



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 35 of 2009

REPUBLIC.....APPLICANT

VERSUS

TRIBUNAL (YATHUI)

1. THE CHAIRMAN YATHUI LAND DISPUTES
2. CHIEF MAGISTRATE COURT AT MACHAKOS

AND

1. NZIOKA MUKOLYA
2. JOSEPH KIMUYA
3. GREGORY KIMUYA.....INTERESTED PARTIES

1. MAKENZI KINGATI

2. WAMBUA KINGATI.....EX-PARTE APPLICANTS

RULING

This is a **Notice of Motion** dated 6th March 2009 filed by *the ex-parte* applicants **Makenzi Kingati** and **Wambua Kingati**. The application which was brought under **Order LIII rule 3** of the **Civil Procedure Rules** has three (3) prayers. In my view, prayer 2 has been spent. The prayer are as follows:-

1. **THAT an order of certiorari and prohibition (be issued) to remove into this Honourable Court for the purposes of being quashed a Ruling or award dated 6th August 2008 of Yathui Land Disputes Tribunal Case No. 23 of 2008 forwarded to Chief Magistrate's Court at Machakos but which is yet to be delivered being Misc. Application NO. 130 of 2008 Nzioka Mukolya, Joseph Kimuya and Gregory Kioko –vs- Makenzi Kingati and Wambua Kingati.**
2. **(Spent).**
3. **THAT costs of this application be provided for.**

The application was filed with an affidavit sworn by **Makenzi Kingati** on 6th March 2009. No leave of court appears to have been obtained before filing this affidavit. I will therefore ignore it, as **Order LIII Rule 4** of the **Civil Procedure Rules** states that the affidavit(s) filed with the Chamber Summons for leave is the one to be relied upon by the court, unless the filing of further affidavits is authorized by the

court. The affidavit to be relied upon herein therefore is the “**affidavit verifying facts to be relied upon**” sworn by **Makenzi Kingati** on 5th February 2009. In the said affidavit, paragraph 11, it is stated that the Land Disputes Tribunal award registered in the Chief Magistrate’s Court Machakos as **Misc. No. 130 of 2008** has not yet been read by the Magistrate’s Court.

After the filing of the application, the interested parties **Nzioka Mukolya, Joseph Kimuya, and Gregory Kimuya** filed a notice of preliminary objection dated 7th June 2010 through their advocate **B.M. Mung’ata & Company**. The objections are two and I will reproduce them hereunder. They are as follows:-

(i) The notice of motion as filed is incompetent and should be dismissed at once for having been filed out of time.

(ii) No notice was taken out and served in accordance with Order LIII Rule 1(3) of the Civil Procedure Rules.

The interested parties also filed a replying affidavit to the application. In the affidavit, it was deponed that the Tribunal had jurisdiction to entertain the land dispute herein.

The respondents who are the Chairman, **Yathui** Land Disputes Tribunal and the Chief Magistrate’s Court, Machakos did not file a response to the application.

The *ex-parte* applicants filed written submissions on 3rd August 2011. The interested parties filed written submissions on 24th November 2011. Thereafter, the *ex-parte* applicants filed supplementary submissions on 16th April 2012.

On the hearing date, **Mr Mutua Makau** appeared for the *ex-parte* applicant, while **M/s Amala** appeared for the interested parties.

This application cannot succeed. It is premature and therefore incompetent. In my view, there are only two ways in which the jurisdiction of the High Court can come into play under the **Land Disputes Tribunals Act (Cap 303 A)**. The first avenue, is that a party who is aggrieved by the decision of the Land Disputes Tribunal can appeal to the Provincial Land Disputes Committee. If he or she is dissatisfied with the decision of the Committee, he or she may appeal to the High Court on a point of law as provided under **Section 8 (9) of the Act**. The second mode of approach to the High Court, is through Judicial Review Proceedings, such as the present. However, such proceedings can only be taken after the Land Disputes Tribunal’s decision has been adopted and pronounced as a judgment of the subordinate court. This has not been done in the present case. What the applicants seem to be doing now is to skip the pronouncement of the Tribunal’s decision by the subordinate court, and to prohibit the subordinate court from performing its statutory functions. That is a wrong approach. It is not supported by the law.

As at now, there is nothing for this court to quash by way of *certiorari* because the subordinate court has not adopted the Tribunal’s award thus bringing into play the judicial review jurisdiction of this court. Secondly, this court cannot allow itself to be used as an impediment to the administration of justice by prohibiting a subordinate court from performing its legitimate statutory functions of adopting the Tribunal’s award.

In short, I find that the application is premature and incompetent. It cannot be sustained. I strike out the application, with costs to the interested parties.

Dated and delivered at Machakos this **23rd** day of **November** 2012.

George Dulu

Judge

In the presence of:

Mr Kasyoka holding brief for Mr Mung'ata for Interested Parties

N/A for the *ex-parte* Applicants

N/A for Respondents

Nyalo – Court clerk