of the constitutional admonitions against placing undue regard to technicalities, there is nothing pernicious in observing procedural rectitude provided it is kept under proper constitutional control, and relates to a technicality of a nature that is the Centre piece of administration of justice. For example, service of court process and pleadings is an integral part of due process and natural law; its role can never be dwindled an iota. I admit that in a great many cases, and I have said this earlier, procedural law facilitates substantive law.

[40] It seems the Supreme Court circumscribed the proper constitutional control on technicalities, in its response in **SAMWEL KAMAU MACHARIA AND ANOTHER V KCB LTD AND TWO OTHERS APPLICATION NO 2 OF 2011** to the argument by learned counsel Mr. Oraro on a requirement in the Companies Act which he contended was affecting the rights of the parties. In its forthright characteristic in ascertaining the law, the Supreme Court appears to suggest that the circumstances of each case will determine whether a procedural requirement is one that affects the rights of the parties or...***is a procedural technicality the likes of which are depreciated by Article 159(2) (d) of the Constitution.***

[41] Back to the real issue of the matter herein, the question to ask is; whether the way the Chamber Summons dated 14th July 2010 was instituted is of such a fundamental nature as to affect the essential substance of the Notice of Motion dated 10th August 2010? I take the view that it is not for reasons that follow.

[42] I observe from the outset that the Notice of Motion itself is correctly instituted, and the orders therein are sought in the name of the Republic. It does not therefore offend any procedural requirement on intituling of judicial review pleadings. The only quarrel that the Interested Party has is that the Chamber summons dated 14th July 2010 has cited the Republic as "Applicant". I here below reproduce the recital in

the said Chamber Summons for fuller appreciation of what I will have to say about it.

[43] Except that the ‘’Republic’’ is indicated as ‘’Applicant’’ in the heading of the Chamber Summons, the essential requirements of form are substantially complied with. Despite the error I have pointed out, it is clear in the heading of the said Chamber Summons that the Applicant is Electina Wang’ona.

[44] When an objection such as the one herein is raised, the test to be applied by the court in deciding the competence or otherwise of the judicial review proceeding, is; whether by the incorrect intituling of the pleadings, the proceeding has become muddled up as to completely obscure the identity of the parties and the remedies sought. This test was enunciated in **MOHAMMED V R (1) [1957] E.A. 523** when the court in declaring the pleadings incompetent observed;

‘’This recital reveals a series of muddles and errors…’’

[45] Subsequent judicial decisions on this aspect followed **MOHAMMED V R** and the test therein**.** For further elucidation on the subject test, see the cases of; **FARMERS BUS SERVICE AND OTHERS V THE TRANSPORT LICENSING APPEAL TRIBUNAL [1959] E.A. 779,** and **WELAMONDI V THE ELECTORAL COMMISSION OF KENYA [2002] 1 KLR 486**. Justice Ringera (as he then was) in the last case, in dealing with an objection on intituling of judicial review application, observed and held that;

The application in this case was <u>completely muddled up</u> in form and thus incompetent and <u>misconceived in substance</u>. (Underlining mine)

[46] In the instant case, and I have pointed out this earlier, the error does not produce the kind of muddling up that obscures the parties or the substance of the case. The interested Party has not been prejudiced at all and has not shown that any prejudice would arise from the inclusion of the ‘’Republic’’ as ‘’Applicant’’ in the Chamber Summons herein. My thinking is grounded, and properly so, on Article 159 of the Constitution which demands that technicalities should not be given undue regard to the detriment of substantial justice of the case. For emphasis' sake, I should not however, be understood to be saying that such procedural law that is integral to the substantive law, should not be observed. Earlier, it is on record, I have recited the splendid array of the benefits of procedural law, and its efficacy in the administration of justice which should not at all be diminished. What I am saying is that, whereas adherence to procedural requirements should be observed, it should not be unduly used to defeat substantial justice of the case. Applying technicalities with an almost peremptory command will only lead to an absurdity and disparage of the very Constitution to which all law must conform.

[47] The upshot of the foregoing, I find that the error in the way the Chamber Summons dated 14th July 2010 was instituted does not affect the substance of the leave that was granted thereon. Neither does it impair the competence of the Notice of Motion dated 10th August 2010 filed pursuant to the leave granted upon the Chamber summons dated 14th July 2010. The said Notice of Motion is therefore competent, properly before the court, and the order of certiorari is grantable, but of course on merit.

