



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Misc. Appli. 318 of 2007**

REPUBLIC APPLICANT

AGAINST

MAKUENI DISTRICT LAND DISPUTE TRIBUNAL..... 1ST RESPONDENT

MAKUENI SENIOR RESIDENT MAGISTRATE'S COURT 2ND RESPONDENT

ONESMUS N MBINDYE 3RD RESPONDENT/INTERESTED PARTY

**EXPARTE {ISAAC
KYENGO**

{RODAH KYENGO

{PATRICK MUTHENYA KYENGO

AND

**IN THE MATTER OF CASE NO. 8 OF 2007 OF MAKUENI DISTRICT LAND DISPUTES
TRIBUNAL**

AND

**IN THE MATTER OF LDTC NO. 27 OF 2007 OF MAKUENI SENIOR RESIDENT
MAGISTRATE'S COURT AT MAKUENI**

RULING

1. The Notice of Motion dated 21/8/2007 is brought under Order LIII Rule 3 of the Civil Procedure Rules and the specific prayers sought are:-

a. "THAT an order of prohibition directed at the 2nd respondent do issue prohibiting it from enforcing/executing its judgment, decree or order entered in LDTC No. 27 of 2007 arising from the 1st respondents proceedings and award in claim No. 8 of 2007.

b. THAT an order of certiorari do issue to bring into this court for purposes of quashing the proceedings and decisions of the 1st and 2nd respondents dated 16/5/2007 and any other subsequent proceedings of said respondents subsequent thereto.

c.

d. Costs of these proceedings.”

2. In the Verifying Affidavit and the Statement of Facts as well as submissions by the advocate for the ex-parte Applicants, his case is as follows:-

That the proceedings relate to land known as Nzau/Kithumba/392 registered in the names of Kyengo Mbivya, a brother to the Interested Party. The said Kyengo died on 24/4/2004 and sometime in 2007, the Interested Party instituted a claim seeking that the Land Disputes Tribunal sitting at Makueni should award him the suit land because he had purchased it from the deceased at an agreed purchase price of Kshs.8,560/=. That he took possession but did not have it transferred but later when he tried to, the deceased’s family refused to do so hence his claim before the Tribunal. After hearing both the ex-parte Applicants and the Interested Party, the Tribunal found, and concluded as follows:-

“FINDINGS

1. The panel has established beyond reasonable doubts that the late Thomas Kyengo Mbivya had sold his parcel NZAUI/KITHUMBA/392 to Mr ONESMUS MUTUKU MBINDYE.

2. That Mr. Onesmus Mutuku Mbindye continued to work on the shamba as his property from 1981 to date.

3. That Thomas Kyengo’s family never complained neither did they work on the same parcel until after he died (Kyengo).

ii. That the late Kyengo’s family agrees that Mr Onesmus Mutuku Mbindye bought the whole parcel from their father while he was alive back 1981.

iii. That late Mr Thomas Kyengo Mbivya received the total Kshs.8,320/= (Eight Thousand three hundred and twenty only) leaving a balance of Kshs.240/= (Two hundred and forty only) which according to the claimant was meant to be used during the transfer of the parcel from Kyengo Mbivya to Onesmus Mutuku Mbindye.

AWARD.

1. Claimant to be compensated by the objector for all costs incurred.

2. The Claimant to pay the balance of Kshs.240/= (Two hundred and forty only) to the administrator to the estate of the late Thomas Kyengo Mbivya.

CONCLUSION.

1. The Administrator of Estate of the late Kyengo Mbivya should transfer Parcel NZAUI/KITHUMBA/392 to MR. ONESMUS MUTUKU MBINDYE immediately.

