REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS CIVIL APPLICATION NO. 286 OF 2006

THE REPUBLIC OF KENYA…….....……..APPLICANT/EXPARTE

VERSUS

MURITU THUKU.....APPLICANT

1. THE CHIEF MAGISTRATE, NYERI

2. MUKURWEINI LAND DISPUTE TRIBUNAL

3. MBOGO WAMAI……RESPONDENTS

RULING

Pursuant to the provisions of *Order LIII rule 3* of the Civil Procedure Rules (now Order 53 rule 3 of the Civil Procedure Rules), Muritu Thuku, the applicant herein, took out the Motion dated 22nd December 2006 in which he applied for the following orders:

1. ***THAT this Honourable Court be pleased to grant the applicant an order for certiorari to move to this Honourable court to Quash and set aside the decision by Mukurwe-ini land dispute Tribunal delivered in mukurwe-ini land dispute tribunal case Number 7 of 2005 dated 27th June 206 and Decree by Nyeri chief Magistrate court award No 50 of 2006 adopted of 22nd day of November 2006 subdividing L.R. NO. Gikondi/Karindi/92 t one Mbogo Wamai.***
2. ***THAT costs of this application be provided for.***

The Motion is accompanied by a statement of facts and is verified by the affidavit of Muritu Thuku. The Attorney General filed a notice of a preliminary objection to oppose the Motion on behalf of the Chief Magistrate, Nyeri and the Mukurweini Land Disputes Tribunal the 1st and 2nd Respondents respectively. Mbogo Wamai, the 3rd Respondent herein, filed a replying affidavit to oppose the Motion.

The facts leading to the filing of the aforesaid Motion are short and straightforward. The 3rd Respondent herein filed a complaint before the Mukurweini Land Disputes Tribunal claiming to be entitled to 1.5 acres to be excised from **L.R. NO. GIKONDI/KARINDI/92**. The Applicant herein objected to the 3rd Respondent's claim. The Land Disputes Tribunal heard the dispute and in the end it

found the case in favour of the 3rd Respondent. The Applicant has now filed the current application seeking to have the decision quashed. It is the argument of the Applicant that the Land Disputes Tribunal had no jurisdiction to hear and determine disputes relating to title to land. The 1st and 2nd Respondents opted to raise preliminary points of law leaving the issues raised in the statement of facts and in the affidavits unanswered. In his replying affidavit, the 3rd Respondent too did not answer the question as to whether or not the Land Disputes Tribunal had jurisdiction to hear and determine the dispute. The thrust of the Respondents' objection is that the Motion is fatally defective in that the same was not made in the name of the Republic but was made in the name of the Applicant. It is also argued that the Motion has been overtaken by events in that the decision sought to be impugned has been adopted. It is also pointed out that the statement of facts does not comply with the provisions of *Order LIII* of the Civil Procedure Rules (Now Order 53). The 3rd Respondent complained that the Applicant did not issue the necessary notice to the Registrar of this Court before instituting the proceedings. This last submission was countered by the applicant who stated that he had issued the notice when he appeared exparte. I have perused the record and I have found no notice to the Registrar nor an affidavit of service showing that the same was served. Let me point out that the requirement to issue a notice to Registrar was done away upon the coming into place of the amended civil procedures i.e. Civil Procedure Rules, 2010 vide Kenya Gazette Supplement No. 65 of September 10 2010, as legislative Supplement No. 42 and Legal Notice No. 151. The aforesaid rules came into effect on 17th December 2010. The application before this court was filed and argued before the aforesaid rules came into force. Pursuant to the provisions of Order 54 of the Civil Procedure Rules, I am bound to apply the law applicable at the time. There is no doubt in my mind that if the Applicant did not serve the Registrar of this Court with notice before filing the application for leave, then he would be in breach of *Order LIII rule 1 (3)* of the Civil Procedure Rules. It was a mandatory requirement of law and therefore any application for judicial review which is made without such notice having been given is incompetent unless this Court for good reasons extended time for lodging such a notice or excused the failure to lodge the same. I have taken the liberty to call for **NYERI H.C.C.MISC.C. Application 279 of 2006** for my perusal. Upon scrutinizing the aforesaid file, I found out that the Exparte Applicant actually served the Deputy Registrar of this Court with the notice and the Deputy Registrar acknowledged receipt of the same on 14th December 2006. It is therefore obvious that the preliminary objection on this aspect must fail. The other preliminary issues raised and argued by the Respondents touch on the format the Applicant should have adopted. It is said the Applicant should have filed the application in the name of the Republic instead of using his own name. The other issue raised by the 3rd Respondent is that the application is fatally defective because the Republic has been named as the Exparte Applicant instead of the Applicant himself being named so. I have carefully considered those submissions plus the authorities relied. There is no dispute that the aforesaid objection is for want of form. Though this Court and the Court of Appeal have upheld such objections by striking out the Motion, I am of the view that the Court should adopt a different attitude by looking at the broad interest of justice by ignoring the objections as mere technicalities and by deciding the dispute on its merits. In fact the authorities relied on by the Respondents appear to support the view I have now taken. In **FARMERS BUS SERVICE AND OTHERS =VS= TRANSPORT LICENSING APPEAL TRIBUNAL,** the Court of Appeal noted the defects for want of form, but it did not dismiss the appeal, but instead gave the parties a chance to amend the pleadings to meet the requirements of the law. I agree with the Respondents that the Motion before this Court is defective for want of form. I will overlook those defects.

However, the Respondents are aware of what the Applicant has raised and argued before this Court. They are aware that the Applicant is before this Court to question the jurisdiction of the Mukurweini Land Disputes Tribunal in hearing and determining the dispute. I have carefully looked at the proceedings and the award of the tribunal. It is clear that the Land disputes Tribunal made an award giving the 3rd Respondent 1.5 acres to be excised from **L.R. NO. GIKONDI/KARINDI/92**. The aforesaid decision was adopted by the Chief Magistrate's Court, Nyeri, as the order of that Court on 22nd November 2006. Miss Munyi, the learned Provincial Litigation Counsel, has urged this Court to find that the application has been overtaken by events. There is no evidence that the adoptive order has been executed. If it was shown to this Court that the order has been executed, then I could have found favour in Miss Munyi's arguments. The effect of the Land Disputes Tribunal's decision is to cause title No. **L.R. NO. GIKONDI/KARINDI/92** to be closed upon subdivision. Thus title to land will have been interfered with. When faced with a case similar to this, the Court of Appeal in **ASMAN MALOBA**

WEPUKHULU & ANOTHER =VS= FRANCIS WAKWABUBI BIKETI C.A. NO. 157 OF 2001
(Unreported), the Court of Appeal expressed itself as follows:

"At the close of the rival submissions by the parties, Mr. Omukunda, Counsel for the appellants, conceded that the learned judge could not be faulted at all since none of the two bodies was seized of jurisdiction to determine the dispute relating to the suit land. With respect, we agree with him. The title relating to the suit land, BOKOLI/KITUNI/169 was unlawfully interfered with by bodies which lacked jurisdiction and all orders made by them were illegal."

I must conclude by stating that the decision of the Mukurweini Land Disputes Tribunal was made without jurisdiction hence there was no competent decision to be adopted by the Chief Magistrate's Court. In the end I find the Motion dated 22nd December 2006 to be well founded. It is allowed as prayed with costs to the Applicant.

Dated and delivered at Nyeri this 18th day of February 2011.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Kingori holding brief Wahome for Respondent. No appearance for Applicant.