



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Misc Civ Appli 48A of 2003

REPUBLIC APPLICANT

VERSUS

THE CHAIRMAN LAND DISPUTES TRIBUNAL

UASIN GISHU DIVISION RESPONDENT

AND

JOHN KEAH CHERWON INTERESTED PARTY

EX-PARTE

MONICA MALEL & HEZRON KOSGEI

JUDGEMENT

This is a Notice of Motion made under the provisions of the Law Reform Act, Chapter 26 Laws of Kenya and Order 53, Rules 1 and 2 of the Civil Procedures Rules. The Applicant seeks, inter alia following orders:-

(a) That the Honourable Court do Review and quash the Respondent's decision dated 5.2.2002 and adopted by Eldoret Chief Magistrate's Court on 8.1.2003 in John Keah Cherwon -v- Monica Chelel Malel and Hezron Kosgei.

(b) That the Honourable Court do issue an order of prohibition against the Respondents and the Interested Party from subdividing, transferring and/or in any manner interfering with the Applicant's parcel of land known as TURBO SETTLEMENT SCHEME/258.

(c) That the Honourable Court do recall the proceedings of the Tribunal for the purposes of being quashed.

(d)

(e)

The main grounds in the application and the statutory statements are that:

- The proceedings are irregular.

- The Interested Party did not file case or claim against the Applicant before the Land Disputes Tribunal as per law required under the Act.
- The Rules of Natural justice were not observed.
- The decision was reached in utter disregard of the laid down procedural requirements of the Land Disputes Act.
- The decision was unprocedural and prejudicial to the Applicant's rights.

In his Replying Affidavit the Interested Party replied inter alia that:-

- The Land Dispute Tribunal had jurisdiction to adjudicate over the suit property.
- The Applicant did attend the meeting and gave her evidence as required.

The Respondent did not file any response to the application. At the

outset, I would point out the question of the language used during the proceedings, before the Tribunal was not raised in the statement or in the application herein. As a result, I shall ignore any reference to this question by counsel for the Applicant.

I have considered the application herein, the statement, the Verifying Affidavit and subsequent affidavits. I have also considered the submissions of the Counsel.

I have carefully looked at the proceedings and the record. I did not see a copy of the Verifying Affidavit which must have accompanied the application for leave to file judicial review proceedings. It is trite law that what is contained in the Verifying Affidavit is substantially the evidence to be considered at the hearing of the substantive notice of motion. There is no provision for the Notice of Motion to contain or exhibit any affidavit whatsoever. There is no provision that any evidence be produced through the Notice of Motion.

As a result I do hereby expunge the Affidavit dated 10th March, 2003 and the so-called "Verifying Affidavit" dated 10th March, 2003. There is no provision for a Verifying Affidavit to accompany the Notice of Motion. It follows therefore that this Court did not see the actual Verifying Affidavit which accompanied the Chamber Summons through which leave was obtained.

If the practice has been that the application for leave is made in one file and the substantive application in another, then it is the duty of the Applicant and his Counsel to ensure that during the hearing, a copy of the original Verifying Affidavit is availed or placed before the Court. The evidence of the Applicant is first and foremost contained in the Verifying Affidavit. Without the Verifying Affidavit, the subsequent affidavits are inconsequential.

It is my view that no new ground can be raised in a subsequent affidavit. The allegation that there was no statement of claim served on the Applicant could only be contained in the Verifying Affidavit. This was not produced in evidence at the trial. The Applicant has therefore not been able to prove this allegation.

With regard to the claim that the Applicant was not heard at the Tribunal, the record speaks for itself. The Applicant testified and participated in the proceedings. She also called one witness, her husband. There is no basis therefore that she was not heard and the Rules of Natural Justice were breached.

I am satisfied that from the facts of this case, the Tribunal had the power and jurisdiction to deal with the dispute under the Provisions of Section 3 of the Land Disputes Tribunal Act. This dispute related to a division of land. The land is still unregistered. I have dealt with this point of law as it was raised during the submissions though it had not been pleaded specifically.

In the light of the foregoing, I find no merits in the Application. I do hereby dismiss the Notice of Motion dated 10th March, 2007 with costs to the Interested Party.

DATED AND DELIVERED AT ELDORET ON THIS 12TH MARCH, 2007.

M. K. IBRAHIM

JUDGE