



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MACHAKOS

Miscellaneous Civil Application 22 of 2006

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN, MACHAKOS LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> RESPONDENT  
CHIEF MAGISTRATE'S COURT MACHAKOS.....2<sup>ND</sup> RESPONDENT  
AND  
JOEL NGANDA .....INTERESTED PARTY

***EX PARTE PATRICK MUTUA KILONZO AND MOSES KILONZO  
(LEGAL REPRESENTATIVES OF THE JOHNSON KILONZO MUTUA, DECEASED )***

**J U D G E M E N T**

On **13<sup>th</sup> March 2006** the Ex-Parte Applicants herein obtained leave of the court to apply for judicial review. The order to be sought was *certiorari* to remove into this court for purposes of quashing an **award dated 3<sup>rd</sup> December 2002** of the **Machakos Land Disputes Tribunal** (hereinafter called the Tribunal) in its case **No. 163 of 2002**. The award was filed in the Chief Magistrate's Court, Machakos on **29<sup>th</sup> January 2003** in that court's **Miscellaneous Civil Application No. 8 of 2003**.

The award appears to have been remitted back to the Tribunal for it to indicate the acreage of land due to each of the persons awarded. An **amended award dated 14<sup>th</sup> February 2003** was filed in court on **27<sup>th</sup> September 2005**.

The Chief Magistrate's Court entered judgment upon that amended award on **14<sup>th</sup> October 2005**. The application for leave (by chamber summons dated 1<sup>st</sup> March 2006) was filed on **2<sup>nd</sup> March 2006**.

The substantive application was filed on **3<sup>rd</sup> April 2006** by **notice of motion dated 30<sup>th</sup> March 2006**. The Interested Party filed a **replying affidavit on 6<sup>th</sup> October 2009**. This was with leave of the court. On **2<sup>nd</sup> December 2009** the court ordered that the application be heard by way of written submissions. The Ex-Parte Applicants and the Interested Party filed their respective written submissions. The Respondents did not file any.

I have considered the written submissions. The grounds for the application as set out in the statement of facts can be rephrased as follows:-

1. **That the Tribunal lacked jurisdiction to deal with claim brought before it.**

2. **That the amended award was a nullity as it was never read to the parties.**
3. **That the decision of the tribunal was never read to the parties.**
4. **That the claimant's claim had abated on account of the claimant's death when the amended award was filed in court as no substitution had been done over a year from the claimant's death on 7/9/2004.**

In his replying affidavit the Interested Party took issue with the leave granted on 13<sup>th</sup> March 2006. It is his case that the leave was obtained outside the six-month period prescribed in respect to *certiorari*. The point was also taken that the Ex-Parte Applicants cannot challenge jurisdiction of the Tribunal as it was, in effect, they who approached the Tribunal to adjudicate over the dispute. I may state here that jurisdiction is a matter of law and can never be conferred by the parties.

For the Ex-Parte Applicants it was submitted as follows. The claim taken before the Tribunal was a claim upon the assets of a deceased person's estate, one **MBULI MUTUA** (hereinafter called the Deceased). The claim was essentially by a beneficiary of the estate of the Deceased. The Tribunal thus had no jurisdiction to distribute the estate of the Deceased.

Further, the estate of the Deceased comprised shares in a co-operative society that owned land. The shareholders of the society (including the Deceased) were entitled to some land from the co-operative society by virtue of their shareholding. It was submitted that this fact further ousted the jurisdiction of the Tribunal.

The second point taken in the submissions filed on behalf of the Ex-Parte Applicants was that the claimant before the Tribunal died on 7<sup>th</sup> September 2004 before the amended award was filed in court on the 27<sup>th</sup> September 2005. As there was no substitution of someone else to take his place, his claim abated, and the lower court should thus not have entered judgment in terms of the amended award.

For the Interested Party it was submitted as follows. The original award was read to the parties on 3<sup>rd</sup> December 2002. It is that original award that is sought to be quashed. Leave therefore should have been sought within six months from 3<sup>rd</sup> December 2002. Leave was sought over three years after the award was read. The leave was thus irregularly granted.

The Interested Party appears to admit in the written submissions filed on his behalf that the claim before the Tribunal involved distribution of the assets of the estate of the Deceased grandmother of the present parties.

Both parties have addressed the respective merits or lack thereof of the claim placed before the Tribunal. It is not within the purview of judicial review to consider such merits.

Let me first deal with the issue of leave. We have seen that after the original award was read to the parties the same was remitted back to the Tribunal for it to specify the acreage due to each party or their successors. The original award was dated 3<sup>rd</sup> December 2002 and was filed in court on 29<sup>th</sup> January 2003. An amended award dated 14<sup>th</sup> February 2003 was apparently filed in court on 27<sup>th</sup> September 2005. Judgment was entered upon that amended award on 14<sup>th</sup> October 2005.

As already seen leave was sought by chamber summons dated 1<sup>st</sup> and filed on 2<sup>nd</sup> March 2006. That was within six months from the date of entry of judgment. The challenge to the award obviously includes a challenge to the judgment entered upon that award.

The point taken by the Interested Party that leave was sought and obtained out of time therefore has no substance. The notice of motion must be decided upon merit.

The only substantive issue raised by the Ex-Parte Applicants is on jurisdiction of the Tribunal. The jurisdiction of land disputes tribunals is set out in **section 3(1)** of the **Land Disputes Tribunals Act, No. 18 of 1990**. That jurisdiction is limited to **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.**

The claim before the Tribunal involved the division of land that had been allocated to the Deceased grandmother of the parties by virtue of her shareholding in a co-operative society owning the land. The division was to her children (the original claimant and respondent) and ultimately to their children (grandchildren of the Deceased).

This was not a claim involving **title** to land. The award of the Tribunal did not give title to the parties for the respective acreages it awarded them. The Tribunal merely said that the land due to the Deceased from the society should be shared amongst the three beneficiaries in the acreages it indicated. The Tribunal further said that the division of the land should be done by the society, and each beneficiary shown his/her parcel. The Tribunal did not award any titles.

I therefore hold that the Tribunal had jurisdiction to deal with the claim as presented before it as the claim involved **division** of, and not **title** to, land. The main ground of the application must therefore fail.

I will address briefly the submission that the claim before the Tribunal abated with the death of the claimant. It is to be noted that the claimant died on 7<sup>th</sup> September 2004. This was long after the Tribunal heard the claim and made the award. It was also after the Tribunal had amended the award in order to indicate the acreage due to each beneficiary.

But, admittedly, the amended award was filed in court on 27<sup>th</sup> September 2005. This was after the claimant had died. But this affects nothing. Rules of civil procedure do not apply to matters before land disputes tribunals. **Order 23** of the **Civil Procedure Rules** that makes provision with regard to the death, etc, of parties to a suit has no operation in this matter. One of the reasons for enactment of the **Land Disputes Tribunals Act** was to remove land disputes falling under that Act from the legalistic requirements of civil procedure. There is absolutely no merit in this ground.

In the circumstances I find no merit in the notice of motion dated 30<sup>th</sup> March 2006. The same is hereby dismissed with costs to the Interested Party. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 9<sup>TH</sup> DAY OF JULY 2010**

**H. P. G. WAWERU**  
**JUDGE**