



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 243 of 2006

IN THE MATTER OF LAND DISPUTES TRIBUNAL LAND CASE NO.43 OF 1995

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY STEPHEN KIMEU
NGUKU

BETWEEN

REPUBLIC APPLICANT

AND

MACHAKOS DISTRICT LAND DISPUTES TRIBUNAL RESPONDENT

AND

PHILIP MAUNDU KITHOME INTERESTED PARTY

AND

1. STEPHEN KIMEU NGUKU

2. MARY MUENI EX PARTE APPLICANTS

RULING

Before me is an application dated 26th January 2007 filed by the *ex-parte* applicants **Stephen Kimeu Nguku** and **Mary Mueni**. It was brought under **section 8** and **9** of the **Law Reform Act (Cap 26)** and **Order LIII Rule 3** of the **Civil Procedure Rules (Cap 21)**. It seeks the following orders:-

1. **THAT** an order of certiorari do issue to remove to the High Court and quash in its entirety the decision of the Machakos District Land Disputes Tribunal maintaining boundaries and the judgment in Machakos Chief Magistrates Misc. Case NO. 20 of 2006.
2. **THAT** an order of prohibition do issue to stop, prevent the District Commissioner, Land Registrar and any officers under him from acting upon the said decisions.
3. **THAT** the cost (of) this application be in the main cause.

Six grounds were relied upon in the application. Firstly, that **plot No. 629** belonged to the 1st applicant's mother **Mwongeli Nguku** now deceased; that the Tribunal lacked jurisdiction to hear and determine the matter; that the matter was *res-judicata*; that both applicants were sued wrongly as none had taken out letters of administration; that the chief **Kola** Location and the Chairman and members of **Akitondo** clan acted *ultra vires* their authority.

On 7th March 2007, **Mary Mueni Mativo** (the 2nd *ex-parte* applicant) filed an affidavit which she swore on 5th January 2007. Paragraph 3 and 4 of the affidavit state:-

3. That I have never given consent to the institution of the proceedings herein to the 1st applicant neither have I instructed any advocate to file a case on my behalf.

4. That I pray this Honourable (court) to strike out my name from the proceedings as I am not interested in the case at all.

On 4th November 2008 the interested party **Philip Maundu Kithome** filed an affidavit he swore on 3rd October 2008 stating that the 1st *ex-parte* applicant filed appeal No. **46 of 2006** to the **Embu** Provincial Appeals Tribunal which was determined, and no appeal therein had been filed. Annexed was a copy of the Appeal Tribunal's decision, which was undated, in which the appeal of the 1st *ex parte* applicant was dismissed, and he was given 30 days to appeal.

Both the applicant's counsel **J. Kamanda** and the interested party's counsel **Katumbi Isika** filed written submissions. I have perused and considered the submissions.

The judicial review court deals with matters that relate to correcting excess or lack of jurisdiction in exercise of power by public institutions or officials. It also corrects the exercise of power which is done in bad faith.

The burden is always on an applicant to demonstrate the fault that is to be corrected by the judicial review court.

This is a matter filed by two *ex-parte* applicants. The second *ex-parte* applicant **Mary Mueni** has sworn and filed an affidavit that she did not bring these proceedings. She is therefore removed from the parties in the proceedings.

The first *ex-parte* applicant is therefore the only person who has brought these proceedings. His complaint appears to be with regard to determination of a boundary to a piece of land. That land, he claims, does not belong to him. It belonged to his late mother.

The jurisdiction of the now defunct Land Disputes Tribunals, is defined under **section 3 (1)** of the **Land Disputes Tribunal Act** which provides:-

“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 shall be heard and determined by a tribunal established under section 4.”

In my view, therefore, if the Tribunal determined the issue of boundary to the land in question, it was perfectly within its mandate to do so. Whether the Tribunal did it rightly or wrongly, is not a function of the judicial review court, but of the appeal court, which the judicial review court is not. This court, as a judicial review court cannot deal with the merits of a decision.

It is also apparent to me that the *ex-parte* applicant filed an appeal to the Land Disputes Appeals Committee and a decision was made dismissing his appeal, after he failed to make submissions thereat. He himself admitted in paragraph 12 of his affidavit, sworn on 18/10/2006, that he filed such an appeal. He stated:-

12. That after the said award was read by the CM's court, I filed an appeal being 46 of 2006 at the Provincial Appeals Tribunal at Embu (annexed and marked SK N7 is a copy of the said appeal and receipt for payment).

In my view, the *ex-parte* applicant is misusing or abusing the process of the court. If he was dissatisfied with the decision of the Land Disputes Appeals Committee, he should have filed an appeal, rather than come to this court through the judicial review process. The appeal would have dealt with the merits of the whole matter, which the judicial review court is not able to do. Once the Appeals Committee has made a decision, the law under the **Land Disputes Tribunals Act** provides that the only avenue available to a person who is aggrieved is to appeal to the High Court, not to pursue judicial review proceedings.

In my view, these judicial review proceedings herein are misconceived and misadvised. I find no merits in the application. I dismiss the application of the 1st *ex-parte* applicant. He will pay the interested party's costs of the application.

Dated and delivered at Machakos this **10th** day of **December** 2012.

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George Dulu
Judge

In the presence of:
N/A for the parties
Mutinda – Court clerk