



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPLICATION NO. 85 OF 2003**

**REPUBLIC ::: APPELLANT**

**VERSUS**

**THE CHAIRMAN LAND )**

**HON. ATTORNEY GENERAL ) ::::::::::::::::::::::: RESPONDENT**

**R U L I N G**

By the notice of motion dated 14.7.2003 the applicant Muthui Kwitya who is the exparte applicant in the proceedings under Order 53 Rule 3 and 4 Civil Procedure Rules prayed that the decision and award of the Land Disputes Tribunal Mwingi District read to the parties on 2.4.2003 in Land Case No. 23/2001 of Mwingi Law Courts and all consequential orders be declared null and void and quashed under authority of certiorari. The basis of this application is that the Land Disputes Tribunal Mwingi District lacked jurisdiction to hear and determine disputes for recovery of land and therefore acted ultra vires. This was set out in the motion which was argued by Mr. Kinyua Advocate. The exparte applicant Muthui Kwitya swore an affidavit in support and a verifying affidavit.

The Principal State Counsel appearing for the State filed a replying affidavit in opposition of the application in which he depones that the dispute before the tribunal related to boundaries but not ownership of land and hence the tribunal had jurisdiction to entertain the matter.

Mr. Nzili for the interested party filed grounds of opposition to the effect that the application is vexatious and an abuse of court process, court has no jurisdiction to entertain the matter, that the tribunal had jurisdiction in the matter and that this application has no affidavit in support.

As regards the issue of whether or not the applicant filed an affidavit in support of the application, I do find that there is an affidavit indeed except that it has 4 paragraphs and it merely annexed the proceedings MK 2 and award of the Land Disputes Tribunal Mwingi District. The affidavit does not details the facts required of the plaintiff. I hope that the Advocate will do better than that in future in other applications.

The court will also consider the allegation raised during submission that the tribunal acted contrary to Rules of natural justice by denying the applicant a chance to call witnesses and cross examine the plaintiff. Firstly I do note that there are no such averments in the applicants affidavit. He never deponed that he asked for a chance to call witnesses and was denied or that he wanted to cross examine the plaintiff and was denied a chance. It was not one of the grounds cited in the notice of motion dated 14.7.2003. The only ground cited related to the issue of excess of jurisdiction by the tribunal. In any event a look at the proceedings before the tribunal indicates that the defendant who is the applicant had no questions to ask the plaintiff. I note that the applicant cross examined the plaintiffs witnesses and he later gave his sworn statement for his defence. There is no evidence that he was denied a chance to call his witnesses. It seems he was given a chance to present his case through cross examination of the witnesses or by giving his defence. There is no evidence of breach of rules of natural justice as now alleged by counsel. The plaint filed by the plaintiff in the tribunal at paragraph 3 reads that it is a claim against the defendant for recovery of land. The jurisdiction of the tribunal is provided for under Section 3 (1) of the Land Disputes Act as claim to occupy or work land. It was the plaintiff's evidence that 5 people who included his grandfather and that of the applicant shared out land and the boundaries were demarcated. Though the plaintiffs statement shows it was in 1995 the plaintiffs witnesses say it happened in 1975. It seems this was a typing error. He cleared a portion of the land in 1988 and started a small shamba. The

plaintiff said and I quote “Muthini Kwitya seeing that he made a fence round my shamba.” This must be agricultural land. The matter was later referred to clan elders by the plaintiff’s but later the plaintiffs said the applicant came and fenced “all the land”. Further to the above the plaintiffs 1st witness said that the present portions had a case on 4.5.1998 and the land went to the plaintiffs. Likewise the 2nd plaintiff’s witness talks of the disputed land belonging to the plaintiff.

From the court’s understanding of the proceedings before the Land Disputes Tribunal, it concerned ownership of land. As per plaintiff, defendant fenced off all his land. It was not part of it. Even the finding of the tribunal is in tune with the proceedings before it – they found the land to belong to the plaintiff. No issue of a boundary arose. The court considered the 2 authorities cited by counsel Civil Miscellaneous Application 67/01 by J. Nambuye and the decree of J. Mwera in H.C.Misc. App. 294/00 where both courts held that the tribunals exceeded their jurisdiction and acted ultra vires. The last case was quite similar to the present in that the dispute involved the whole piece of land in issue. In the present case it was outside the mandate of the tribunal to determine the issue of ownership of land. The court therefore grants the order as prayed. The tribunals decision in issue is quashed by order of certiorari. Costs of application to applicants.

Dated, read and delivered at Machakos this 27th day of April, 2004.

**R. V. WENDOH**

**JUDGE**