



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**MISCELLANEOUS 117 OF 2008**  
**IN THE MATTER OF AN APPLICATION BY HENRY MUTISIA NGELI FOR**  
**LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND PROHIBITION**  
**HENRY MUTISYA NGELI .....EX-PATE APPLICANT**

**VERSUS**

- 1. KANGUNDO LAND DISPUTES TRIBUNAL**
- 2. CHIEF MAGISTRATE MACHAKOS LAW COURT.....RESPONDENTS**

**AND**

- 1. KIVAYA NGELI**
- 2. NDUNGE WAMBUA..... INTERESTED PARTIES AND**

**RULING**

1. Before me is a Notice of Motion dated 5.6.2008 premised on Order LIII Rule 3 of the Civil Procedure Rules. The ex-parte Applicant seeks the following.

***"i. That an order of certiorari do issue to remove into this court for purposes of quashing the award of the Kangundo Land Disputes Tribunal Case No. 78 of 2007 dated 25.3.2008 and forwarded to Machakos Law Courts and registered as Machakos Chief Magistrate's Miscellaneous Application number 56 of 2008.***

***ii. That an order of prohibition do issue directed at the Respondents and interested parties prohibiting them from conducting any further proceedings in respect of Machakos Miscellaneous Application Number 56 of 2008 or interfering with the applicants rights, control and/or peaceful enjoyment of the suit premises pending the hearing and determination of the intended substantive application.***

***iii. That the leave herein do operate as a stay against the implementation and/or enforcement of the said award of Kangundo Land Disputes Tribunal in Tribunal Case Number 78 of 2007 and forwarded to Machakos Law Courts and registered as Machakos Chief Magistrate's Miscellaneous Application Number 56 of 2008 pending the hearing and determination of this application or further orders from this Honourable Court.***

**iv. That the costs of this application be borne by the interested parties.**

2. It is clear from the outset that prayers 2 and 3 are misguided as when I granted leave to institute judicial review proceedings I granted prayer 3 and the same orders were to subsist until this Ruling. Prayer 3 is therefore struck off as is prayer 2 for reasons that it is not framed to operate after this Ruling but worded as if to operate prior to this Ruling.

3. Turning to the more serious issue of certiorari, I note that the award being challenged is that dated 25.3.2008 by the Respondent Tribunal. For avoidance of doubt the Tribunal in its **“judgment”** of even date, gave a clear summary of the dispute before it and then concluded with the following orders;

**“a. The Registrar of lands to cancel Title Kangundo/Kikambuani/1467 in the name of Henry Mutisya Ngeli.**

**b. Once that is done the Registrar to issue another new fresh title for 1050 and 1467 as one shamba as originally was.(sic)**

**c. Any party that is not satisfied with this Ruling has the right to appeal within (30) thirty days from the date this judgment is read by the Magistrate of the High Court at Machakos and date stamped.”(sic)**

4. The ex-parte Applicant in the statement of facts dated 4.6.2008 states as follows:-

**“i. That the tribunal lacked the jurisdiction to entertain the claim as the same fell outside the Provision of Section 3 (1) of the Land Disputes Tribunal Act.**

**ii. That the Tribunal acted ultra vires by entertaining a claim over registered land when it had no jurisdiction to do so.**

**iii. That the Tribunal had no jurisdiction to entertain the claim before it as it was based on land ownership.**

**iv. That the Tribunal ordered for cancellation of title to land parcel Number Kangundo/Kikambuani/1467 when it lacked jurisdiction to do so.**

**v. That the Tribunal breached the rules of natural justice as it never gave the Applicant a chance to be heard and cross-examine the witness.**

**vi. That the Tribunal purported to determine the paternity of the applicant when it had no jurisdiction to do so.**

**vii. That the statement of claim filed by the applicant pertained to two parcels- Kangundo/Kikambuani/1467 and Kandundo/Kiakambuani/1050.”**

5. In his Replying Affidavit sworn on 21.10.2008, the Interested Party deponed that the ex-parte Applicant obtained the disputed land by false pretences and secretly and that only the true sons of one Ngeli viz Kivaya Ngeli and Wambuya Ngeli, husband of Ndunge Wambua were entitled to the land. That the ex-parte Applicant in any event refused to defend the claim lodged before the Tribunal and cannot now claim that he was denied the right to be heard. Further, that the exparte Applicant’s mother lives in Mitaboni, has never claimed to be married to the late Ngeli and therefore the ex-parte Applicant cannot inherit Ngeli’s ancestral land as he has no blood relationship with him whatsoever.

6. For my part, it is clear that the Respondents may well have a good case against the ex-parte Applicant and the Tribunal may well have reached a good decision on the merits of the case. I say so guardedly and without in any way determining the issues of the ex-parte Applicant’s paternity or the claim he may or may not have to the disputed parcels of land. However, the merits of the case is a matter wholly irrelevant in the present circumstances because what is principally in issue is whether the Respondent

Tribunal had the mandate to determine the dispute before it. Section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990 provides as follows:-

*“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*

*b. trespass to land*

*shall be heard and determined by at tribunal established under section 4.”*

7. The Tribunal in this case had the following issues to determine;

i. Whether the ex-parte Applicant was a son of one Ngeli (deceased). It determined that he was not because his mother was not married to Ngeli.

ii. Whether the ex-parte Applicant was entitled to any land belonging to Ngeli and it determined that he was not entitled to it although the land viz Kangundo/Kikambuani/1467 is actually registered in the ex-parte Applicant’s name and title issued on 26.10.2006.

8. The tribunal then made the orders directing the Registrar of Lands to cancel the above title and issue a fresh title consolidating two separate titles. It will not take any genius to see that vis-à-vis the mandate conferred by statute, the Tribunal exceeded its mandate and entered into matters that only a court of law can properly delve into. That being the case, once there was no jurisdiction, all the proceedings, whatever the merit of the decision were rendered a nullity ab-initio and the remedy of certiorari can issue.

9. In the event, I will grant prayer 1 of the Notice of Motion dated 5.6.2008 and strike out prayers 2 and 3 thereof.

10. Let each party bear its own costs because the error was made by the Tribunal which has failed to defend the proceedings before me.

11. Orders accordingly.

Dated at **Machakos** this **16th** day of **June 2009**.

**Isaac Lenaola**

**Judge**

In the presence of: Applicant present

Respondent present

**Isaac Lenaola**

**Judge**