[48] Before I depart from the above objection, which I have found nothing much would turn on, I must say that, in developing the law in accordance with Article 259 of the Constitution, the jurisprudence by the court on the procedural exclusivity of judicial review, need be reconciled with the constitutional provisions on judicial review, particularly Article 23(3) (f) of the Constitution.

[49]. Doubtless, Article 23(3) (f) embodies a paradigm shift where judicial review is one of the reliefs that the court may grant, either alone or in combination with others. Therefore, and I believe I am not wrong, it will no longer be an apt argument that judicial review cannot be combined with other remedies such as constitutional remedies, declarations, injunctions and so on as it has been held before. This is a position of the Constitution that will materially shift from insistence that judicial review pleadings must take a particular form, to a more balanced approach that serves substantial justice. And without making a decision, so far as I am aware, the fact that judicial review can be applied for in a constitutional petition renders such strict insistence of form unsustainable in our jurisprudence. And further, I note, separation of

judicial review from constitutional petitions may become almost practically impossible, if not redundant.

DECISION OF THE TRIBUNAL: IS IT CHALLENGEABLE INDEPENDENT OF OR SEPARATE FROM THE ADOPTION ORDER?

[50] The Interested Party has emphatically urged this issue and substantially relied on it in opposition to the application herein. I respectfully agree with the decision of the Honorable Justice Khamoni (as he then was) in the case of **REPUBLIC V CHAIRMAN LAND DISPUTES TRIBUNAL, KIRINYAGA DISTRICT & ANOTHER EX PARTE KARIUKI [2005] 2 KLR 10** when he stated;

''When a decision of the Land Disputes Tribunal has been adopted by a magistrate's court in accordance with the provision of the Land Disputes Tribunal Act, that adoption makes the decision of the tribunal or decision of the Appeals Committee, be a decision of the magistrate's court. Consequently, the decision of the tribunal or Appeals Committee, in law, ceases to exist as an independent decision challengeable separately in an appeal or judicial review.''

[51] Most aptly put and I cannot agree more. But it makes sense to unpack the decision into the pigeon holes that are the arguments in and circumstances of the case before me. The decision by the Honorable Justice Khamoni (as he then was), the way I understand it, is alive to the fact that illegality or nullity of the decision of the tribunal is the bedrock of the challenges raised on appeal or judicial review. The decision of the court embodies the decision of the tribunal. By this embodiment, the good things as well as the innuendoes in the decision of the tribunal are incorporated into the corpus of the adoption order. Of necessity, the adoption order is tinctured with the innuendoes in the decision of the tribunal, which becomes the basis for the challenge. And as a way of speaking, any arguments put forth in such challenge, cannot avoid making prominent and specific reference to the decision of the tribunal. That is why a subtle craft was used by the honorable judge in his decision that…***the decision of the tribunal or Appeals Committee, <u>in law</u>, (underlining is mine) ceases to exist as an independent decision challengeable separately in an appeal or judicial review.*** Nonetheless, it is not legally possible or permissible to challenge the decision of the tribunal *per se* but that of the magistrate in which the decision of the tribunal is embodied.

[52] At this point, it is profitable to apply the perspective in the decision by Justice Khamoni to the application now before the court. Is the application herein challenging the award of the tribunal independent of or separate from the decision of the magistrate which adopted the award? The answer to this question is found in the order sought in the application which is reproduced below for a more searching scrutiny and analysis.

An order of certiorari to remove into this court and quash the decision of the Matungu Land Dispute Tribunal which was read and adopted as judgment of the court on 21st April 2010 vide MUMIAS SRMC LDT NO. 7 OF 2010, together with the said adoption order.

[53] The way the order is framed could be objectionable, or better put, invite technical and legal objections. At first glance, one sees an application seeking to quash the order of the tribunal that was adopted as judgment of the magistrate's court. But when care is taken to scrutinize the order as a whole, one finds no difficulties in seeing that the applicant is seeking to quash the adoption order by the magistrate. Perhaps, the order in which the prayers sought are arranged is the source of the seeming confusion. Except it is not in doubt, in law, by the quashing of the adoption order, the award of the tribunal, invariably, falls by the way side. To me, the objection being raised is really on the style adopted in the couching of the prayers in the application, which does not turn up much. The objection therefore fails in the face of the reasons I have discussed. Nonetheless, it is most desired that parties, and their counsels, will employ meticulous drafting of pleadings in order to bring out the real issues in dispute clearly, which will avoid much judicial time being wasted on clarifying issues that the party filing the case could easily have clarified in the pleadings.

