



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Misc Civil Appli 5 of 2008

IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY KASIWA NGOWA
MWAKALE AND KAHINDI KAINGU JANGAA FOR LEAVE TO APPLY FOR ORDERS OF
MANDAMUS CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: THE LAND DISPUTE TRIBUNAL PROCEEDINGS

BETWEEN

**DHAHABU NGOWA MWAKALE, KARISA KENGA KAZUNGU, KAHINDI KENGA
KAZUNGU, CHENGO KENGA KAZUNGU, SAFARI KENGA KAZUNGU, SAID KASIWA
NGOWA AND KAHINDI KAINGU JANGAA, THE MAGARINI DIVISION LAND DISPUTES
TRIBUNAL GONGONI IN RESPECT OF PLOT NO.
MALINDI/KAKUYUNI/MANDUNGUNI/265**

AND

IN THE MATTER OF: THE SENOR PRINCIPAL MAGISTRATE'S COURT AT MALINDI

LAND CASE NO. 16 OF 2007

RULING

By an application by way of chamber summons dated 22nd February 2008 pursuant to the provisions of Order LIII Rules 1(1) and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the applicant seeks orders:

1. That the applicants **KASIWA NGOWA MWAKALE** and **KAHINDI KAINGU JANGAA** be granted leave to apply for orders of mandamus and prohibition to stop the Malindi Senior Principal Magistrates from proceeding with hearing of the Land Dispute Tribunal Case Nos. 16 of 2007 and 3 of 2008 and the grant of leave do operate as a stay of execution of the Senior Principal Magistrate Order dated 17th January, 2007 (error, instead of 17th January 2008) until determination of the application or until the honourable Judge orders otherwise.

2. That the applicants be granted leave to apply for an order of certiorari for the purposes of quashing the judgment of the Magarini Division Land Disputes Tribunal dated 23rd day of August, 2007 and the subsequent orders issued by the Malindi Senior Principal Magistrate's Court dated 17th January, 2007 (error, instead of 17th January, 2008).
3. That costs of this application be costs in the cause.

The application is based on the grounds that:

1. The land in question is parcel No. MALINDI/KAKUYUNI/MADUNGUNI/265 and is situated within Malindi Municipality and is NOT within the description of land as envisaged by Section 2 of the Land Disputes Tribunal Act (No. 18 of 1990) as read with Section 2 of the Land Control Act (Cap 302).
2. By the reason of the foregoing, the Magarini Land Disputes Tribunal had no jurisdiction to hear or adjudicate on such a dispute.
3. The land in question being land registered under the Registered Land Act (Cap 300) Laws of Kenya is governed by the Transfer of Property Act as the substantive law and not by Customary Law as provided for by Section 3(7) of the Land Disputes Tribunal Act and hence the Magarini Division Land Disputes Tribunal is incompetent to adjudicate over the same.
4. The respondents herein had and have no legal right of ownership of the land in dispute as they are not the registered proprietors of the parcel No. MALINDI/KAKUYUNI/MADUNGUNI/265 and neither do they have any letters of Administration of the Estate of the late KENGA KAZUNGU who they alleged to have been their father and husband to the 1st respondent and neither have they obtained probate letters for purposes of suing only.

The application is supported by the statutory statement and affidavit of Kasiwa Ngowa Mwakale and Kalundu Kaingu Jongaa dated 21st February 2008 and sworn on 21st February 2008, respectively.

It was urged on behalf of the applicant that the matter is urgent by reason of fact that a decree may soon issue now that judgment in Malindi Land Disputes Tribunal Case No. 16/2007 has been finalized.

I have carefully analyzed the application. In passing, I find that the application may be more complex than the applicant perceives. Accordingly, I order that this matter be fixed for *interpartes* hearing on a day to be fixed by the applicant after service of the application on the respondents.

A copy of this order to be served on the respondent.

Dated and delivered at Malindi this 26th day of February 2008.

N. R. O. Ombija

JUDGE