



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT KISUMU**

**Miscellaneous Application 262 of 2002**

**MARY OTITA ONGACHI ..... APPLICANT**

**VERSUS**

**THE LAND DISPUTES-**

**TRIBUNAL & OTHERS ..... RESPONDENT**

**RULING:**

The Notice of Motion by the Applicant dated 16<sup>th</sup> December 2002 is for the following Orders:-

- (a) That the Honourable Court do issue an order of certiorari to bring before this court for purposes of being quashed and to quash, the proceedings and decision of the Kisumu District Land Disputes Tribunal Case No. 34 of 2002 dated 31<sup>st</sup> October 2002 and Kisumu SPMCC Land Case No. 47 of 2002 dated 25<sup>th</sup> November 2002.
- (b) That the Honourable Court do issue an order of prohibition prohibiting and/or barring the Respondents from using applying, executing and/or in any other manner whatsoever enforcing the decision in Kisumu Land Disputes Tribunal Case No. 34 of 2002 dated 31<sup>st</sup> October 2002 and Kisumu SPMCC Land Case No. 47 of 2002 25<sup>th</sup> November 2002.
- (c) That costs of this application be provided for.

**The grounds of the application are that:**

- (i) The Tribunals decision was made in breach of the Principles of natural justice.
- (ii) The proceedings before the tribunal were conducted in a manner which breached the provisions of the Land Disputes Tribunal Act 1998 hence *ultra – vires*.
- (iii) The Tribunal had no jurisdiction to determine the dispute.

The grounds are further supported by the statement of facts and a verifying affidavit dated 28<sup>th</sup> November 2002. The actual application is dated 29<sup>th</sup> November 2002, although a copy thereof filed on 17<sup>th</sup>

December 2002 is dated 16<sup>th</sup> December 2002. Otherwise, the application is one and the same and seeks similar orders hereinabove mentioned.

In effect the replying affidavit in opposition to the application by the Respondent Martin Onyango Ooko Mwere refers to the application dated 28<sup>th</sup> November 2002 (should be 29<sup>th</sup> November 2002).

At the hearing, the said Martin Onyango Ooko Mwere was referred to as the interested party and was represented by Learned Counsel, Mr. Mwamu.

The rest of the Respondent's did not participate in the proceedings although duly served with the necessary hearing notices.

Mr. K'owinoh, appeared on behalf of the applicant.

In arguing the application the Learned Counsel, Mr. Kowinoh submitted that the proceedings before the tribunal were null and void as the interested party never complied with S. 3, (2) of the land Disputes Tribunal Act since a claim containing summary of the material facts was not filed.

This argument does not have any leg to stand on. In the first place, it is unlikely that the matter would have been presented before the tribunal and a decision be made thereon without a complaint or claim. Secondly, a copy of the tribunal's proceedings indicate that the interested party was the complainant against alleged acts of trespass by the Applicant. The dispute was registered as case No. 34 of 2002. Mr. Kowinoh also submitted that S. 4 of the said land Disputes Tribunal Act was contravened in that the number of the elders was four inclusive of the chairman.

The said provision indicates that a tribunal shall consist of the chairman and two or four elders selected by the District Commissioner from a panel of elders.

The material tribunal consisted of four elders one of whom doubled up as the chairman.

There was no contravention of S.4 of the Act as alleged by the Learned counsel for the Applicant who also argued that the Applicant was never served as provided by the Civil Procedure Act.

On service, the provision governing the same is Rule 11 of the Land Disputes Tribunal [Forms and Procedure] Rules, 1993 which provides that:-

**“The clerk shall prepare a hearing notice and a notice of attendance in the presented form and shall effect service both on the claimant and the objector in the manner provided for by the Rules made order the Civil Procedure Act.”**

The proceedings before the material tribunal were conducted in the absence of the Applicant. In its decision, the tribunal noted as follows:

**“The defendant (Applicant) has failed to appear before this court three times despite being summoned through the area chief Philip Onyina who confirmed that the defendant rejected the summons.”**

The said Philip Onyina deponed an affidavit dated 5<sup>th</sup> May 2003 in support of the fact that he served the summons upon the Applicant.

Under the provisions of Order 5 Rule 6 (1) of the Civil

Procedure Rules:-

**“Where the court has issued a summons to a defendant, it may be delivered for service.**

- (a) **To any person for the time being duly authorized by the court.**
- (b) **To an advocate, or advocate's clerk approved by the court.**
- (c) **To any subordinate court having jurisdiction in the place where the defendant resides or**
- (d) **To a police officer appointed under the Police Act, or to an officer appointed under the Administration Police Act."**

A chief is not covered under the aforementioned provision. Therefore, he was not the authorized officer for the purposes of service of process.

The contention by the Applicant that she was not served is very

The Learned counsel for the interested party was clearly in error for stating that the land Disputes Act does not specify who is to deliver service and that the tribunal may use a Government officer to do so.

Indeed, the tribunal may use a Government Officer but it must be such Government Officer authorized under the Civil Procedure Act and not just any Government Officer. Lack of proper service by an authorized officer would impute that the tribunal arrived at its decision without according the Applicant the opportunity to be heard. She was condemned unheard contrary to the principles of natural justice around one of the application is duly established and proved.

On the jurisdiction of the tribunal the Learned Counsel for the Applicant submitted that the tribunal lacked the necessary jurisdiction to deal with the matter because each of the disputants had distinct parcels of land duly registered and that the dispute was not one of trespass.

The Learned Counsel for the interested party contended that the tribunal had the jurisdiction to deal with the dispute. Basically, the jurisdiction of a land disputes tribunal to deal with a matter is conferred by S. 3(1) of the Land Disputes Tribunals Act No. 18 of 1990 which provides that:-

**"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."**

From the proceedings of the tribunal (see annexure marked "MO 1") it is quite clear that the dispute at hand related to trespass to land which is one of the areas covered by the provision of the land Dispute Tribunal Act mentioned hereinabove.

The contention by the Applicant that the tribunal lacked the necessary jurisdiction is not well founded.

All in all, the Applicant succeeds only in ground one of the grounds in support of the application.

The tribunal failed to adhere to the "Audi Alteram Partem" rule.

The usual remedy for breach of the rules of nature justice is the order of certiorari.

The Learned Counsel for the interested party argued that this court cannot quash a judicial action but an administrative action. However, the functions of an administrative tribunal such as the Land Disputes Tribunal are quasi judicial and may be quashed if the process adopted in arriving at a decision is flawed.

After all, judicial review is concerned with the decision making process and not with the merits of any decision.

The role of the Magistrate's Court is merely to enter Judgment in accordance with the decision of the tribunal to facilitate enforcement in the manner provided under the Civil Procedure Act.

In sum, this application is granted in terms of prayer (a) of the Notice of Motion.

Ordered accordingly,

**J.R. KARANJA**

**JUDGE**

(Read and Signed this 31<sup>st</sup> day of March 2009)

In the presence of Mr. Oluoch for Mwamu and Mr. Kowinoh for Applicant)

JRK/mo