



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Miscellaneous Civil Application 208 of 2009

**IN THE MATTER OF AN APPLICATION BY JACKSON KALIKO NDINDIO FOR LEAVE TO
INSTITUTE PROCEEDINGS FOR ORDERS OF MANDAMUS.**

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NUMBER MBOONI/IIANI/898

BETWEEN

JACKSON KALIKO NDINDIO.....APPLICANT

VERSUS

1. THE ATTORNEY GENERAL

2. THE DISTRICT LAND REGISTRAR

3. MAKUENI DISTRICT.....RESPONDENTS

RULING

1. The application before the Court is the one dated **23rd March, 2011** (“Application”). It is a Notice of Motion expressed to be brought under Order 16 Rule 6, 10(3), 12 and 14 of Civil Procedure Rules and Section 3, 3A and 63(e).

2.The Application prays for two orders:

a.That the Court issues “summons against the Registrar of Persons to produce records regarding the person namely MUTUNE MUTISO appearing in the register of land Makueni District as the registered proprietor of land reference Number MBOONI/IIANI/898 (“Suit Property”) and to confirm whether or not the said MUTUNE MUTISO is alive”; and

b. That “further and without prejudice....[the Court]... issue[s] summons to the Chief Tulimani Location, Tulimani Division, Makueni District, to attend before [the Court] and submit a report as to the whereabouts of the person namely MUTUNE MUTISO registered as proprietor of land Reference

Number MBOONI/IIANI/898 which parcel of land is within the said Chief's jurisdiction."

3.The Application is brought in the context of a substantive judicial review application ("Main Application") which seeks, in the main, an order of mandamus requiring the District Land Registrar, Makueni District to rectify the land register in respect of the Suit Property by removing the name of MUTUNE MUTUA and substituting it with that of the applicant in that Main Application (as well as the instant Application) namely, Jackson Kaliko Ndindio.

4. The Applicant is seeking the current orders because he has formed the view that if he can conclusively establish the existence or non-existence of MUTUNE MUTUA, whose name appears in the land register, the District Land Registrar will be inclined to rectify the title and substitute the names as he prays in the Main Application. Apparently, the Applicant has formed this view from remarks made in court by the State Counsel representing the District Land Registrar in the Main Application.

5. However, the Applicant has been unable to establish such proof because all his efforts as well as efforts of his attorneys to obtain any record from the Registrar of persons or the area Chief which would establish the existence or non-existence of the said Mutune Mutua have failed.

6.Both have, apparently, insisted that they cannot issue the requested documents without a court order.

7.The Applicant is of the view that the Court has the power and authority to issue the summons prayed for and that it is necessary to do so in order to justly dispose of the Main Application.

8.Although the Attorney General was served with the Application and an affidavit of service duly filed, they did not appear for the hearing of the application on 22nd November, 2011. When the matter was called for hearing on that day, counsel for the Applicant, **Mr. Kitulu** urged that the Application be allowed because it was not really opposed. He asked for a ruling based on the documents on file.

9.I am aware of the line of cases, many of them included in the Respondents' list of authorities in the Main Application, which expressly impugn the applicability of Civil Procedure Rules and the Civil Procedure Act outside Order 53 to judicial review proceedings. **See**, for example, *Abdulrahman A. Perrera ex parte Isiolo County Council* [2006] eKLR and *Republic versus Secretary, Public Service Commission & 2 Others ex parte Peter Gitahi Kamaiitha*, Nyeri H.C. Misc. App. No. 22 of 2009. In the latter case, for example, my brother **Judge M.S.A. Makhandia** had this to say:

[Judicial review proceedings [are] strictly governed by Order 53 of the Civil Procedure Rules. Save for this particular order other provisions of the Civil Procedure Act and the rules made thereunder are inapplicable. Further it has been said constantly that judicial review is a special jurisdiction that is neither civil nor criminal. That being the case the principles enunciated above may not come in handy in the circumstances of this case.

10. I am also aware that this line of cases has emanated from the High Court and, while persuasive, is not binding on this Court. It is also true that most of these cases were decided before the enactment of the new Constitution which now entrenches judicial review as part of the right to fair administrative action in section 47. This section bequeaths every person with the right to administrative action that is expeditious, lawful, reasonable and procedurally fair.

11. Elsewhere in the new Constitution all courts are instructed to shun an obsession towards technical justice:

- **Article 22 (3) (d) admonishes the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.**
- **Article 159 12 (d) is in the same vein and instructs that justice shall be administered without undue regard to procedural technicalities.**

12. While this is not a constitutional reference or an enforcement action under Article 159 of the Constitution, I believe that the Constitutional ethos and spirit should infuse every action of the Court and be taken into account in every motion made before the Court. In this case, the Applicant has credibly demonstrated that he will suffer great prejudice and harm if the Court does not exercise its discretion to order two public officials to appear before the Court or to produce certain reports. These reports are necessary for the prosecution of the Applicant's Main Application. Indeed, their production might resolve the case altogether. I see no valid and legitimate bar to issuing the orders sought.

13. I have, however, noted what appears to be a typographical error on the face of the Notice of Motion. It asks for orders respecting a person named MUTUNE MUTISO. However, the Main Application, and all other documents related to this suit speak of MUTUNE MUTUA. See, for example, the Supporting Affidavit of **Mr. Kitulu** sworn on **21st March 2011**. The court will use its inherent authority to amend the scrivener's error on the face of the Application in granting the orders sought.

14. In the event, I make the following orders:

a. That the Registrar of Persons is hereby ordered to produce records regarding the person namely MUTUNE MUTUA appearing in the register of land Makueni District as the registered proprietor of land reference MBOONI/IIANI/898 and to confirm whether or not the said MUTUNE MUTUA is alive; and

b. That summons do issue to the Chief of Tulimani Location, Tulimani Division, Makueni District, to attend before the Court at a date when the matter is fixed for hearing and submit a report as to the whereabouts of the person namely MUTUNE MUTUA registered as proprietor of land Reference Number MBOONI/IIANI/898 which parcel of land is within the said Chief's jurisdiction.

DATED and DELIVERED at MACHAKOS this 9TH day of DECEMBER, 2011.

J.M. NGUGI
JUDGE