



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

**Civil Misc Case 231 of 2001**

**REPUBLIC.....APPLICANT  
VERSUS  
IKUTHA LAND DISPUTE TRIBUNAL.....RESPONDENT  
AND  
JULIUS KYALO PAUL.....INTERESTED PARTY  
RULING**

This Notice of Preliminary Objection is filed by Kinyua Musyoki & Company Advocates representing the Interested Party. It raises three points:-

1. That the application for the review order is bad in law in that it contravenes the express provisions Order 53 rule 2 of the Civil Procedure Rules.
2. That the application is incurably defective and incapable of proceeding to hearing on merit.
3. That the application ought to be struck out with costs to the Interested Party.

In respect to the first point above Mr Musyoki argued that the grounds of application are contained in the body of the application instead of being in the Statement of Facts which should accompany the Notice of Motion.

I have carefully examined the Notice of Motion in question. It is normal and regular Notice of Motion which seeks the following two orders:-

i. That an order of certiorari do issue to remove to the High Court the decision of Ikutha Land Disputes Tribunal in Civil Case No. L82 of 2000 delivered on 1/2/2001 for the purpose of quashing the said decision.

ii. That costs of the application be paid to the ex parte applicant.

The Notice then supports itself by several grounds thereon enumerated which include the following- that:

- a) The Tribunal which heard the case consisted of four elders instead of three or five as provided by the Land Disputes Act.
- b) One of the elders – George N. Muli was not a gazetted elder.
- c) The Tribunal failed to fix the boundary in dispute but instead allowed the Interested Party himself to fix it in the absence of the applicant.

The Notice of Motion at this stage then refers to Statement of Facts and the Verifying Affidavit of the applicant which it stated, will be accompanied by other reasons that will be offered during the hearing. To the said Notice of Motion was attached a Statement of Facts referred to in the referred Notice. And finally, to the Notice of Motion was attached the Chamber Summons by which the applicant had obtained leave to file the Notice of Motion. Also to the said Chamber Summons were attached the Statement of Facts now attached to the Notice of Motion presently before this court, plus the typed proceedings and judgement of the Tribunal. The Judgment at its end, awards the shamba to the Interested Party by confirming the then existing boundary in relation to which the Tribunal stated, it would visit the land to strengthen the boundary by planting “**Ndau**” plants. The Judgment was dated 19.9.2000 and is signed by three elders.

A hand-written proceedings confirms that the judgment or award was read by the Principal Magistrate’s Court on 1.2.2001 in the presence of the parties.

It is with the above background that the Preliminary Objection before me will be examined.

It cannot be doubted therefore that the Notice of Motion before me is indeed constructed in a manner all such motions are constructed and are supposed to be constructed. But at the bottom of it, it refers to the separate Statement of Facts and the Verifying Affidavit which are attached to it. Careful reading confirms that this Statement of Facts and the Verifying Affidavit are the same as those upon which the Chamber Summons used to obtain leave, was based and argued.

Further careful reading of the Statement of Facts and the Verifying Affidavit will confirm that the grounds shown in them are the same now making the basis of this Notice of Motion. That the said grounds are repeated in the body of the Notice of Motion, cannot be denied. But how else can such Notice of Motion be constructed? In any case, as long as the original Statement of Facts and Verifying Affidavit in the Chamber Summons for leave, are attached to the Notice of Motion, then Order 53 rule 4 is thereby complied with.

Furthermore it is not correct, as Mr.Musyoki averred that the present Motion is not accompanied by those documents. I find the assertion openly, and obviously misleading. Nor indeed was the Chamber Summons for seeking leave missing as I have shown above. In conclusion on this point then, the Motion was properly accompanied by the Statement of Facts, the Chamber Summons for leave, the verifying affidavit, the Tribunal Proceedings with the Judgment or award, and the certified proceedings of the Principal Magistrate in relation to the reading of the award in court on 1.2.2001. This preliminary Point has no merit.

The second point raised by Mr.Musyoki is that the Notice of Motion and the Chamber Summons seeking leave earlier, both were time barred. He said that the award or judgment was issued on 22.8.2000. I find on the other hand that the judgment was drawn by the tribunal on 19.9.2000 as clearly shown on page 8 of the proceedings. There is no indication in the Judgement as to whether it was read on the same day or later. The heading on the said page 8 states “**THE JUDGEMENT OF THE CASE, 19.9.2000.**” A reasonable construction of this, (and that is the construction the court took), is that 19.9.2000 is the date the judgment was written by the Tribunal. Since there is no evidence of delivery of the Judgement, on the same, the Principal Magistrate’s notes on 1.2.2001 fit in to clarify the point. It states;- “**Award read to the parties. Disputed land awarded to the plaintiff-Julius Kyalo Paul. Judgment accordingly**”. It was then dated 1.2.2001.

Mr Musyoki agrees that the application for leave was filed on 30.7.2001. The leave application cannot therefore have been out of time to need extension.

Further more if there is a Tribunal Judgment which also rules about intention to confirm boundary by the Tribunal is found in it, then Mr. Musyoki’s argument that the decision or judgement of the Tribunal was not attached, cannot be correct. What judgement is he talking about then?

In addition, the Principal Magistrate’s notes reading the award and showing that the land is given to

plaintiff, forms part of the Tribunals Judgement. Its presence is glaring . Mr Musyoki just did not wish to see it! The letter from the Land Tribunal dated 19.9.2000 in the courts view refers to the right of passage which purported to make or be part of the award. It was drawn the same day the Judgment was drawn and appears to be a clarification to it. It made title difference even were it to be excluded.

In conclusion, the points raised as points of Preliminary Objection, were not only incorrect in matters of fact, but were as well frivolous and a complete waste of time. Effectively, they were in my view taken to test the applicant's case at this preliminary point in time. I will not be surprised if they will not feature during the main hearing since they already have been argued. If they will not be raised, it will be likely because they have already been argued and court's position ascertained. This is a practice which is almost unethical. Points of objection on points of law were defined in the case of Mukisa Biscuit Co. vs West End Distributors Ltd, [1969] E.A. P. 696 where Newbold President stated thus-

**“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.**

In the same case Law, J.A.said;-

**“ A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”.**

I have considered Mr. Musyoki's preliminary objections. The facts he raises are argumentative and are not accepted by the other side. For example, there was no agreement between the parties as to the date of a ward, whether an award was attached or whether the award was read by Tribunal or Court. Mr.Musyoki nevertheless raised and relied on these disputed facts to argue his preliminary points. The points did not accordingly fit in the dictum of Mukhisa case above.

As stated in the same case the raising of preliminary points of objection which are not correct such preliminary points of law, is a practice abhorred by the court. It wastes time and funds and ends up achieving little as in this case. It is to be discouraged as ruled in the said case and the only way to do so is to visit those who raise the points with discouraging costs.

For the reasons above, I dismiss the Preliminary Objections aforementioned with costs assessed at Kshs. 2000/= to be paid by Mr. Musyoki personally. It is so ordered.

**D.A.ONYANCHA**

**JUDGE**

**9/11/2006**