



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

Civ Misc Appli 153 of 2005

REPUBLIC.....APPLICANT

AND

THE CHAIRMAN

PROVINCIAL LAND DISPUTES TRIBUNAL..... RESPONDENT

AND

MUTEMI NZIOKA.....INTERESTED PARTY

AND

DAVID MUTISYA MULANDI.....EX-PARTE

R U L I N G

This is a Notice of Motion application dated 15th June 2005 brought under **O.LIII Rule 3** of the **Criminal Procedure Rules**. It seeks an order of prohibition to issue directed to the Respondent, Chairman, Provincial Land Disputes Tribunal from executing its decision or order or directive in its cases **No. 20/2003, 203/2003** and **207/2003** in relation to Land Parcel No. 232, 1789 and 1790.

It also seeks an order of Certiorari to issue directed at the Respondent to remove into this Tribunal read to the parties on 26th January 2005 for being a nullity.

The application was opposed by the interested party vide his replying affidavit dated 2nd December 2005 and the submission by his counsel Mr. Mulwa. Mr. Mulwa submitted that the appellant was fatally defective as it failed to adhere to the provisions of **O.LIII r.1.3**) of the Civil Procedure Rules which provides thus:

“O.LIII r. I (3) The applicant shall give notice of the application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the Statement and affidavits:

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown.”

Mr. Mulwa submitted that leave to file the notice of motion was irregularly obtained as it was brought

without the mandatory notice to the Registrar which was not served as required.

Mr. Mungata for the Applicant submitted that the Notice to the Registrar was lodged and was properly taken out. Counsel submitted that it was dated 23rd May 2005 and that it was filed in court on the same day.

The Notice to the Registrar is on record. It is dated 23rd May 2005 and filed on the same day. It gives notice to the Registrar that an Application for leave to apply for Judicial Review would be made on the day succeeding 23rd May 2005. The Chamber Summons application referred to in the Notice to the Registrar was also dated 23rd May 2005 and filed on the same day. That means that both the Notice to the Registrar and the Chamber Summons application seeking leave to file judicial review application were dated the same day and filed in court on the same day.

The Notice to Registrar was not served on the Registrar as there is no proof of service. This contravenes O.LIII r.1 (3) of Civil Procedure Rules. There is no proof that the registrar is aware of the application. Since the Republic is the applicant, it ought to be notified. Alternatively the Applicant could have moved the court for waiver as provided in the proviso under O.LIII r.1 (3) of Civil Procedure Rules. No such application for waiver of service to the registrar at the first instance or at all was made as required.

In view of the failure to notify the registrar one day before the filing of the application and in view of the failure in the alternative to seek waiver to the service of the Notice on the Registrar as provided under O.LIII the omission is fatal to the application and the same ought to be struck out with costs. I would strike out the application on these grounds. In case I am wrong in so doing, I will consider the application itself.

After leave to file the Application for judicial review was granted by the court on 26th May 2005 the exparte applicant lodged his application by way of Notice of Motion dated 15th June 2005 and filed on the same day. It was accompanied by a statement, a supporting affidavit and a verifying affidavit all dated and filed on the same day. There is no evidence of service of the Notice of Motion application on the Respondents and the interested party herein. However the interested party filed a Notice of Appointment of Advocates in which he appointed the firm of Mulwa and Mulwa Advocates to represent him. The notice was filed on 4th July 2005. The Attorney General through Wanjiku Mbiyu Senior Principal Litigation Counsel filed a notice of appointment to act for all the Respondents on 11th July 2005.

I see from the notice that despite notice by the Attorney General that they were appearing for the Respondents this matter has gone on in court in their absence. The only reason for that, as the record clearly shows, is that despite filing notice of appointment the Attorney General was never served with the Notice of Motion application and subsequently was also not served with the hearing notices for the inter-party hearing of this and other subsequent applications in this file. That is highly irregular as it is quite clear that the Applicant has not complied with mandatory provisions of O.LIII r. 3(2) of the Criminal Procedure Code. The affidavit of service required to be filed under O.LIII r. 3(3), indicating the names and addresses of persons served with the notice of motion has also not been filed. It is therefore right to rule that neither the Notice of Motion Application nor the other two applications on record herein were served on the Respondents at any stage of the proceedings. This is highly irregular. When considered against the finding that the Notice to the registrar required under O.LIII r. 1(3) to be served on the registrar was never served, then the irregularity is compounded further and the more reason why the application should be struck out for having been lodged defectively. For this second reason, I find that the application should not be entertained at all and should be struck out with costs.

