



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Miscellaneous 58 of 2006

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI

AND

**IN THE MATTER OF PROCEEDINGS AND AWARD IN LAND DISPUTES TRIBUNAL KITUI
DISTRICT, MUTOMO DIVISION LAND TRIBUNAL**

AND

**IN THE MATTER OF THE RESIDENT MAGISTRATE'S COURT AT KITUI LAND CASE
NUMBER 14 OF 2005**

REPUBLIC

VERSUS

CHAIRMAN, LAND DISPUTES TRIBUNAL, KITUI DISTRICT

DISTRICT LAND DISPUTES TRIBUNAL, MUTOMO DIVISIONRESPONDENTS

**MUNGOOTI NYAMAIINTERESTED
PARTY**

**NDUNGI KIMANZI..... EX-
PARTE**

RULING

1. The Notice of Motion before me is dated 13.6.2006 and is premised on the provisions of Order LIII Rule 3 of the Civil Procedure Rules. Save for costs the substantive prayer is framed as follows:-

“1. That an order of certiorari do issue removing to

the High Court of Kenya at Machakos, the proceedings and award of the Land Dispute Tribunal, Kitui District Land Tribunal, Mutomo Division in the tribunal case number 13 of 2005 filed in the Senior Resident Magistrate's Court at Kitui as Land Case Number 14 of 2005 between Mungooti Nyamai versus Ndungi Kimanzi as well as the order of the Resident Magistrate made on the 9.3.2006 adopting the award of the Tribunal as the judgment of the court, for the purposes of having the said proceedings, award and order quashed.

2. *That costs of this application be awarded to the Applicant.”*

2. The grounds on which the motion is brought are that:

“i. *The proceedings before tribunal concerned*

ownership of land which is not within the Land Dispute Tribunal’s jurisdiction.

ii. *The tribunal that heard the dispute does not exist in law.”*

3. In his Verifying Affidavit sworn on 25.4.2006, the ex-parte Applicant depones that one A.K. Kilelo writing on behalf of the District Officer, Mutomo Division wrote a letter purporting to appoint members of the Mutomo Land Disputes Tribunal while in fact he had no such powers and further that the Tribunal did not exist within the meaning of the Land Disputes Tribunals Act.

4. In support of the ex-parte Applicant’s case, Mr. Musyoki, advocate referred me to two decisions on the above point viz;

a) Mwania Kilunda vs Musomi Musua H.C. Misc. Appl. No. 133/98

b) Richard Kiema vs Chairman, Land Disputes Tribunal, Mathima Location H.C. Misc. Appl. No. 154/2003.

5. The Tribunal filed no response to the Application but Mungooti Nyamai, the Interested Party, in a Replying Affidavit sworn on 17.7.2006 deponed that the ex-parte Applicant should have preferred an Appeal to the Provincial Appeals Committee and not instituted the present proceedings. That the Tribunal had jurisdiction over the dispute between the parties and the Motion should be dismissed with costs.

6. The matter before me portends no difficulty; Firstly, it is not denied that the Respondent Land Disputes Tribunal was appointed by Letter dated 14.10.2005 by the District Commissioner, Kitui District. The letter dated 19.10.2005 from A.K. Kilelo aforesaid merely confirmed that fact. The law however is clear as to the manner of appointment of Tribunals. Section 4(1) and (2) of the Land District Tribunals Act Provides as follows:-

“(1) *There shall be established a tribunal, to be called*

the Land Disputes, for every registration district

(2) *Each Tribunal shall consists of –*

a) *a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and*

b) *Either two or four elders selected by the District commissioner from a panel of elders appointed under section 5.*

7. Section 5(1)and (2) provides as follows:-

“(1) *the minister shall, by notice published in the*

Gazette; appoint a panel of elders for each registration district.

(2) *if an elder on the panel becomes, in the opinion of*

the Minister, unfit to be selected to serve as a member of the Tribunal or incapable of performing any duties a such, the Minister shall forthwith declare his office to be vacant and shall notify the fact in such manner as he thinks fit, and thereupon the office shall become vacant.”

8. Whereas the District Commissioner can appoint the Chairman and elders, the Tribunal must relate to **“every registration District”** and to my mind such a unit must be one created by the President in accordance with the Districts and Provinces Act No. 5 of 1992. Mutomo District does not exist nor can a Tribunal in that name exist. However, in appointing the Tribunal in the instance case, the District Commissioner did so in his capacity as District Commissioner for Kitui District, which exists, and there is no evidence before me that the elders were not properly appointed under section 5(1) of the Act. In fact the proceedings of the Tribunal are clearly headed **“Kitui District Land Tribunal”** and the submissions about Mutomo Land Tribunal are misplaced. The two decisions cited above are therefore distinguishable. [Mwania (supra) and Richard Kiema (supra)].

9. Secondly, and more crucially, the Tribunal in its proceedings and award delved into the issue whether the disputed land belonged to the ex-parte Applicant or the Interested Party. In its award, the Tribunal decided as follows:-

“After careful consideration and weighing the evidence of the parties this court accepts their testimonies and those of the Plaintiffs witnesses.

This court is satisfied that the land in dispute belongs to Wangooi Nyamai and not Ndungi Kimanzi.

This court has given Ndungi Kimanzi (30) thirty days to appeal if he is not satisfied with this Ruling.”

10. It is clear to me that the issue before the Tribunal was not one that it had jurisdiction to determine. Section 3(1) of the Act limits the jurisdiction of the Tribunal in the following terms.-

“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.”

11. Ownership of land, it has been repeated by our courts, is a matter for courts and not Tribunals as presently constituted. To that extent therefore the tribunal’s decision is against the law for lack of jurisdiction and is amenable to judicial review orders.

12. Lastly, it matters not that the ex-parte Applicant had a right of appeal to the Provincial Appeals Committee. Once the Tribunal had no jurisdiction, all other matters were rendered irrelevant as the proceedings were rendered a nullity ab initio.

13. In the end the orders of certiorari are granted as prayed.

14. Costs will be borne by each party as the Tribunal is to blame for the predicament facing both of them.

15. Orders accordingly.

Dated and delivered at **Machakos** this **9th** day of **June 2009**.

Isaac Lenaola

Judge

In the presence of; No appearance for Applicants.

Isaac Lenaola

Judge