THE QUESTION OF JURISDICTION OF THE TRIBUNAL

[54] This is the thrust of the matter. The jurisdiction of the Matungu Land Disputes Tribunal is circumscribed by section 3(1) of the Lands Disputes Tribunal, Act No. 18 of 1990, now repealed (hereafter the Act). Section 3(1) provides:

'***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 land. Or

(c) Trespass to land, Shall be heard and determined by a Tribunal established under section 4.''

[55] Are matters which the Tribunal tried within the jurisdictional bounds in section 3(1) above?

A reading of the record of the proceedings of the tribunal, and of the magistrate court, reveals that the issues placed before the tribunal involved;

a. Rights and obligations under a contract for sale of land

b. Title to land

c. A beneficial claim of and under the estate of deceased persons

[56] Below I have examined each of the matters in paragraphs (a), (b) and (c) above, and demonstrated how they affect the jurisdiction of the Tribunal.

a. Rights and obligations under a contract for sale of land

[57] The Interested Party has argued from two different stand points. One; that the Ex parte Applicant was and still is a trespasser. The other; the Interested Party accepts that the Ex parte Applicant is the widow of Ismail Wang'ona, deceased, and came on the suit land by virtue of the purchase of the suit land by the said Ismail Wang'ona. She further acknowledges that a sum of KShs. 30, 000 was to be refunded to the late Ismail Wang'ona being his costs on the purchase of the suit property. Regrettably, according to her, her late husband was not able to refund due to illness. She too, she stated before the tribunal, has not hitherto been able to make the said refund. From the record, the only reservation she has is that the said sale was wrong because the land had been sold secretly by her husband's brother, one Henry Wesonga.

[58] These two positions by the Interested Party; the trespass; and acknowledgement of purchase of the land, are totally irreconcilable, and it seems the claim of trespass is being made in the hope that it will place this case within the jurisdiction of the Tribunal as per section 3(1) of the Act.

[59] The truth of the matter is, sometimes in 1976 or thereabout, there was some sale of the suit land and a consideration which is being termed as expenses, passed over from the purchaser, Ismail Wang'ona, to the seller, Henry Wesonga. As a consequence, Ismail Wang'ona was registered as the proprietor of the suit property on 18.9.1978 and was issued with the Land certificate on 28.2.1978 as shown in the extract of the register marked EW1. The sale of the suit property then became known to Blasio, and he reported it to Baraza of elders for consideration. Whatever happened in the Baraza of elders is not in issue and is not before this court for determination. But the discovery by the late Blasio of the sale is what set in motion events leading to the filing of a claim by the Interested Party before the Tribunal. It is not indicated when the matter was filled before the Tribunal, but it is clear the case was registered as No. MTG/22/2009. I presume it was filled in 2009.

[60] From the record annexed herein, the Tribunal was being asked to determine and indeed "determined", the rights and obligations under a contract for sale of land. As both the seller and the purchaser were deceased at the time of the filling of the case at the Tribunal, each of the parties to the contract for sale of the suit land was ‘’represented’’ in the Tribunal by their respective widow. This turns up another issue

which will be treated comprehensively later for it is one of the linchpin issues on which the judgment of the court substantially rotates.

b. Title to land

[61] From the foregoing, the record of and the award made by the Tribunal, it is manifest the Tribunal decided on title to land, and ordered that the suit land

''…be divided into two portions of one acre for the objector, Electina Wang'ona…, and the rest of it goes back to the claimant, Salome Kusa…''

[62] This award was informed by the fact that there was a transaction in the form of sale of the suit land between the deceased persons, and was each ''represented'' by the respective widow. There is no any other explanation for the decision of the Tribunal to have recognized a common interest between the parties or the family of Blasio and Wang'ona. The decision therefore attempted to decide on and vest proprietary interest upon parties-an aspect that only the court has jurisdiction to try.

