



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC. APPLICATION NO. 195 OF 2010

IN THE MATTER OF: AN APPLICATION BY PETER MATHEKA KYATU AND PAUL NGUMBAU KYATU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION DIRECTED AT MAKUENI DISTRICT LAND DISPUTES TRIBUNAL

AND

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

AND

IN THE MATTER OF: THE DECISION OF THE MAKUENI DISTRICT LAND DISPUTES TRIBUNAL DATED 30TH APRIL 2010, IN RESPECT OF CASE NO. 42 OF 2002 CONCERNING LAND PARCEL NO. UKIA/UTAATI/869 MAKUENI DISTRICT

BETWEEN

**PETER MATHEKA KYATU 1ST
APPLICANT**

**PAUL NGUMBAU KYATU 2ND
APPLICANT**

(Administrators of the Estate of the Late Gabriel Kyatu Manyala)

AND

**MAKUENI DISTRICT LAND DISPUTES TRIBUNAL
RESPONDENT**

AND

**GRACE NTHAMBI MONI 1ST INTERESTED
PARTY**

**THERESIA WAYUA NDUNDA 2ND INTERESTED
PARTY**

RULING

This is a Chamber Summons dated 1st October 2011 filed under Section 8 and 9 of the Law Reform Act (Cap 26) and Order LIII Rule 1, 2 and 3 of the Civil Procedure Rules, and Section 3 and 4 of the Land Disputes Tribunal Act No. 18 of 1990, as well as Section 3 and 3A of the Civil Procedure Act (Cap 21).

The prayers in the application are:-

1. Leave be granted to the Applicants to apply for judicial review orders of:-

i. Certiorari directed at the Respondent to remove and bring to the High Court to be quashed its decision dated 30th April 2010 purportedly dismissing the complaint lodged before it and awarding costs of Kshs.50,000 to itself.

ii. Prohibition directed at the Respondent, its servants and/or agents or whomsoever from enforcing the order by way of execution or in any other manner.

iii. Grant of leave to apply for judicial review orders of certiorari and prohibition do operate as stay of execution of the Respondent's decision made on 30th April 2010.

iv. Costs of this application be provided for.

The application was filed with a statement and verifying affidavits as required by law.

The main reasons for the requests in the application are that the Makueni District Land Disputes Tribunal acted beyond its powers by awarding itself costs, and making a decision on the subject land without the involvement of the estate of GABRIEL KYATU MANYALA or the beneficiaries of that estate.

The application was opposed and grounds of opposition were filed on 31st March 2011 by the Attorney-General. The Objections are brief and I will reproduce them verbatim. They are as follows:-

1. That there is no decision of the Respondent that is capable of being quashed.

2. That an order of prohibition cannot issue in the instant case as the alleged decision has already been made.

3. That the application is void of merit and ought to be dismissed with costs.

This matter came up for the hearing of the Preliminary Objection on 28th September 2011. Ms Nganga for the Respondent submitted in support of the Preliminary Objection. She submitted that once the decision of the Tribunal was adopted by the magistrate the decision of the Tribunal ceased to exist and could not be quashed. Counsel also argued that prohibition orders could not be grantable as the decision had already been made.

Counsel for the Applicant Mr Shijenje submitted that the Attorney-General had admitted that there was a decision. The application for leave was therefore justified. In counsel's view the objection is premature.

Having considered the objections filed and submissions of counsel on both sides, I am of the view that the points raised in the objection are premature. The decision of the Tribunal was made. It was adopted by the court. It is only after leave is granted and the main motion filed, that the parties can be able to argue substantively both factual and legal points. The purpose of the application for leave is just for the court to determine if Applicant has an arguable case.

In my view, in the present case the applicant has an arguable case.

With regard to the decision cited by the Respondent in **Kakamega Misc. Application No. 37 of 2004 Hadijah Wanjala –vs- Matungu Land Disputes Tribunal** – it is persuasive but not binding on me. In my view there are two alternative ways to challenge a decision of the Land Disputes Tribunal. One of the ways is to appeal to the Provincial Appeals Committee under Section 8 (1) of the Lands Disputes Tribunal Act (No. 18 of 1990) before the Tribunal decision is adopted by the court. However, once the Tribunal's decision has been adopted by the court, like in the present case, then the only recourse to challenge the decision is through judicial review proceedings, which are commenced after leave is obtained.

Though what was argued before me is the grounds of objection, the arguments and findings hereinabove determine the Chamber Summons. I find merits in the Chamber Summons application. I allow the same and grant prayer 1, 2 and 3. The Notice of Motion will be filed within 21 days otherwise the stay automatically lapses. Costs in the cause.

Dated and delivered at Machakos this **6th** day of **December** 2011.

George Dulu

Judge

In presence of:-

For the Applicant: N/A

For the Respondent: Mr Tuti holding brief for Ms Nganga

Court clerk: Nyalo.