In case I am wrong to strike out the application on these two grounds I proceed further to consider an issue that was raised by the Interested Party's advocate and which is also a glaring defect on the record of these proceedings. When the application for leave to file a judicial review application was argued before Hon. Justice Wendoh on 26th May 2005, the Hon. Judge declined to order the leave granted to operate as stay on grounds that the statement of facts filed with the Chamber summons was defective. The

Applicant filed another Chamber Summons application on 29th June 2005 but on 30th June 2005 successfully applied for its withdrawal.

On 9th November 2005, the Applicant herein filed an application for injunction under O.XXXIX r.2 and r. 3(1) of Civil Procedure Code. That application was heard and granted ex-parte on 11th November 2005 by Hon. J. Onyancha. The interested party subsequently filed a Notice of Motion application dated 3rd March 2006 seeking the setting aside of this court's order of 11th November 2005 in which an injunction was issued in favour for the Applicant. The Interested Party sought to argue that application before the hearing of the substantive application on 23rd May 2006 but his court ruled against it by directing that the substantive application be heard instead. All I wished to comment is that the injunction issued by the court on 11th November 2005 in effect granted on the Applicant a stay against the Respondents and Interested Party. That in effect meant that the stay Hon. Justice Wendoh declined to grant on 26th May 2005 when she granted leave to the applicant to apply for the judicial review was granted. That was irregular for two reasons:

1. O.LIII r. 1 (4) of Civil Procedure Rules gives the Judge power to determine whether to grant leave to an Applicant to apply for the superior orders of certiorari and prohibition and at the same time decides whether such grant of leave should operate as a stay of proceedings in question.
2. Injunctions cannot be issued within judicial review applications under O.LIII of the Civil Procedure Code. Section 8 (1) of the Law Reform Act under which the High Court gets its power to issue judicial review order specifically ousts the High Court's Civil and Criminal jurisdiction when issuing such orders.

For this reason therefore, the order for injunction was irregular and should be set aside.

Mr. Mulwa for the interested party submitted further that the statement of facts, affidavit verifying the facts and affidavit were not served upon the interested party as required. That submission is not correct for I see in the file the interested party's replying affidavit dated 30th November 2005. In paragraph 2 of the said affidavit the interested party avers as follows: -

“THAT the Exparte Applicant's application dated 15/6/05 together with the Statement of Facts and the supporting affidavit have been read over and explained to me by my advocates on record and the issues raised therein are well within my knowledge and I can competently respond.”

The Interested Party had the Notice of Motion Application and all accompanying pleadings with him at the time he swore his replying affidavit on 30th November 2005. Even though there is no affidavit of service showing he was served, going by his averment, he already had in his possession the application herein. In any event if he was not served and he desired to be served he ought to have come to Court to move the Court to have the application served on him in line with O. LIII r. 3(4) of Civil Procedure Rules.

This issue of service, raised at this late stage with evidence that the interested party had possession of the Notice of Motion Application by 30/11/05, is a none issue and is therefore dismissed.

Mr. Mulwa also submitted that the Respondent did not pass any ruling and that if there was any ruling it was an appeal to the Minister dated 26th January 2005 and read by the District Commissioner Makueni. That consequently for this reason alone the application was totally defective.

Mr. Mungata submitted that the award being challenged was dully signed by the District Commissioner as laid out in the statement of facts.

I see from the application (Notice of Motion) that the statement of facts filed together with the application contained in it the name and description of the applicant, facts relied on annexing all the evidence, relief sought and grounds on which the relief is sought. That statement contravenes O.LIII r 1(2) of Civil Procedure rules. The rule is very clear as to what a statement should contain which is the

name and description of the applicant, the relief sought and the grounds for the relief.