[63]. There are many authorities on this subject but suffices the cases of **C.A. CIVIL APPLICATION NO 256 OF 2002, JORAM AMUNAVI AND THE CHAIRMAN SABATIA LDT, and C.A. CIVIL APPLICATION NO 157 OF 2001 ASMAN WEPUKHULU & ANOTHER AND FRANCIS BIKETI.**

[64] Based on the above account, I find that the Tribunal acted without jurisdiction in making the award herein. Its award was a nullity *ab initio,* and in law, is nothing. At this point this matter is as good as determined. But I will decide on the other issues herein for completeness of record, and posterity when one is faced with similar matters, perhaps the juristic thought in this decision will cut indents for settling the issues that may have arisen.

c. A beneficial claim of and under the estate of deceased persons

[65] The suit property before the Tribunal constitutes the property of the estate of Blasio, or Wang'ona or both. From the award, the Tribunal was aware that it was dealing with property of deceased persons and so it decided that the families of the deceased "*...**to process the succession of this parcel of land''.*** In accordance with section 47 of the Law of Succession Act, Chapter 160 of the Laws of Kenya, the High Court has jurisdiction on all matters governed by that Act, except for those matters falling under section 48 of the said Act. In light thereof, and without saying much, the Tribunal could not pretend or at all to have had any jurisdiction over succession matters. It therefore presided on a matter it had no jurisdiction over and its decision was a nullity *ab initio*. Judicial decisions on this aspect are legion but I do not wish to multiply them, except refer to the case of **R V NYERI PROVINCIAL APPEALS COMMITTEE & OTHERS NKR HC JR. APPLICATION NO 111 OF 2011.**

[66] Connected to the above, the parties before the Tribunal were not representatives of the estates of the deceased persons in the sense of the Law of Succession Act. There is no evidence in the form of grant of probate or letters of administration that was produced before the Tribunal to prove their capacity to sue or to be sued. The presence of proper parties before the Tribunal is a matter of jurisdictional significance. The absence of proper parties, does not make the case feeble, rather, it goes to the jurisdiction of the Tribunal with the result that the Tribunal had no jurisdiction. This issue was in a masterly fashion dealt with in the case of **NKR HC MISC APPLICATION NO 64 OF 2011 APEX FINANCE & ANOTHER V KENYA ANTI-CORRUPTION COMMISSION.** Justice Emukule, quoting another case of **SUPREME COURT OF NIGERIA GOODWILL AND TRUST INVESTMENT LTD AND ANOTHER V WITT AND BUSH LTD** stated**;**

The question of proper parties is a very important issue which affect (sic) the jurisdiction of the case in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit…

[67] But with or without the requisite capacity, I have already found that the Tribunal did not have

jurisdiction, and this finding only reinforces the decision of the court.

CONCLUSION

[68] The Ex parte Applicant applied to this court for an order of certiorari to remove to this court and quash the order made on 21st April 2010 in the **MUMIAS SRMCC MISC AWARD NO 7 OF 2010** adopting the award of the Matungu Land Disputes Tribunal made on 12th January 2010.

[69] The application substantially stands on the lack of jurisdiction on the part of the Tribunal to try matters that were filed before it. I have found the Tribunal purported to decide on matters relating to rights and obligations of parties in a contract, title to land and matters falling under the Law of Succession Act. Clearly, it did not have jurisdiction. Its award was a nullity *ab initio* and of no legal effect. Consequently, the order adopting the award is quashed, and invariably, the award of the Tribunal falls by the way side.

[70] As a matter of jurisprudential value, yet with great practical significance, insistence of adherence to procedural technicalities in judicial review in a manner that suggest almost a peremptory command, will not only deny parties in a suit of substantial justice, but will also disparage the very core aspiration of the Constitution of building a just society ***based on the essential values of human rights, social justice and the rule of law.***

[71] Judicial review being a public remedy- a constitutional remedy- its value in the lives of the people as they interact with their Government and other state organs cannot be overemphasized. It facilitates access to justice by citizens, and acts as a control strategy by the court over acts of the executive which are harming the citizens. When the court exercises its superintendent authority, it enables the other arms of the government to appreciate the rule of law and the boundaries established under the law within which they must operate. Thence, they work well and well within the constitutional bounds for the benefit of the citizens-the very reason of the existence of government and by which its performance is gauged.

WHO WILL PAY COSTS OF THE SUIT?

[72] Costs follow the event. However, it is the court that makes an order for costs upon a judicious exercise of its discretion. I am alive the nature of these proceedings offers public remedies to ensure subordinate courts and tribunals, respectively, exercise judicial or quasi-judicial authority in accordance with the law. I will therefore order each party to bear its own costs in this case.

Dated, read, signed and delivered at Bungoma this 29th day of October 2012

F. GIKONYO
JUDGE

In the presence of:

Mercy Alusa, Court Clerk

Mr. Murunga Advocate holding brief for Makali for the Ex parte Applicant