



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL CASE 128 OF 2008**

**MUE MUTHEKE ..... PLAINTIFF**

**VERSUS**

**MULI MUTHEKE ..... DEFENDANT**

**RULING**

1. The Originating Summons dated 25/8/2008 Is premised on Order XXXVI Rule 3F, 6 and 7 of the Civil Procedure Rules and the orders sought are;

i. **“THAT there be a declaratory order that the proceeding and the whole award or decision of Machakos District Land Disputes Tribunal No. 73 of 2007 dated 7<sup>th</sup> December 2007 is illegal, null and void.**

ii. **THAT the Machakos Chief Magistrate’s Court be stayed from acting upon or proceeding with execution or implementation of the award of the Tribunal that was confirmed as the judgment of the said court on 22<sup>nd</sup> April 2008.**

iii. **THAT the Tribunal award or decision that was confirmed as the judgment of the court be set aside.**

iv. **THAT an order of injunction do issue to permanently restrain the respondent, his servants and/or agents from entering, using and/or otherwise interfering with the Applicants use and possession of parcel No. Mitaboni/Ngiini/2415 or part thereof.**

v. **THAT costs and interests.”**

2. The grounds in support are that;

a. **“THAT the award or decision of the Machakos District Land Disputes Tribunal is illegal.**

b. **THAT the Tribunal exceeded its jurisdiction and acted ultraviresly.**

c. **THAT the Tribunal was in breach of rules of natural justice and fair play.**

d. THAT the two terraces awarded to the Respondent out of the Applicant's Mitaboni/Ngiini/2415 rightfully belongs to the Applicant.

e. THAT the Tribunal failed to verify the proceedings of the Land Adjudication Committee to establish whether or not the Applicant misled Land Adjudication Officers to draw the map thereby cutting two terraces in dispute as found.

f. THAT to allow execution of the Tribunal award that was confirmed as the judgment of the court would be furthering an illegality.

g. THAT the use of the two terraces was not an issue before the tribunal for determination.

h. THAT in reaching its decision the tribunal acted against the law."

3. I have read the Supporting Affidavit of Mue Mutheke sworn on 25/8/2008 and his case is as follows:-

That the Plaintiff and the Defendant were parties to Machakos District Land Disputes Tribunal Case No. 73/2007 and the issue before the Tribunal was what interest each of them, who are also brothers, had to parts of title No. Mitaboni/Ngiini/2414. The Tribunal decided that Muli Mutheke was entitled to two terraces in dispute "**within the suit land**". The decision was made on 7/12/2007 and instead of appealing to the Provincial Land Appeals Committee under Section 8 of the Land Disputes Act No. 18 of 1990, the Plaintiff instituted the present claim on the grounds set out above. Although the summons is unopposed, I will dismiss it for the following reasons;

4. Firstly, Order XXXVI Rule 1 of the Civil Procedure Rules provides as follows:-

**"1. The executors or administrators of the deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as *cestui que trust* under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and the circumstances of the case may require, that is to say, the determination, without the administration of the estate of trust, of any of the following questions;-**

**(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or *cestui que trust*;**

**(b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;**

**(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, or such accounts;**

**(d) they payment into court of any money in the hands of the executors, administrators or trustees;**

**(e) the approval of a sale, purchase, compromise or other transaction;**

**(f) the determination of any question arising directly out of the administration of the estate or trust.**

5. From what I have stated above the complaint in the summons goes to the manner in which the Tribunal conducted the proceedings between the parties and cannot be the basis for proceedings as above state. In fact the sideline to Order XXXVI Rule 1 is "**who may take out originating summons and in respect of what matters.**" The Plaintiff and the matter before court have no locus standi to approach the matter in the way he has done.

6. Secondly, the Land Disputes Tribunals Act has an elaborate procedure from the Tribunal to the Appeals Committee and thence to this court on a final Appeal on matters of law only. The procedure is well laid out in Section 8 and Section 9 of the Act. To circumvent that process and procedure other than by way of judicial review proceedings is wrong and unlawful.

7. Thirdly, the Tribunal's decision unless challenged by proper and lawful channels cannot be delved into by this court, least of all by a strange and novel procedure.

8. Lastly, I see no merit in the summons and I find it misguided, incompetent and wholly frivolous and is dismissed without any order as to costs since it is undefended.

9. Orders accordingly.

Dated and delivered at Machakos this **19<sup>th</sup>** day of **May** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau h/b Mr Mutinda for Applicant**

ISAAC LENAOLA

JUDGE