



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

Civ Misc Appli 101 of 2003

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN

PROVINCIAL APPEALS COMMITTEE.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

WAMBUA NDOLO.....INTERESTED PARTY

AND

GEDION MATHENDU WAMBUA.....EX-PARTE

R U L I N G

The Applicant herein seeks an Order of Certiorari to issue against the award or decision of the Land Disputes Appeal Committee read to the parties at Embu on 30th June 2003 and the decree of the court be removed to this court for quashing and setting aside. It is the Notice of Motion application dated 19th January 2004. It is grounded on the statement of fact filed herein and the affidavit sworn by the Applicant **Gedion Mathendu Wambua**. The Applicant's advocate, **Mr. Mungata** submitted that the Tribunal in question erred in law in the manner it handled its **case No. 157 of 2002**. Counsel submitted that the Tribunal lacked jurisdiction over this matter for two reasons. One, that the matter before it involved a deceased person one **NDOLO MUKEKA** and that since there was no legal representative for the said deceased person the tribunal should not have entertained it. Secondly that the award given was not signed for by all elders.

MR. BITA for the Respondents opposed the application on grounds that it was bad in law and also an abuse of the Court process. The Respondent had filed grounds of opposition in which the two grounds were raised. Counsel submitted that the evidence relied upon by the Applicant was contained in the Statement of Fact. That it was trite law that any evidence should be contained in a verifying affidavit. In reply **Mr. Mungata** submitted that the proceedings challenged herein were annexed to the supporting affidavit.

I have perused the statement of facts filed by the Applicant together with the Notice of Motion

application in issue. The statement has paragraph 1 which gives the name and descriptions of the Applicant. Paragraph 2 gives relief sought. Paragraph 3(i) to 3 (vi) gives the facts relied on and finally paragraph 4 gives the grounds upon which relief is sought. In the celebrated decision of the Court of Appeal, **Commissioner General KRA vs. Silvano Onema Owaki CA No. 45 of 2000 (Kisumu)** at page 2 was observed as follows: -

“The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by rule 1(2) of O.LIII of the Civil Procedure Rules to set out the name and description of the Applicant, the relief sought and the ground in which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case.”

The court of appeal continued to observe at page 7 of the same proceedings as follows:-

“We would observe that it is the verifying affidavit not the statement to be verified which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of O.LIII.”

It is quite clear to me that the Applicant, by including the facts relied on in the statement contravened O.LIII r 1(2) of the Civil Procedure Rules. Therefore paragraph 3 of the Statement dated 4th August 2003 ought not to be part of the statement is bad in law and is therefore struck out.

The Applicant did however also file a supporting affidavit in which he annexed two proceedings and a ruling. He annexed GMW1 and GMW2 rulings of Machakos District Tribunal and the Appeals Committee respectively. The Supporting Affidavit contains no substantiation regarding both rulings. Having annexed them to the Affidavit, this court is duty bound to look at the said proceedings and rulings. “GMW1” is **Land Tribunal Case No. 24/2002** held on 22/3/02. The proceedings of the said Tribunal for the said day are contained in this exhibit. The issue before the Tribunal was ownership of land plot No. Mua Hills/Kamuthanga/263. The findings of the Tribunal were that the Plot in question was allocated to Ndolo Mukeka and that since the said Ndolo Mukeka had died before transferring the land to Gedion Mathendu Wambua who had developed part of it, the land should be sub-divided equally between Gedion Mathendu Wambua and William Wambua Ndolo. The Tribunal also challenged a High Court ruling over ownership and in its ruling requested that the Land Registrar should de-register William Wambua Ndolo and sub-divide the land between both parties as the Tribunal had found.

