



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 5 of 2009

IN THE MATTER OF: LANDS DISPUTES TRIBUNAL ACT NO. 18 OF 1990

A N D

IN THE MATTER OF: FILING APPLICATION FOR REVIEW FOR ORDERS OF
CERTIORARI

A N D

IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

REPUBLIC OF KENYAAPPLICANT

=VERSUS=

THE MALINDI DISPUTES COMMITTEE MALINDI DISTRICT1ST RESPONDENT

THE PASTOR AND CHURCH ELDERS, ADU P.E.F.A. CHURCH.....2ND RESPONDENT

SAMSON JEFWA MWANYULEEX-PARTE APPLICANT

R U L I N G

1. These proceedings were commenced with leave granted by the court on 2nd July, 2009. The main Notice of Motion was filed on 10th July, 2009 seeking in prayer 1

“THAT an order of certiorari do issue directed to the respondents, their agents/servants to quash/nullify the award made in Land Disputes Number 7/3 of 2008 and adopted as judgment of the court on 2nd June 2009, in PM's Court at Malindi, land case Number 11 of 2009.” (sic)

The grounds on the face of the application are that:

“I. The disputed referred as Land Disputes case number 7/3 of 2008 entirely involves the estate of Eric Kaingu Mwanyule – Deceased.

II. No letters of administration are in place but the respondents choose to deal with deceased d's beneficiaries who do not have the capacity to be sued.

III. The 2nd respondent does not have the capacity to sue or be sued. (sic)”

2. Several affidavits were filed in respect of the Notice of Motion. The ex parte applicant Samson Jefwa Mwanyule swore two affidavits to support the Notice of Motion on 27th May, 2010 and 2nd June, 2010 filed on 20th May, 2010 (sic) and 3rd June 2010 respectively long after the objections to the omissions to file affidavits was cited by counsel for the 2nd respondent vide grounds of opposition filed on 17th November, 2009. From the record these affidavits were filed with leave. It is also true that these proceedings commenced without notice to the deputy registrar as contemplated in Order L. III rule 1 (3) Civil Procedure Rules (now Order 53 rule 1 (3)), that the original chamber summons was not accompanied by a verifying affidavit as argued in the 2nd respondents Preliminary objection.

3. However the court already granted leave on the basis of the chamber summons on 2nd July, 2009. The deficiencies in the original proceedings cannot therefore be revisited at this stage. The 2nd respondents have not demonstrated how the cited non-compliance has prejudiced them. The objections are technical in my view and do not detract from the substance. The court is more concerned with the substance of the matter rather than procedural technicalities.

4. The 2nd respondent also filed a long affidavit in opposition to the Notice of Motion. The Notice of Motion was disposed of by way of written submissions. I have now perused all the respective affidavits and submissions in respect of the Notice of Motion filed on 10th July, 2009. Briefly, the position of the parties can be summarized as follows.

The applicant's complaint is that the 1st respondent (who did not participate in the proceedings beyond filing of the notice of appointment by the Attorney General on 10th September, 2009) in entertaining the dispute brought before it by the 2nd respondent acted ultra vires by purporting to determine the ownership of the suit land. Secondly, that the dispute amounted to intermeddling in the estate of the deceased owner of the suit land Eric Kaingu Mwanyule. Thirdly that the objectors, including the ex parte applicant herein were non suited as parties in the dispute as they are not administrators of the estate of Eric Kaingu Mwanyule.

5. Despite these submissions and the material filed by the ex parte applicant, the 2nd respondents argued in their submissions that the proceedings are not challenging the jurisdiction of the 1st respondent. That further there is no evidence of breach of the rules of natural justice as the objectors elected to boycott the tribunal sittings despite due service.

6. Having considered all these matters, I am not persuaded that the judgment of the tribunal was not about the ownership of the land. That is plain from a cursory reading of the judgment. There can be no doubt that by virtue of Section 3 of Land Disputes Tribunal Act the 1st respondent lacked the jurisdiction to decide the question of ownership. It is also true, as the ex parte applicant asserts that he is not an administrator of the estate of the true owner, (now deceased) of the subject property.

7. The elephant in the room that was never addressed is this: from whence does the ex parte applicant himself draw his authority to bring these proceedings? He is guilty of the very thing he is accusing the 2nd respondent. At any rate he dragged the said respondents to court and should be estopped from challenging their capacity. He too lacks locus standi. Two wrongs do not make a right. The ex parte applicant cannot hope to challenge the decision of the Land Disputes Tribunal, no matter how irregular, when he has no authority over the estate. For this reason alone his Notice of Motion must be struck out with costs.

8. Finally, there is on record an application filed by the 2nd respondent under certificate of urgency on 17th January, 2012. Ex parte orders were given but it has not been set down for inter partes hearing. The 2nd respondents should set down the said application for hearing within 14 days of today's date.

Orders accordingly.

Delivered and signed at Malindi this **12th** day of **November, 2012** in the absence of the parties.

Court clerk - Evans

C. W. Meoli
JUDGE