The statement filed herein contains evidence and the counsel for the Applicant referred the court to the said evidence which evidence cannot even be considered. In fact the facts included in the statement cannot form the evidence of the case, are erroneously included therein and the proper action to take is to strike out the facts from the statement. The leading case in this issue is the Court of Appeal case of **Commissioner General KRA vs. Silvano Onema Owaki CA No. 45 of 2000 (Kisumu)** at page 2 where the Court 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.”

Consequently, I strike out from the Applicants statement, paragraphs 2 to 11 both inclusive. Having struck out those paragraphs in the statement, the issue is whether the application still stands. The evidence relied upon in support of this application is also contained in the supporting affidavit shown by the Applicant. As I indicated earlier, the application before court was filed in contravention of **O.LIII r 1(3)** of the **Civil Procedure Rules** in that the notice to the registrar was not served upon him at least one day before the filing of the Chamber Summons application seeking leave. Further the Respondents were not served with the Notice of Motion application and all the accompanying affidavits and statement as required and neither were they notified of the hearing dates. This also is in contravention of mandatory requirements which I have set out hereinabove.

As a consequence to all these irregularities, I have struck out the entire application. However, as indicated I will very briefly now consider the application to comment on whether it is meritorious. The Applicant’s affidavit sets out the evidence relied upon in this application which seeks to set aside a decision of the Provincial Land Disputes Tribunal. In paragraph 4 of the said affidavit, the applicant depones that the deceased father of the interested party herein brought a suit in Kilungu Resident Magistrate’s Court Civil Case No. L 159 of 1973 in which he sought to have the land parcel No. 232 registered in his name. That after the suit was dismissed as per Judgment “DMMI” the Interested Party herein caused the land parcel No. 232 to be sub-divided into two portions Nos. 1789 and 1790. He then filed an objection challenging the applicant’s ownership of land. The objection was dismissed as per “DMM3”. “DMM3” was the record of the proceedings of the sitting of an Adjudication Committee for Uvete Adjudication Section under the Chairmanship of the Land Adjudication Officer. That decision in effect dismissed the Interested Parties objection to the Applicant’s ownership of the land in question. In paragraph 8 the Applicant depones that the Interested Party filed an appeal to the Provincial Appeals Tribunal on 26.1.05 and that despite dismissing the appeal, the Provincial Tribunal awarded part of the suit property Parcel No. 1790 to the Interested Party. The award was “DMM6”. It is that award/decision which is the subject matter of this Judicial review Application. It was the Applicant’s advocate’s submission that the Provincial Tribunal had no jurisdiction to hear the appeal because the appellant, the Interested Party herein, lacked locus standi to appeal as the party who could have appealed was his late father and the Appellant did not have the necessary letters of Administration to appeal. The second ground argued is that after the magistrate court had heard and determined the matter, the Tribunal lacked jurisdiction to entertain it.

The Interested Party argued only the technical issue of the application not being properly brought to court and which I have agreed with him. The Interested Party submitted that the issue of his *locus standi* to appeal to the Provincial Tribunal was not proved. That is a mere denial. The proceedings are quite clear that the Interested Party was appealing on behalf of his late father without Letters of Administration. The Interested Party clearly lacked locus to appeal to the Provincial Tribunal and so the Tribunal lacked jurisdiction to entertain his appeal. The Provincial Tribunal also lacked jurisdiction to award any parcel of land to the Interested Party as it purported to do and the lack of jurisdiction to make the award existed notwithstanding the dismissal of the appeal.

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 simple reason for lack of jurisdiction is that the Provincial Tribunal had no jurisdiction to determine the issue of ownership. While I rule that the Applicant herein has a good claim with a high chance of success, he did not lodge the application as required under O.LIII of the Civil Procedure Rules. The same is struck off with costs to the Respondent and the Interested Party. He may consider filing the matter afresh subject to court’s ruling as to leave. Those are the orders of this Court.

Dated and delivered this 22nd day of June 2006.

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LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

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JUDGE