



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Miscellaneous Civil Application 83 of 2006

REPUBLIC.....APPLICANT.

VERSUS

KAPENGURIA L.D.T. COMPR. OF
THOMAS LOKORWA & 2 OTHERS.....1ST RESP.

THE A.G.2ND RESPONDENT.

JOEL KUKWAI KANYONGIINT. PARTY.

PHILISTER KIMAIYOEXPARTE.

RULING.

By a Notice of Motion dated 3rd July, 2006, pursuant to the provisions of order LIII Rules of the Civil Procedure Rules, sections 8 and 9 of the Law Reform Act (Cap 26) Laws of Kenya and section 3 and 3A of the Civil Procedure Act, the applicant seeks orders:-

- (a) **THAT**, this Honourable court be pleased to issue orders of Certiorari to remove into this Honourable Court and quash the proceedings and decision of Kapenguria Land Disputes Tribunal Court adopted as the Judgment of Kitale Law Courts on the 14/3/2006 vide KITALE SPMCC LAND CASE NO. 69/03.
- (b) **THAT**, costs of this application be provided for.

The application is predicated upon the grounds:-

- (i) THAT, the tribunal lacked jurisdiction to determine the dispute involving land registered under Cap 300 Laws of Kenya.
- (ii) THAT, the interested party has no legal capacity/authority from his mother, who is the Registered owner of the property arbitrated upon, to commence the proceedings the subject matter of judicial review herein.
- (iii) THAT, no claim was ever filed and served upon the Ex-parte applicant as stipulated under section 3 (2), (3) and (4) of Land Disputes Act No. 18 of 1990.
- (iv) The award herein is null and void as the same does not disclose what land parcel was being arbitrated upon and as to how many acres each beneficiary was to get.
- (v) THAT, the ex-parte applicant has been condemned unheard contrary to the principles of natural justice.
- (vi) The panels proceedings do not disclose the Land Case number and the year the same was filed. Neither does it disclose the date when the ruling was signed.

The application is further supported by the statement of particulars of Phillister Kimaiyo dated 28th April, 2006 her verifying

affidavit sworn on 3rd July, 2006 and the annexures thereto.

On behalf of the applicant, it was urged that Phillister Kimaiyo is the legal administrator of the estate of her late husband, William Kimaiyo as evidenced by exhibit "PK 1" – annexure in the application for leave to obtain grant.

That her father-in-law was Terer Kanyangi and her mother-in-law Yano Kanyongi respectively.

Terer Kayongi and Yano Kayongi had two issues of the marriage – Joel Kakwai Kayongi – the 2nd respondent – and William Kimaiyo Kayongi – her husband (since deceased)

Upon the demise of Terer Kayongi – father-in-law – the second respondent herein caused the ancestral land to be sub-divided into two portions comprising of 55 hectares and 47 hectares.

The 55 hectares was registered in the name of the second respondent who occupies the same and his family to date. While 49 hectares was registered in the name of Yano Kayongi (grandmother), this portion forms part of **L.R. No. WEST POKOT/SIYOI/397**.

It is parcel No. **L.R. WEST POKOT/SIYOI/399** which was the subject of arbitration as evidenced by exhibit "PK2". That is the very parcel where the applicant's children, co-wife and mother-in-law have been occupying and are currently occupying.

The applicant's husband – William Kimaiyo Kayongi – passed away before Yano Kayongi – his mother – would transfer plot No. L.R. West Pokot/Siyoi/399 to him.

Notwithstanding the fact that the 2nd respondent is not the registered owner of land parcel No. L.R. West Pokot/Siyoi/399 – the subject matter of the arbitration – he commenced proceedings before the Kapenguria Land Disputes Tribunal against her family, - co-wife and mother –in-law. While so doing he lacked the legal capacity to litigate on behalf of the registered owner – Yano Kayongi.

It is the applicant's, case that Tribunal had no jurisdiction to hear and determine an issue relating to land registered under the Registered Land Act (Cap 300) Laws of Kenya.

In furtherance of the illegality, she was not served with summons or hearing notice to attend the tribunal's sittings. She was thus condemned unheard contrary to the principles of natural justice. In this regard she called in aid the proceedings of the Kapenguria Land District Tribunal exhibited as "PK3".

In any event the award as worded is vague. It does not disclose how the subject land was going to be sub-divided among the beneficiaries. The award has thus given the 2nd respondent unfettered powers to divide the land as he chooses.

For those reasons, the applicant contended, the award which was adopted as a judgment of the court in Kitale SPMCC Land case No. 69/03 exhibited as "PK 4" should be questioned as it is made without jurisdiction and is equally vague.

The application was served upon the Attorney General for and on behalf of the Kapenguria Land Dispute Tribunal, and the 2nd respondent as evidenced by the affidavit of Joash Mageto Otachi sworn on 23rd March, 2009.

At the hearing, it transpired that the order for leave was not annexed to the Notice of Motion. The applicant's advocate sought leave of this court to introduce the order of leave through a supplementary affidavit. Mr. Khakula for the respondent opposed the application. I reserved any ruling which I now give.

Order LIII Rule 4 of the procedure Rules provides:-

"4(1) Copies of the statement accompanying

the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule be provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the statement. 4(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with a new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intentions and of any proposed amendment of his statement, and he shall supply on demand copies of each further affidavits."

In my view, the language of order LIII Rule 4 (2) is permissive. It gives the court discretion to allow amendment of the statement and to allow further affidavits to be used if they deal with new matters arising out of affidavits of any other party to the application.

In the present case the court was concerned with the issue of whether leave was actually obtained before the filing of the motion. That is an important issue. For that reason I exercise my discretion and allow the applicant to introduce the order vide which leave was obtained by a supplementary affidavit limited to that issue only.

Dated and delivered at Kitale this 31st day of March, 2009.

N.R.O. OMBIJA.

JUDGE.

Mr. Kaosa for Ex-parte applicant.

N/A for Respondent.