



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL MISC. 157 OF 2009**

**YATTA DIVISION L.D.T .....APPLICANT**

**VERSUS**

**CHIEF MAGISTRATE, MACHAKOS .....RESPONDENT**

**RULING**

1. The application before me is premised on Order LIII Rule 1(2) of the Civil Procedure Rules and in it the Applicant, Mbaika Mbithi seeks leave to institute judicial review proceedings for an order of certiorari to quash the award of Yatta Division Land Disputes Tribunal dated 12.8.2008 and which became a judgment of the Subordinate Court on 28.4.2009 when it was read to parties.

2. It is stated in the Statement of Facts and in the Verifying Affidavit sworn on 14.5.2009 by the said Mbaika Mbithi that the dispute before the Tribunal related to the boundaries between L.R. Machakos/Matuu/59 and 60 and that title number 60 aforesaid was registered in the names of Mbithi Musyoki (deceased). That the Tribunal could not deal with the dispute since it had no powers over the estate of deceased persons.

3. Further, that the claim was time-barred as the cause of action arose more than 14 years before the Tribunal hearing which was a matter to be dealt with under the Law Reform Act. The tribunal therefore acted illegally and exceeded its jurisdiction.

4. I have seen the claim form filed in Land Case No. 18/1999 by one Ruth Mbeke Kioko. The persons sued were "***Mbaika Mbithi and family***" and the issue complained of was "***trespass in land parcel "Yatta Matuu No. 59"***". The orders sought were "***to vacate from the land of which they extended the boundary***".(sic)

5. After hearing the parties, the Tribunal decided as follows;

***1. "Since it is so well shown on the registered map for this area let the Registrar of Land Office (sic) send surveyor on the ground and mark properly where the access road of 20ft pass (sic) between parcel No. Machakos/Matuu/59 and Machakos/Matuu/60 and also between Machakos/Matuu/59 and Machakos/Matuu/61.***

***2. On the issue of succession, this will hold this ruling and still stand (sic) and should therefore not hold execution of this ruling."***

6. To my mind, the Tribunal acted on a proper complaint before it and gave a lawful order within its mandate. The issue was one of trespass and extension of boundaries and neither succession to the estate of Mbithi Musyoki nor the issue of limitation of time could properly arise as the trespass was continuous and the claim was not one barred by section 3 (1) of the Land Disputes Tribunal's Act. Further, there was no issue of succession because no one was claiming any portion of the deceased's estate but the Tribunal, alive to that issue, stated that creation of an access road was not in any way a violation of the Law of Succession.

7. Prima facie therefore and unlike in many other instances, I find no fault on the part of the Tribunal, and prima facie I see nothing to be challenged by way of judicial review proceedings. In any event, the Application as drafted is seeking to challenge a decision passed on 12.8.2008 and in terms of Order LIII Rule 2, the same is outside the 6 months period and was doomed to fail. It does not help to refer to the decision of the subordinate court as the substantive decision being challenged is the one dated 12.8.2008. As for the order of leave to institute orders of prohibition, I have not been shown nor told why leave to institute such orders is sought.

8. What I am saying is that on all fronts, the Application before me is without merit and is dismissed with no order as to costs.

9. Orders accordingly.

Dated at and delivered **Machakos** this **20<sup>th</sup>** day of **May 2009**

**Isaac Lenaola**

**Judge**

In the presence of : Mr. Makau for Applicant

**Isaac Lenaola**

**Judge**