REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Misc Appli 48 of 2005

REPUBLIC – EXPARTE THRO'

MALIA MUHANDA .....APPLICANTS

V E R S U S

ILEHO LAND DISPUTE TRIBUNAL .....RESPONDENT

A N D

DINAH ASILI .....INTERESTED PARTY

R U L I N G

In the application by Notice of Motion dated 20.7.2005, **the ex-parte Applicant**, Malia Muhanda, wrongly described himself as "Republic Ex-parte through Malia Muhanda". The application is brought in the name of the Republic at the instance of the ex-parte applicant and the correct way of framing it is that explained in **FARMERS BUS versus TRANSPORT LICENCING (159) EA 779.**

The application sought an order of certiorari to quash a decision made by Ileho Land Disputes Tribunal said to be undated but filed in the Chief Magistrate Court at Kakamega on 13/1/05 in Kakamega C.M. Misc. Award No.3 of 2005 affecting Land Title No. Kakamega/Kambiri/916. The grounds for the application included the allegation that the decision was "not signed by some members of the panel contrary to the provisions of the Land Disputes Tribunals Act 1990 **(No.18 of 1990)** and failure of the Tribunal to give reason. An error was also alleged in the proceedings in which the decision was made in that some vital evidence relating to the date and presence or otherwise of surveyors and parties was omitted.

The application shows that the land known as Isukha/Kambiri/816 measuring 1.7 hectares Registered under the Registered Land Act, Cap 300 of the Laws of Kenya was at the material time registered in the name of the Applicant as its proprietor. A dispute arose between the Applicant and the Interested Party relating to the boundary of the said land. The aggrieved party was the applicant. He referred the dispute to the Land Disputes Tribunal set up under Act No.18 of 1990. The Tribunal dismissed the boundary complaint. The applicant did not appeal against the decision.

In his replying affidavit, the Interested Party, Dinah Asili, while conceding that the Ileho Land Disputes Tribunal had jurisdiction to hear and determine the dispute contended, inter alia, that the Applicant failed to appeal to the Appeals Committee and that the application herein is bad in law and an abuse of the court process.

The nature of the dispute before the Ileho Land Disputes Tribunal was one in which the Tribunal had jurisdiction to hear and determine as it related to boundary dispute and therefore was within the purview of the provisions of section 3 of Act 18 of 1990. The Tribunal was constituted by five members in compliance with section 4 (2) of the said Act. Where the quorum is five, it is expected that all the five members of the panel would sign the award and the majority decision would prevail. Where the number of the panel members signing is four it cannot be assumed that the fifth member participated in the decision-making exercise. In such case, this court will assume that the panelists who sat were four instead of five as required by section 4 (2) of the said Act. It might be argued that because the names of all the panel members appear at the beginning of the proceedings before the tribunal, they all participated.

This may be a sound argument where, as here, the proceedings are heard at a single sitting at the end of which the Tribunal endorses its award. The absence of the signature of the fifth member in such case, can only be reasonably construed to mean that the member did not subscribe and was not privy to the decision. This, I hold, is the case here as there was no evidence to show that the 5th member did not sit and deliberate with the others. The point on quorum must therefore fail.

The second ground on which the application was pegged was that the panel did not give reasons and the purported exhibits were not attached to the decision forwarded to court for adoption. What in effect the applicant is saying is that the decision was wrong or not sound. This court is only concerned with the decision making process. It is not concerned whether the decision was wrong or not. A wrong decision should be challenged through an appeal and not through judicial review. This court does not act as an appeal court nor does it usurp the functions and powers of an appellate court while exercising its supervisory powers under section 8 of the Law Reform Act, Cap 26. Rather, it exercises its original supervisory jurisdiction under the said section. The concern of this court in judicial review is whether an individual received fair treatment before the Tribunal (or body or authority) that made the decision and whether such Tribunal, body or authority acted within the law. This court will not be concerned whether the concerned Tribunal, body or authority made a good decision or not providing that the decision was authorized by law and the individual was given a fair hearing. In determining whether the treatment meted out to the applicant was fair, this court will examine to see whether the principles of natural justice were observed, whether there was bias, bad faith, or whether the decision was irrational and therefore unreasonable, or whether irrelevant considerations were taken into account or relevant considerations were omitted thus making the decision making process wanting.

What the ex-parte applicant is saying in this case is that the decision was not sound, that it was wrong. He has assigned reasons why it was wrong. He is not saying that the Tribunal exceeded or acted outside the preview of its statutory powers. He specifically states that the decision contained an error as the date the Tribunal visited the site was not disclosed. He was given a hearing and he has no quarrel with that. His quarrel is with the decision.

I have carefully perused the application and given due consideration to the submissions made by Mr. Munyendo, learned counsel for the Respondent and the Interested Party and Mr. Khalwale, learned counsel for the Applicant. It is my finding that the Ileho Land Disputes Tribunal did not exceed or act outside the purview of its powers under Act 18 of 1990. It is also my finding that the attack on the decision of the said Tribunal by the Applicant hinged on the unsoundness of its decision rather than whether the decision making process was wanting. I hold that the applicant has failed to make out a case for this court to exercise its supervisory jurisdiction by way of judicial review. Accordingly, I find no merit in the application which I dismiss with costs.

Dated, signed and delivered at Kakamega this 2nd day of February 2006.

G. B. M. KARIUKI

J U D G E