



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISCELLANEOUS CASE NO. 114 OF 2008**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHAIRMAN LAMURIA LAND DISPUTES TRIBUNAL.....RESPONDENT**

**JAMES NDEGWA NGENYA.....INTERESTED PARTY**

**SAMUEL GICHUKI MWANGI.....EX PARTE APPLICANT**

**JUDGMENT**

This judgment is the result of the Motion dated 23<sup>rd</sup> June 2008 taken out by **Samuel Gichuki Mwangi**, the *Exparte* applicant herein. In the aforesaid Motion the Applicant sought for the following:

1. ***“THAT this honourable court be pleased to issue judicial review orders of Certiorari to have the decision of LAMURIA DIVISION LAND DISPUTES TRIBUNAL CASE NO. 1 OF 2008 made on 1<sup>st</sup> April 2008 and filed in court vide NANYUKI SENIOR PRINCIPAL MAGISTRATE’S COURT LAND CASE NO. 13 OF 2008 removed into this honourable court and quashed.*”**
2. ***THAT costs of this application be awarded t the ex-parte applicant.”***

The Motion is accompanied by a statutory statement of facts and it is verified by the affidavit of the Applicant. The Respondent i.e. The Chairman Land Disputes Tribunal filed a notice of preliminary objection to oppose the Motion. The Interested party, James Ndegwa Ngenye also filed a notice of preliminary objection to oppose the Motion.

When the Motion came up for hearing, learned counsels appearing in this matter recorded a consent order to have the Motion disposed of by written submissions. I have considered the grounds set out on the face of the Motion and the facts deponed in the verifying affidavit plus the preliminary objections. The main issue ground raised and argued by the exparte applicant is that the Land Disputes Tribunal acted in excess of its jurisdiction when it purported to hear and determine a dispute whereas there was a similar dispute pending in the High Court. It is the applicant’s submission that the Interested Party acted in bad faith and in abuse of the Court process when he instituted the case before the Land Disputes Tribunal. The second ground argued is that the tribunal did not give the Applicant a right of hearing. The Interested Party raised an objection which is to the effect that the Applicant had failed to cite the provisions of the Law Reform Act and that he had wrongly cited the provisions of *Sections 3 and 3A* of the Civil Procedure Act. In my humble view, the defects pointed out are not fatal. The moment an Applicant has cited the provisions of *Order LIII* of the Civil Procedure Rules, it is not a must for one to cite the provisions of the Law Reform

Act. My finding is informed by the fact that the provisions of *Order LIII* of the Civil Procedure Rules were promulgated pursuant to the provisions of the Law Reform Act. It is conceded by the applicant that he has cited *Sections 3 and 3A* of the Civil Procedure Act on the face of the Motion. That would have been fatal had the Applicant only cited the aforesaid Sections to be the premise of the Motion. In the Motion before this Court, the Applicant has also cited the provisions of *Order LIII rule 3* of the Civil Procedure rules. In such a case the Court will ignore *Sections 3 and 3A* of the Civil Procedure Act and procedure to only look at the relevant provisions of the law governing the orders sought.

Having disposed of the preliminary issues, let me now consider the merits of the Motion. I have already stated that the Applicant is of the view that the Tribunal acted in excess of its jurisdiction when it heard and determined a dispute which was similar to one pending before this Court. The documents availed to this Court indicates that at the time of filing the complaint before the Lamuria Land disputes Tribunal, **Nyeri H.C.C.C. NO. 69 OF 2007** was pending. Perhaps it is important at this stage to set out the nature of claims made in the suit before this Court and that before the Tribunal. In **H.C.C.C. NO. 69 OF 2008**, the Plaintiff, who is the Exparte Applicant herein, sought for three main orders:

**(i) An order for injunction to restrain James Ndegwa Ngenye, the Interested Party herein, from entering, trespassing and or interfering with the Plaintiff possession of L.R. NO. LAIKIPIA/NGOBIT SUPUKO BLOCK II/652 (WIYUMIRIRIE).**

**(ii) An order of eviction.**

**(iii) General damages for trespass.**

The complaint filed before the Lamuria Land Disputes Tribunal relates to a boundary dispute.

Can it be said that the two suits are similar? In my view the claims and the issues in dispute are intertwined hence one can easily say that the complaint before the Lamuria Land Disputes Tribunal was *res-subjudice*. The question which must be answered is whether or not the Land Disputes Tribunal was made aware of the existence of **NYERI H.C.C.C. NO. 69 OF 2008**? The Applicant was bound to show that the tribunal was made aware of pendency of the suit before this court. I have perused the proceedings attached to the verifying affidavit which shows that the issue was not put to the attention of the Land Disputes Tribunal. Had that been done, then the Tribunal can be accused of having acted in breach of the principle of *res subjudice*. In such a scenario, the Land Disputes Tribunal was required to stay proceedings. In the circumstances of this dispute, I am convinced that the Lamuria Land Disputes Tribunal did not intentionally breach the *res-subjudice* principle.

The second ground argued is that the Land Disputes Tribunal breached the Applicant's right by failing to give the Applicant a right of hearing. It is the Applicant's submission that the Tribunal never heard the parties at all. The Applicant claims he was not granted an opportunity to ask questions or cross-examine the interested Party. I have carefully perused the Tribunal's proceedings and it is clear that both the Applicant and the Interested Party were heard by the Tribunal. It cannot therefore lie in the mouth of the applicant that he was not heard yet the proceedings show he fully participated during the hearing of the complaint. He was even cross-examined by the members of the Tribunal. In the end I find that the Applicant has failed to prove that he is entitled to the orders. Consequently the Motion dated 23<sup>rd</sup> June 2008 lacks merit. The same is ordered dismissed with costs to the respondent and the Interested Party.

***Dated and delivered at Nyeri this 19<sup>th</sup> day of November 2010.***

**J. K. SERGON**

**JUDGE**

Mwaura holding brief Muchiri for Applicant. No appearance Chweya for Interested Party. No appearance for Respondent.

