



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**MISC.CIVIL APPLICATION NO.74 OF 2006**

**IN THE MATTER OF AN APPLICATION BY BENJAMINE KISIERO FOR JUDICIAL  
REVIEW ORDERS OF CERTIORAI & PROHIBITION**

**BETWEEN**

**REPUBLIC.....  
.....APPLICANT**

**VERSUS**

**THE CHAIRMAN CHEPTAIS LAND DISPUTE  
TRIBUNAL.....RESPONDENT**

**AND**

**JOSEPH BIKETI WAUKHILA (LEGAL REPRESENTATIVE OF SIMON WACHIE  
(DECEASED)).....INTERESTED PARTY**

**AND**

**BENJAMINE  
KISIERO.....EX PARTE  
APPLICANT**

**JUDGEMENT**

The application before me is the Notice of Motion dated 5.7.2006, brought by the Ex Parte applicant. It seeks the Judicial Orders of Certiorari to remove to this court and quash it, the proceedings, recommendations and an Award of the Cheptais Land Disputes Tribunal dated 26.9.2005 and later adopted under the Bungoma SPM LDT Case No.41 of 2005. The application also seeks for the Order of Prohibition to prohibit the said Cheptais Land Disputes Tribunal and the Senior Principal Magistrates Court from entertaining the same dispute in the future.

The ground upon which the Notice of Motion was based, is that the proceedings and Award, are void ab initio because the Tribunal acted without power or jurisdiction or acted ultravires its powers.

The facts behind the application are that the Ex Parte Applicant, Benjamin is the son and legal representative of one Zebedayo Kisiero. The latter had sold part of this land measuring three acres to one Simon Wachie who is the father of the Interested Party, Joseph Biketi Waukhila. The purchase price was 93 head of cattle of which 73 were immediately paid, leaving a balance of 20 which were never paid by the time Zebedayo Kisiero who died in 1986. Simon Wachie had however immediately taken possession of the land on the said first payment.

In Bungoma Succession Cause No.66 of 2003 filed by the Ex parte applicant, Benjamine Kisiero, the latter took out a grant of Letters of Administration to his father's estate. He then filed Land Dispute Case No.25 of 2005 before the Cheptais Land Disputes Tribunal, seeking to evict Simon Wachie from the land on the basis that he was repudiating the sale agreement between his deceased father and the purchaser in possession.

The Tribunal however declined the Ex Parte applicant's claim, but on the other hand, found the father of the Interested Party entitled to own part of the said land which the Tribunal gave him. The Tribunal also ordered him to pay the balance of the purchase price, the 20 head of cattle. That is the award which was adopted by Bungoma PMC in Land Dispute Tribunal Case No 41 of 2005.

This aggrieved the ExParte applicant who filed this Judicial Review suit on the grounds that the Tribunal had no jurisdiction or acted ultra vires, its powers.

Meanwhile the said Simon Wachie the Interested Party died in January 2008. The Ex Parte applicant did not apply to join Joseph Biketi Waukhila, the Interested Party's son, as a party. He however from time served Biketi with a hearing Notice to these proceedings. There is no evidence either that Biketi has ever applied for or obtained a grant of letters of administration to his father's estate.

Before Simon Wachie died, he had independently filed an Originating Summons in Kitale HCCNo.90 of 2005 seeking ownership registration of the land he had bought from the father of the Ex Parte applicant on the basis of adverse possession. He had applied for and obtained a Limited Grant only for litigation in the said suit which is exhibited herein as JBW 3. In this court's view, however, the said suit do not appear relevant to this application.

I have carefully perused the document in support of this application and those filed by the Interested party. I notice that the Tribunal which is the Respondent in this application never filed any papers in opposition.

On the other hand, the Interested Party, Simon Wachie, had filed a replying affidavit before his death. He did not support the findings of the Cheptais Land Disputes Tribunal although he observed that the Tribunal had nevertheless recognized his proper interest in the land. He however all along realized, that the Tribunal was not the correct tribunal to entertain the suit and uphold his rights on the land.

The Interested Party further deponed in reply to this application, that he withheld filing any proceedings before the Principal Magistrate Court at Bungoma to adopt the Award given by the Tribunal. That it was the Ex Parte Applicant who went ahead to file on adoption proceedings which the Interested Party went ahead to oppose and unsuccessfully tried to stay.

It is clear therefore that the said Joseph Biketi Waukhila although the son of the Interested Party, has never been made a party in this suit. It's also clear from his deponents that he is not opposed to this application but seeks costs for wrongfully being dragged into the proceedings by the Interested Party.

Apart from the fact that the application is unopposed, it is clear from the record that Cheptais Land Disputes Tribunal had itself no power to subdivide the land parcel known as L.R. No. Malakisi/East Sasuri/553 and give part of it to the Interested Party. Indeed it had no jurisdiction to entertain a matter whose issue was to interfere with substantive a beneficial interest in land. In authorizing land surveyors to enter and make an excision of part of the land which was to go to the Interested Party, the Tribunal acted ultra vires the powers given to it under Section 3(1) of the Land Disputes Tribunal Act, Act No.18 of 1990.

The award aforementioned therefore is declared void and is liable for quashing by a relevant order.

As to the issue of costs, it is not denied by the ex Parte applicant that it was him who not only filed the land dispute before the Tribunal but he was also the one who, despite the opposition and attempted stay proceedings, went ahead to have the award adopted by the Principal Magistrate's Court in Bungoma SPMC. Land case No.41 of 2005. In these circumstances, it is my considered view and the finding of this court, that he shall bear the costs of this Court, of the Principal Magistrate's Court and of the Tribunal.

The court accordingly makes the following orders:-

- 1) An order of Certiorari shall issue removing the Award of Cheptais Land Disputes Tribunal to this court and quashing it.**
  
- 2) Costs of the Interested Party and Joseph Biketi Waukhila, in all the two courts and Tribunal, shall be borne by the Interested Party.**

Dated and delivered at Bungoma this 12<sup>th</sup> day of October 2011.

**D.A.. ONYANCHA**  
**J U D G E**