REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPLICATION NO. 162 OF 2006

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL.

AND

IN THE MATTER OF THE MOSOCHO LAND DISPUTES TRIBUNAL LAND CASE NO. 15 OF 2005

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY BENARD MORIRA KEBATI, MIRUKA MORIRA, TOEL MORIRA AND CHRISTINE KEBATI FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION.

BETWEEN

REPUBLIC ……. APPLICANT

AND

MOSOCHO LAND DISPUTES TRIBUNAL …… RESPONDENT

AND

HENRY MOGENI MAYAKA ……..……INTERESTED PARTY

RULING

Land parcel registration number **WEST KITUTU/ BOGUSERO/ 1058** hereinafter to as "the suit premises" is jointly registered in the names of **Miruka Morira**, **Toeri Morira**, **Kebati Morira** & **Asieka Morira,** hereinafter "the applicants". According to them the last two proprietors are deceased. The first and the last applicants are however the children of the late **Kebati Morira** deceased.

Neighbouring the suit premises is Land parcel number **WEST KITUTU/BOGUSERO/2105** initially registered in the name of one **Nyangaresi Okachi** who in turn sold it to one **Jane Nyanchoka**. **Nyanchoka** later sold the said parcel of land in or about 1998 to **Henry Mogeni Mayaka**, "the interested party". However before the said **Nyanchoka** sold to the interested party the parcel of land aforesaid, she had filed a complaint with the District Land Registrar in 2001concerning closure of a road

of access. She had accused the proprietors of the suit premises with interfering with the road of access.

The District Land Registrar visited the ***locus*** in ***quo*** together with a private surveyor appointed by the applicants. The findings of the District Land Registrar and the private surveyor did not agree apparently. The applicants filed an appeal to the Chief Land Registrar who ordered the hearing of the case afresh. The case was re-heard and the findings were that the original owner, **Okachi Nyangaresi** did not have any dispute with the applicants and that there was an error on the map which the Land Registrar recommended that it be rectified by the Chief Land Registrar. After that decision of the District Land Registrar, the said **Jane Nyanchoka** then sold the said **LR NO. WEST KITUTU/BOGUSERO/2105** to the interested party. Soon thereafter the interested party herein instituted a case at Mosocho Land Dispute Tribunal, "the respondent" accusing the applicants of trespassing on his land, by cutting the trees and cultivating a portion thereof. They had also blocked access road and indeed cultivated on the same. However these were matters which had been resolved earlier as aforesaid. Apparently he was not happy with the decision of the land registrar. He had therefore approached the respondent for further assistance. In response, the applicants stated that the portion of land in dispute was part of their suit premises and they had not trespassed on the interested party's land. They also denied having blocked the access road. The respondent having visited the 2 parcels of land in the company of the District surveyor reached the verdict thus:

"***Following a visit to the land in dispute and the surveyors findings there is no doubt that the disputed portion of land belongs to parcel no. 2105 and not percel (sic) 1058 as was claimed by the objectors. The tribunal has also found there was access road, which has been blocked and cultivated by the objectors. The objectors are therefore guilty of trespass and should surrender the portion of land in dispute immediately to the claimant. The objectors should open up the access road immediately and the area Assistant chief should ensure that this is done….".***

It is this award that triggered this application. On 2nd October, 2006, the applicants obtained leave of court to commence judicial review proceedings in the nature of certiorari to quash the award aforesaid, and prohibition to prohibit the interested party from implementing the decision. Subsequent to the leave aforesaid the applicants filed the substantive motion which is the subject of this ruling.

The application came up for interparties hearing before me on 17th May, 2010. The respondent had been served, but was absent. The interested party was present though. Satisfied that the respondent had been duly served with the hearing notice and had no reason to be absent, I allowed the prosecution of the application, the absence of the respondent notwithstanding. Both the applicants and the interested party agreed to canvass the application by way of written submissions which I have carefully read and considered.

This application in my view, can be disposed off on technicalities. Those technicalities were pointed out by **Mrs. Asati**; learned counsel for the interested party in her submissions. I believe that parties exchanged the written submissions. One would thus have expected a response of sorts from the applicants to those technical points raised by the interested party. However none was forthcoming from the applicants. If anything they seem to have given them a wide berth. Is it perhaps that they had no response to the same?

First and foremost the affidavit in support of the notice of motion was not among those filed with the ex-parte application seeking leave. These is an entirely new affidavit which was executed on 2nd October, 2006. It has introduced new evidence by way of annextures which were then not available at the time that leave was granted. It is trite law that only affidavits which were tendered in support of the application for leave should be the ones that should accompany the substantive motion. Further or other affidavits can only be filed with leave of court.

In the circumstances of this case the affidavit in support of the Notice of Motion is therefore not properly on record. It was not filed with the application for leave nor was the leave of court subsequently sought and obtained before it was filed. Further the said affidavit was executed by the applicants jointly. Under order XVIII rule 5 of the **Civil Procedure rules**, it is provided interlia:-

"Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject".

This is a mandatory provision of the law. It is difficult to tell from the affidavit as drawn whose affidavit it is and among the four, whom did the commissioner for oaths administer the oath to as it is not possible to administer a joint oath to those expected to swear separately.

For all the foregoing reasons, the affidavit aforesaid in expunged from the record. Having done so there is no evidence left in support of the application. Even if I was to revert to the affidavits sworn in support of the ex-parte, chamber summons for leave, the applicants case cannot be advanced any further as the affidavit sworn in support of the ex-parte application was again sworn jointly. Secondly, the verifying affidavit was a 3 paragraph affair and sworn in a similar manner.

The upshot of the foregoing is that the substantive Notice of Motion is bare, devoid of evidence and lacks merit. It is accordingly dismissed with costs to the interested party.

Ruling dated, signed and **delivered** at Kisii this 16th July, 2010.

ASIKE-MAKHANDIA

JUDGE