



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 1099 of 2004

**IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES AND ALL
ENABLING PROVISIONS OF THE LAW**

AND

**IN THE MATTER OF: THE SENIOR MAGISTRATE'S COURT AT KAJIADO IN THE
LAND DISPUTE TRIBUNAL NO. 13 OF 2002**

IN THE MATTER OF THE REPUBLIC APPLICANT

IN THE MATTER OF: BACKSON NKASIAKA MTUNKEI PLAINTIFF/APPLICANT

VERSUS

SAMSON GITONGA WACHEGE..... DEFENDANT/RESPONDENT

***EX-PARTE* BACKSON NKASIAKA MTUNKEI INTERESTED PARTY**

JUDGMENT

On the 27th August, 2004 the applicant approached the court by way of Chamber summons dated 27th August, 2004 seeking to be heard during the High Court vacation Rules.

On 30th August, 2004 my brother Mr. Justice Ojwang was presented with a Notice of Motion dated 18th August, 2004 in which the applicant moved the court under Order 53 Rule 1(3) Civil Procedure Rule and section 21 Civil Procedure Act seeking leave to bring an application for Judicial Review for orders of certiorari, prohibition and mandamus. The orders were supposed to issue against the Senior Resident Magistrate's Court Kajiado and Land Disputes Tribunal Kajiado. The court granted prayers (d) and (e) of the Notice of Motion dated 18th August, 2004. Prayers (d) and (e) were as follows:-

(d) That this Honourable Court do grant the applicant leave to apply to the High Court for an order of mandamus compelling the Senior Resident Magistrate to hand over the matter to the High Court for determination of the issues herein.

(e) That this Honourable court be pleased to order that such leave do operate as a stay until further orders of the High Court.

Prayer (a) which sought leave of the court to apply for an order of certiorari to quash the decision of the Senior Resident Magistrate's decision of 27th February, 2002 and prayer (b) that sought an order of prohibition to prohibit the Senior Resident Magistrate's court from acting on the said decision were not granted.

I wish to point out that from the on-set, the Notice of Motion dated 19th August, 2004 was not properly before the court because it was brought by way of Notice of Motion instead of by Chamber summons as provided by order 53 Rule 1 (2). The said provision is couched in mandatory terms. The word '**shall**' is used. In Judicial Review, an application for leave is by chamber summons whereas the substantive motion is by Notice of Motion once leave is granted.

The court also ordered that the substantive Notice of Motion be filed within 21 days and on 8th September, 2004 the applicant did file another Notice of Motion dated the same day.

The orders sought in the Notice of Motion dated 8th September, 2004 are as follows:-

- 1. The order for certiorari do issue to remove into High Court for the purpose of being quashed, the orders of the Senior Resident Magistrate Kajiado dated 27th November, 2002 converting the Land Dispute Tribunal into a Judgment and Ruling of the court dated 16th August, 2004 compelling the applicant to sign or execute transfer documents in respect of Kajiado/Kitengela/4337.**
- 2. That an order of prohibition be directed to the Respondent herein for acting on the said decision.**
- 3. That an order of mandamus to compel the Land Dispute Tribunal to reconstitute a fair and non partisan committee to deliberate on the matter and or the High Court do hear the matter and issue final orders thereof.**
- 4. Costs of the application be provided for.**

I have already pointed out that when the applicant first came to court seeking leave to bring Judicial Review proceedings, he was only granted prayer (d) & (e) of the Notice of Motion. The prayer seeking leave to bring an application seeking orders of certiorari and prohibition was not granted. It follows that the applicant could not seek orders of certiorari and prohibition in the substantive motion and prayer 1 and 2 cannot therefore be granted.

Even if the leave was granted to bring an application for certiorari, I doubt that such orders would have been granted by this court. This is because Land Dispute Tribunal decision is dated 14th December, 2001 and the said decision was adopted by the Senior Resident Magistrate's court Kajiado on 27th November, 2002. In the prayer in the Notice of Motion there is another mention of a decision of 16th August, 2004. From the affidavit in support of the application, it is the date by which the applicant was supposed to surrender the title deed. The court might have only quashed that court's decision of 16th August, 2004 ordering the applicant to surrender the title deed to the Interested Party. However as regard the decision of Land Dispute Tribunal it was long over due. Under order 53 Rule 2, the application for leave to bring an application for the orders of Certiorari should be made within 6 months. As of 19th August, 2004, it was about one year 9 months since the court adopted the decision of Land Dispute Tribunal and about 3 years since the Land disputes Tribunal made its decision. Even if leave had been granted to bring an application for an order of certiorari, the same could not have been granted on account of time.

Can an order of mandamus issue? The applicant wants the Land Dispute Tribunal to reconstitute a fair, non-partisan committee to deliberate the matter or order the matter transferred to court. The order of the

Land Disputes Tribunal and the Senior Resident Magistrate still subsists, as they were not quashed. This court cannot therefore give orders to the Land disputes Tribunal to redo what they have already done. Even if the court were to transfer the case to itself, it will not make orders unless moved to so do. In any case the orders of the Land Dispute Tribunal & Senior Resident Magistrate 's court still subsist and unless set aside or quashed, this court can do nothing about them.

Therefore, even without going into the merits of the application, it is apparent that none of the prayers sought in the Notice of Motion of 8th September, 2004 can be granted for the reasons given above.

Though the Respondent never filed any papers, the application before court is incompetent and unmeritorious and it is hereby struck out.

The applicant will bear their own costs.

Dated and delivered at Nairobi this 2nd day of June, 2006

R.P.V. WENDOH

JUDGE