



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

MISC APPLICATION 690 OF 2007

REPUBLIC OF KENYA.....APPLICANT

Versus

1. MACHAKOS LAND DISPUTES TRIBUNAL

2. CHIEF MAGISTRATE'S COURT – MACHAKOS.....RESPONDENTS

AND

1. PETER MBITHI MAILU)

2. MUTISYA KIATU).....INTERESTED PARTIES

3. NDETI KIILU)

AND

1. MWAMANYI NZALU)

2. KITHUKA IKINYA)

3. BONIFACE MAKAU NZOKA).....EX PARTE

APPLICANTS

4. NZAMALU IKINYA)

JUDGMENT

The ex parte Applicants Mwamanyi Nzalu, Kithuka Ikinya, Boniface Makau Nzoka and Nzamalu Ikinya brought this Notice of Motion dated 29th December 2006 seeking Judicial Review orders; an order of certiorari, to quash the proceedings of the Machakos Land Disputes Tribunal in Tribunal Case No. 140/2005 and the award dated 5th July 2006 which was read to the parties on 28th July 2006; an order of certiorari to quash orders of the Machakos Chief Magistrate's Court in CM CC Application 96/06 adopting the decision of the Machakos Land Disputes Tribunal Case No. 140/05, as an order of the Court; in order of prohibition to bar the Chief Magistrate's Court Machakos from issuing a decree in Misc 96/06 and lastly that costs be awarded to the Applicant. The Respondents were named as the Machakos Land Disputes Tribunal and the Chief Magistrate's Court, Machakos. The Interested Parties are Peter

Mbithi Mailu, Mutisya Kialu and Ndeti Kiilu.

The application is supported by the affidavit of Boniface Makau Nzoka who claims to have been authorized to swear it on behalf of the other Applicants though there is no evidence of such authorization. It is also supported by the statutory statement dated 7th December 2006. Mrs Nzei urged the Application on behalf of the Applicant while Mr. Mutisya appeared for the Interested Party.

A replying Affidavit was filed by Peter Mbithi Mailu the 1st Interested Party. He claimed to have been authorized to swear it on behalf of the other Interested Parties though there is no letter of authorization. Though served, the Respondents never appeared.

The ground upon which the Application is brought is that the Land Disputes Tribunal had no jurisdiction to entertain the dispute since it was adjudicating on matters relating to registered land under the Registered Land Act Cap 300 Laws of Kenya. The Applicants claim to be the registered owners of the suit land. They exhibited as 'BMN' a title deed for Muthetheni/Kyethivo/102 which is registered to the names of the 3 Applicants.

The Proceedings of the Land Disputes Tribunal were exhibited as BMM 4 and in its decision, the Tribunal determined that the plot be subdivided equally between the claimants and objectors according to Kamba customary law.

The Application was opposed on three grounds, that the Notice of Motion is a nullity because it has no Affidavit in support thereof; that the Tribunal had jurisdiction to deal with the land since it was agricultural land and that elders knew about the land and their decision should be upheld.

I have now considered the submissions of both Counsel, the statement and Affidavit and his annexures. Under Order 53 Rule 4 (1) Civil Procedure Rules, the Applicant is supposed to serve the Notice of Motion accompanied by copies of the statement, accompanying the Application for leave. There is no provision under Order 53 that the Notice of Motion should be filed accompanied by an affidavit. The Affidavit used in Judicial Review proceedings is that filed with the Chamber Summons. Any further Affidavit can only be filed with the leave of the court and must be in reply to matters raised by the Affidavits filed in reply. The Respondents submission that the motion was unsupported by evidence is misplaced.

Section 3 of the Land Disputes Tribunal Act No. 18 of 1990 sets out the jurisdiction of the tribunal to include, the division of or the determination of boundaries to land including land held in common, a claim to occupy or work land and trespass to land. In the instant case, the proceedings show that the claim before the Tribunal was a claim of a share of the ancestral land. By then the land was registered in the names of the Applicants. That claim did not fall under S.3 of the Land Disputes Tribunal for it ordered subdivision of the land which would entail opening of registers under S.89 of Registered Land Act. That dispute did not fall within the provisions of Section 3 (1) of the Land Disputes Tribunal Act. Under S. 159 of the Registered Land Act such a dispute would only be determined by the High Court or a Resident Magistrate's Court which has pecuniary jurisdiction in such a matter. If the Interested Parties were claiming ancestral land which means it was a succession matter again their claim lies in the High Court or Magistrate's Court which has special jurisdiction to hear such matters.

The Court of Appeal held so in the case of **JOTHAM AMUNAVI V THE CHAIRMAN SABATIA DIVISION LDT CR 256/02**; That means that the Tribunal acted outside its powers and its decision is null and void. An order of certiorari lies has to quash a decision made in excess or without jurisdiction and in my view, the decision of the Machakos Land Disputes Tribunal should be quashed by order of certiorari and it is so ordered.

The Land Disputes Tribunal's decision had been adopted by the Court on 29th November 2006. The decision having been made without or in excess of jurisdiction there was no decision for the court to adopt and consequently the order of the Chief Magistrate's court is similarly quashed by an order of certiorari.

Once an order of certiorari has issued, the proceedings and decisions of the Tribunal and court are quashed. An order of prohibition would therefore not lie as prayed.

In sum I grant prayers 1 & 2 of the Notice of Motion dated 29th December 2006 with costs to the Applicant.

Dated and delivered this 14th day of December 2007.

R.P.V. WENDOH

JUDGE

Read in presence of:-

Mr. Njoroge holding brief for Mr. Mutisya for the Applicant

Daniel: Court Clerk