



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Misc Appli 290 of 2005

KATIKA MUTISYA.....APPLICANT

VERSUS

SILA MUTISYA.....RESPONDENT

R U L I N G

The main application was filed by the applicant on 2.11.2005 and was dated 31.10.2005. It sought that:-

- a) the execution of court's order dated 7.6.2005 and undated decree in Machakos Chief's Magistrate's Civil Misc. Application No. 81 of 2003 and all consequential orders thereunder be stayed pending the hearing and final determination.
- b) the time within which the applicant would have filed an appeal to the Provincial Appeals Committee, Embu in regard to the District Tribunal's Award dated 8.2.03 in Case No.122 of 2002,Mwala be enlarged or extended . Alternatively
- c) The time within which the applicant would have filed an application for judicial review for orders of certiorari against the District Tribunals Award dated 18.2.2003 in Case No. 122 of 2002,Mwala be enlarged or extended.

In the meantime the respondent on 24.11.2005 filed a Notice of Preliminary Objection on points of law raising the following points:-

- i) That the main Notice of Motion is incompetently filed before this court and that the same is an abuse of process of law.
- ii) That the provisions of law relied on by the applicant cannot warrant this court to invoke its jurisdiction to issue the orders sought above.

The Preliminary points of law were argued on 15.12.05. Mr.Ndolo who argued them for the respondent stated that the applicant sought both the extension of filing an appeal from the District Land Dispute Tribunal to the Provincial Land Disputes Committee under Order 49 rule 5, Order 50 rule 2 of the Civil Procedure Rules ,respectively, and Section 95 of the Civil Procedure Act. And secondly and in the alternative, he sought an extension of time to file an application for leave to file a Notice of Motion seeking the Review Order of Certiorari. Under the same provisions of law mentioned above, if I understand the applicant sufficiently, Mr. Ndolo further argued that this court's jurisdiction is limited to the scope of Order 53 and cannot apply Order 49 or Section 95 of the Act at the same time as the applicant purported to do. Mr.Ndolo also argued that the District Land Tribunal should have been joined

in this application since its decision is the one being challenged. He finally argued that the applicant cannot at once and the same time in the same application seek two mutually exclusive remedies in that he cannot seek extension to appeal both to the Provincial Land Disputes Committee under Land Disputes Act as well as seek to appeal under Order 53 of the Civil Procedure Rules.

In reply Mr. Mutua who had filed the main application for the extension of time tried to justify his approach of seeking extension of time to the two tribunals at the same time and under the same application, but he was delving into the grounds of the main application.

I have carefully examined the Preliminary Points of law raised by Mr.Ndolo. I have come to the conclusion that these cannot be argued and determined without arguing and determining the whole application substantively. It would therefore be more appropriate and indeed proper that the preliminary objection in points of law be argued together with the main application so that determination of the issues can be done once and for all.

To that end, it is so ordered.

Costs of this Preliminary Objection are reserved to the main application.

It so ordered.

Dated and delivered at Machakos this 31st day of March, 2006.

D.A .ONYANCHA

JUDGE