2. Mr Onesmus Mutuku Mbindye to take any necessary action against trespassers on his land.”

3. It is now the ex-parte Applicant’s argument that:-

i. “The Tribunal’s proceedings are a nullity in law, because the tribunal lacks jurisdiction and has acted *ultra-vires*.

ii. The claimant in the proceedings before 1st respondent *lacked locus standi* for want of letter of administration.

iii. The tribunal entertained a claim filed out of time after the closure of time allowed for transfer process to be effected within Land Control Act Cap 302 of Laws of Kenya and also the claim was time barred as it was brought more than 12 years after the alleged sale was done.

iv. The tribunal acting in breach of express provision of the law regarding the estate of a deceased person (intestate).

v. The 2nd respondent lacked authority to adopt the 1st respondents award as its judgment due to its nullities.”

4. The Interested Party’s case on the other hand can be summarized as follows:-

i. “THAT the ex-parte applicants don’t have capacity to file the application claiming as beneficiaries of the late THOMAS MBIVYA while they are not the administrators.

ii. THAT the Estate of the late THOMAS MBIVYA does not have any administrator.

iii. THAT in the Makueni District Land Tribunal the ex-parte Applicants were sued as individuals and they never raised the issue of the land being part of the estate because they knew it had been sold to the 3rd Respondent.

iv. THAT the 3rd Respondent has been in possession of the land since 1981 without any interruption.

v. THAT the verifying affidavit does not verify the entire facts in the Statement as it is only limited up to ground number 9 of the Statement of facts and as such the Statement of Facts is not verified as required in law.

vi. THAT through out the trial in the tribunal the ex-parte applicants have never denied the fact that the land had been sold to the 3rd Respondent.

vii. THAT the 1st x-parte applicant in his statement in the tribunal stated that the ex-parte applicants wanted the 3rd Respondent to add more money for them to transfer the property to the 3rd Respondent.

viii. THAT it is not in dispute that the 3rd Respondent has been in possession since 1981 and that he has fully developed the property.”

5. For my part, the only issue to address is that of the jurisdiction of the Tribunal. As I understand it, if the Tribunal had no jurisdiction to entertain the claim before it, then all the proceedings before it and before the Senior Resident Magistrate’s Court were rendered a nullity and the orders sought would have to be granted. Land Disputes Tribunals generally draw their mandate from section 3 (1) of the Land Disputes Tribunals Act No. 18 of 1990 which provides as follows:-

“3 (1) 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.”

6. It is quite clear from a casual reading of the findings, award and conclusion of the Respondent Tribunal that the issues before it were:

a. whether in fact there was a proper person(s) called the administrator of the estate of the late Kyengo Mbivya; it was the Interested Party that took the ex-parte Applicants to the Tribunal and yet it is clear that they did not hold the title to the suit land and they had no lawful authority to represent the deceased proprietor of the land. Granted, they were his relatives and so was the Interested Party, but once land is registered in the name of a person, then all relevant written laws including the Law of Succession Act, Cap 160 would have to be strictly followed in any dealing or dispute involving that land. In this case, the claim was against the wrong persons and was misguided ab initio.

b. whether the balance of the purchase price had been fully paid to the proprietor of the suit land. The Tribunal is not a debt-collecting agency nor seized with jurisdiction to determine issues of purchase price of land. In this case, the Interested Party admitted before the Tribunal that he had been paying for the land in instalments and the Tribunal found that he still owed Kshs.240/=. Although that finding may be right, it matters not, because the Tribunal had no jurisdiction to determine the issue.

c. whether the Tribunal had jurisdiction to order transfer of the suit land; it is patently clear to me that matters involving who is entitled to ownership of land and transfer thereto are well outside the purview of the mandate of the Tribunal and the law on the subject is well settled. Once the Tribunal exceeded its mandate thereto, then the proceeding before it became an instant nullity. There is little more to say because the award of the Tribunal is awaiting enforcement by the 2nd Respondent and from what I have said above, both prayers 1 and 2 of the Motion are merited. As to costs, the Interested Party is clearly the initiator of the nullity and will pay costs of these proceedings to the ex-parte Applicants.

7. Orders accordingly.

Dated and delivered at Machakos this 25th day of November 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr O.N. Makau for Applicant

N/A for Respondent

ISAAC LENAOLA

JUDGE