The second exhibit “GMW2” annexes proceedings Appeal No. 157 of 2002 where Gideon Mathendu Wainaina was appealing against the first tribunal’s ruling to the Eastern Province Land Disputes Tribunal. The Respondent was Wambua Ndolo. That is the subject matter of this application. The Provincial Land District Tribunal, according to “GMW2” dismissed the appeal on grounds the High Court’s decision was paramount. The Tribunal went further to observe that the District Land Tribunal lacked jurisdiction to hear and determine the matter as it did in “GMW1”. On the first ground argued in opposition to the Application, I find that in fact there is evidence annexed to the supporting affidavit to the Applicant and that the court can look at it to determine the Application. Before I leave this issue I wish to make an observation. The jurisdiction of a Land Dispute Tribunal is circumscribed by **Section 3 (1)** of the Land Disputes Tribunals Act No. 18 of 1990 which provides: -

“3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to –

- (a) the division of or the determination of boundaries to land including land held in common:***
- (b) a claim to occupy or work land, or***
- (c) trespass to land, Shall be heard and determined by a Tribunal established under Section 4”.***

The District Land Disputes Tribunal clearly lacked jurisdiction to entertain the case before it and therefore its decision was null and void.

The second ground argued by the Respondent was that the Attorney General was improperly sued as no orders were being sought against him. That is not the capacity in which the Attorney General is joined in this application. The Attorney General is in fact the Legal Representative of the Government and is joined to this suit as a Respondent together with the Chairman of the Provincial Appeal Committee who is a Public Servant. The Application is therefore not bad in law on this ground.

The two grounds argued by the Respondent were that the Applicant seeks to quash the decision of the Appeals Tribunal. That in the said decision the Tribunal declined to hear the appeal on grounds that the matter raised in the appeal was *Res Judicata*. Counsel submitted that if that decision was quashed it would mean that the decision of the District Commission would remain standing. Counsel submitted that the judicial review orders were discretionary and that even where grounds for the orders are satisfied, the court should go further and consider the efficacy of the came.

Mr. Mungata in response submitted that the decision of the Appeal Tribunal was challenged because of its order of dismissal of the appeal with costs.

I agree that the applicant in this Notice of Motion is seeking to have brought before this court for purposes of quashing the decision of the Appeals Tribunal in its proceedings No. 157 of 2002 made on the 30th June 2003. I have already set out the decision of the said Appeals or Provincial Tribunal. The effect of the said ruling was to dismiss an appeal to that Tribunal lodged by the Applicant herein for being *Res Judicata*. The Appeals Tribunal made an observation which is pertinent and which did not escape the notice of this court. The tribunal observed that in fact the District Commission, whose decision was being challenged by the Applicant, lacked jurisdiction to entertain the matter in the first place. By quashing the Provincial Tribunals decision as sought, the decision of the District Tribunal will remain standing. The issue I asked myself is why didn't the Applicant seek the more efficacious order to have both decisions removed to this Court for purposes of being quashed? Especially considering that the order intended to be retained is void *abinitio*.

Upon considering that point I read mischief on the part of the Applicant. Even though the Applicant argues that quashing the decisions of the Provincial Tribunal was important so that the Applicant is not made to pay costs, that cannot be the only reason for this whole exercise. There could be other reasons in addition to issue of costs, for example, to enable the Applicant to appeal again against the decision of the District Tribunal. It could also mean that the Applicant wishes to have the Provincial Tribunal's ruling that the matter was *Res Judicata* quashed together with the order to pay costs.

Whatever the reason, the prayer sought ought not to be granted. As **Mr. Bitu** argued, this court has not just a right but a duty to consider the efficacy of granting the orders sought before making its final order. I find that orders sought would serve no purpose at all since the questioning of the Provincial Tribunal's ruling without an accompanying order quashing the District Tribunal's order would serve no purpose at all.

Besides, the Respondent's advocate is right that there is a degree of abuse of the due process of the law. It is the Applicant who went to the District Tribunal and the Provincial Tribunal. He did so after the High Court ruled against him. The Applicant is not acting in good faith. To state that the order for costs by the Provincial Tribunal was offending him is besides the point. In any event, it is trite law that costs should follow the cause. I find no merit whatsoever in this application. It is not brought in good faith. Most important it will serve no purpose at all as I have explained herein above.

This application is therefore dismissed with costs.

Dated and delivered this 22nd day of June 2006

.....

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Applicant

Mr. Bitu for the Applicant

Mr. Mungata for the Respondent (AG)

CC:

LESIIT

JUDGE