



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Civil Appli 227 of 2006

IN THE MATTER OF: AN APPLICATION BY PETER WAINAINA

KAMAU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: THE CIVIL PROCEDURE RULES O.LIII RULES 1,2,3 AND 4.

AND

**IN THE MATTER OF: THE LAND DISPUTES TRIBUNAL AT MSAMBWENI LAND DISPUTE
NO. 12 OF**

2005

BETWEEN

PETER WAINAINA KAMAUAPPLICANT

AND

1. LAND DISPUTE TRIBUNAL AT MSAMBWENI1ST RESP.

2. SENIOR RESIDENT MAGISTRATE AT MOMBASA2ND RESP.

RULING

The Msambweni Land Dispute Tribunal, the 1st Respondent herein, heard a dispute over L.R. No. Kwale/Galu Kinondo/46 filed by Hamisi Mwalimu Mwabwagizo and Ramadhani Mohamed Tsolozzi the 1st and 2nd Interested parties herein. The land in dispute is registered in the name of Dr. Peter Wainaina Kamau, the exparte applicant herein. The Tribunal gave its decision on 7th June 2005 in which it ordered for the cancellation of the aforesaid title. The judgment was adopted by the Senior Resident Magistrate’s Court Mombasa, the 2nd Respondent herein, on 27th September 2005. When the exparte applicant came to learn of these developments he filed the motion dated 23rd March 2006 upon obtaining leave with a view of having the Respondent’s decisions quashed. The aforesaid motion is the subject matter of this ruling. The interested parties opposed the motion by filing a notice of Preliminary Objection dated 19th July 2006. There was no response from the Respondent’s part despite having been served with the motion by advertisement.

In the preliminary objection, the interested parties attacked the motion on the ground that the same was

filed outside the statutory period of six (6) months. It is the submission of Mr. Mkan, learned advocate for the interested parties that the motion should have been filed within a period of 6 months from the 7th day of June 2005. In response to this argument, Mr. Khanna, the ex parte applicant's learned advocate was of the view that his client seeks to impinge the adoptive order which was made on 27.9.2005. I have considered the rivaling submissions and I am satisfied that the motion specifically seeks to have the adoptive order of 27th July 2005 quashed. Of course the tribunal's decision of 7th June 2005, became the magistrate's order pursuant to section 7 of the Land disputes Tribunals Act. In my view the adoptive date is the date when the six months begin to run. I say so because there is not evidence to indicate that the Tribunal's decision was communicated to the ex parte applicant on 7th June 2005. And in any case that is when the tribunal's decision became a court order. Consequently, I see no merit in the preliminary objection.

Having disposed of the preliminary point, let me now consider the issues raised in the motion. To begin with, there is no response from the respondents nor the interested parties to contest the arguments put forth in the statement of facts and the verifying affidavit.

The first issue raised is to the effect that the tribunal (1st Resp) acted contrary to the provisions of Section 3(4) of the Land Disputes Tribunals Act, in that no hearing notice was served upon the applicant. Since there is no evidence to controvert that I take it to mean that the applicant was not served with the papers detailing the claim. The applicant has an interest over the property being the registered proprietor, hence he should have been served. The proceedings before the tribunal do not indicate whether or not the applicant was served. This is a matter which the 1st Respondent should have sorted out before attempting to hear the dispute. I agree with the submissions of Mr. Khanna learned advocate for the applicant that the land Disputes Tribunal acted in excess of jurisdiction when it failed to comply with the provisions of Section 3(4) of the Land Disputes Tribunals Act. A registered owner of land which is the subject of a dispute before a tribunal is a person directly affected and hence he ought to have been given a hearing. The rules of natural justice demand that person be informed of the allegations made against him or the reasons why his title should be cancelled or interfered with in any manner. Where a tribunal breaches the rules of natural justice while making its decision, such a decision is amenable to be quashed by an order of certiorari.

The other issue which was argued before this court touches on whether the tribunal had jurisdiction to hear and make the decision it made. The copies of the proceedings before the tribunal which were availed before this court indicate that the tribunal made an order cancelling the title deed held by the applicant with an order reinstating proprietorship to Ramadhan Mohamed Tsolozzi, the 1st interested party herein. A close perusal of Section 3 of the Land Disputes Tribunals Act will reveal that the tribunal has no jurisdiction to cancel title to land. The 1st Respondent therefore acted in excess of jurisdiction. The title relating to L.R. NO. Kwale/Galu Kinondo/46 was unlawfully interfered with. The court of appeal dealt with a near similar scenario in the case of **Asman Maloba Wepukhulu & Another vs= Francis Wakwabubi Biketi (unreported) civil appeal No. 157 of 2001** in which the court of appeal stated as follows:-

“At the close of the rival submissions by the parties, Mr. Omukunda, counsel for the appellants, conceded that the learned judge could not be faulted at all since none of the two bodies was seized of jurisdiction to determine the dispute relating to the suit land. With respect we agree with him. The title relating to the suit land. Bokoli/Kituni/169, was unlawfully interfered with by bodies which lacked jurisdiction and all orders made by them were illegal.

The effect of the decision of the learned judge is that all proceedings and orders made by the Senior Resident Magistrate's court and the Tribunal are a nullity and were correctly quashed and vacated by the learned judge.”

The final order in this matter is that I find the motion well founded. The same is allowed with the result that the tribunal's decision dated 7th June 2005 and the decision of the learned Senior Resident Magistrate delivered on 27th September 2005 are hereby quashed. Costs of the motion is awarded to the

exparte applicant payable by the interested parties.

Dated and delivered at Mombasa this 9th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Ushin Khanna for the applicant and N/A for Obara.

Court

The parties be supplied with certified copies of proceedings and ruling upon payment of necessary fees.

Sergon, J