



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Miscellaneous Application 3 of 2009

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

**THE CHAIRMAN KISUMU EAST/
WEST LAND DISPUTES TRIBUNAL.....1ST RESPONDENT
THE CHIEF MAGISTRATE KISUMU.....2ND RESPONDENT**

AND

**1. DAN WILLIAM OKECH.....1ST INTERESTED PARTY
2. GEORGE ODEMBA.....2ND INTERESTED PARTY
AND
RUFUS M. NDUBI EXPARTE**

J U D G E M E N T

For determination before court is a Notice of Motion brought pursuant to order L111 Rule 3 of the Civil Procedure Rules, leave to file the same having been obtained and granted by this court on the 2nd of March, 2009. The application is supported by statement of facts filed pursuant to order L111 rule 1(2) of the Civil Procedure Rules dated 6th of January, 2009 and an affidavit of **Rufus Maurice Ndubi** dated 7th January, 2009.

The notice of motion seeks for the following orders:

- (a) This Honourable Court be pleased to grant the applicant an order of certiorari removing and bringing into this court and quashing the decisions:-**
 - (i) Of the Kisumu East/West Land Disputes Tribunal dated 8/10/08 awarding land parcel No. Kisumu/Kanyakwar 'A'/172 to the family of William Onyango Mbaga as well as directing the Land Registrar to effect the changes accordingly, and;**
 - (ii) The order of the Kisumu Chief Magistrate's court made on 24/11/08 adopting the tribunal's decision as a judgment of the court.**
 - (iii) An order reversing all and singular any transactions and or instruments made subsequent and or pursuant to the said decisions.**
- (b) The costs of this application be provided for.**

The application is based on the grounds that:

- (a) The Kisumu East/West Land Disputes Tribunal was not properly constituted and therefore, had no capacity to try the dispute;**
- (b) The said tribunal had no jurisdiction to entertain the dispute as it regards ownership of the subject matter of land;**
- (c) The Tribunal's actions are ultra vires;**
- (d) Interested parties had no locus standi to institute The claim before the tribunal as they were not the legal representatives of John William Onyango Mbagu**
- (e) The Chief Magistrate Kisumu ought not to have adopted the award of the Land Dispute Tribunal.**

The application was opposed by the interested parties who relied on an affidavit sworn by **George Odemba** dated 16th March, 2009.

The respondent through the office of the Attorney-General intimated it will be neutral in the matter.

The interested parties supported the findings of the Land Dispute Tribunal. It is their contention that the application is brought in bad faith and to cover up the forgery over the title-deed and further that the application is incompetent in that:

- (a) The Attorney-General is not a party;**
- (b) That there are to matters pending in court, the current application and Appeal No.244 of 2008;**
- (c) The statement of facts is signed by the advocates and not the ex-parte applicant;**
- (d) No replying affidavit was filed;**
- (e) The Land Dispute Tribunal has a mandate to determine cases of trespass to land.**

Having considered submissions by the parties, it is clear that several procedural issues have been raised a part from arguments based on facts for an against the application. I will first deal with the procedural issues raised in regard to the application before court.

Order L111 has set out the procedure to be used in instituting Judicial Review proceedings. An applicant is required under Order L111 Rule (1) to move the court first, by way of chamber summons ex-parte for leave to institute Judicial Review proceedings. The chamber summons is to be accompanied by a statement of facts, setting out the details of the applicant, in terms of name and description, the relief being sought and the grounds. The applicant is required to file an affidavit verifying the facts relied upon.

The interested parties have challenged the application partly as no verifying affidavit was filed.

From the court records, the ex-parte applicant on filing the chamber summons on the 8th of January, 2009, accompanied the same with a statement of facts dated 6th January, 2009 and an affidavit verifying the facts dated 7th January, 2009 and therefore, on account of this point the argument by the interested parties fail. There is an affidavit, what it probably lack is the word verifying as its heading that cannot be a viable reason when it is clear the said affidavit verifies the facts.

The statement of facts has been signed by the advocate. Order 53 is silent on who signs the statement of facts. It is my view, therefore, that the fact that the advocate signed the statement of facts does not invalidate the same as the affidavit verifying the fact was duly signed by the ex-parte applicant.

The Attorney General representing the respondents sued in their capacities as those whose orders are being sort to be set aside and by virtue of being the government's chief legal advisor the Attorney General is representing their interests. I find that the correct respondents were enjoined.

The interested parties stated that there is a pending appeal however no evidence of the existence of a pending appeal was adduce and therefore the court is unable to deal with the issue.

Having established that the application is properly before the court, I will consider the substantive issues relating to the matters before court.

Section 4 of the Land Disputes Tribunal Act No.18 of 1990 establishes the tribunal with a chairman appointed from the panel of elders as provided under section 5. There is no mention of a secretary. The tribunal is expected to adjudicate and make a decision. Without referring to the Act, the proceedings will have to be recorded and the mere fact that the panel herein had a secretary supposedly to record the proceedings and this is reflected in the said proceedings cannot render the tribunal incompetent. The panel had 3 elders in compliance with the requirements of section 4(2)(b) of the Land Disputes Tribunal Act No. 18 of 1990 and I find that it was thus properly constituted.

Section 3(1) gives the Limit of Jurisdiction for the tribunal as follows:-

“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 land or;**
- (c) trespass to land;**

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

It is clear that the subject matter before the Land Disputes Tribunal, was none of the 3 areas allowed by section 3 above, but ownership of **KISUMU/KANYAKWAR “A”/172**. Section 3 does not give Jurisdiction for the tribunal to adjudicate on the issue of ownership and, therefore it follows that they acted outside their jurisdiction and the award and any other subsequent order cannot lie.

I accordingly, therefore, allow the Notice of Motion dated 6th March, 2009 with costs.

DATED AND DELIVERED THIS 30TH APRIL, 2010

ALI-ARONI
J U D G E

In the presence of:

.....**Counsel of the Applicant**

..... **Counsel for the Respondent**