

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISC CIV APPLI 154 OF 2003**

RICHARD MAKAU KIEMA APPLICANT

VERSUS

CHAIRMAN, LAND DISPUTES TRIBUNAL

MATHIMA LOCATION) RESPONDENT

THANGILA KYAI)

R U L I N G

By a notice of motion dated 2.12.2003, the ex parte applicant moved this court for orders of certiorari to remove to the High Court of Kenya at Machakos, the proceedings and award of the Land Disputes Tribunal Mathima Location in the tribunal case filed in Principal Magistrate's court at Kitui as L.C. 54B/2003 between Thangila Kyai vs Richard Kiema the applicant herein, which adopted the award of the tribunal on 18.9.2003, for purposes of it being quashed.

The statement of facts, verifying affidavit, supporting affidavit and notice to the Registrar were filed with the chamber summons dated 1.10.2003 as required by the law.

The grounds upon which the application is brought are found in the statement of facts and they are that the proceedings before the Land Disputes Tribunal were in relation to ownership of land which is ultra vires the tribunal's mandate; that the tribunal that heard the dispute does not exist in law; and that even if it existed, it was not properly convened; that the record filed in court was incomplete and there is therefore an error on the face of the record and hence the proceedings, award and order by the magistrate were a nullity.

The court having been satisfied that the respondents were served with this application and hearing notice, and failed to attend or file their papers in reply, proceeded to hear this application ex parte. The first issue raised by the applicant is one of jurisdiction. Section 3 of the Land Disputes Tribunal Act limits the jurisdiction of the tribunals to deal with cases of civil nature involving the division or determination of boundaries to land including land held in common; claim to occupy or work land and trespass to land. The applicant urges that the dispute before the Land Disputes Tribunal concerned ownership of land but not any of the disputes listed under Section 3 (1) a, b and c. I have heard a look at the proceedings before the Land Disputes Tribunal which are annexed to the chamber summons and indeed all the complainant's witnesses referred to the land in dispute as belonging to one Thangila Kyai. In his defence the defendant talks of the land in dispute belonging to him and inherited from his grandfather. The Land Disputes Tribunal awarded the land in dispute to the complainant and even a map of the disputed land is annexed. In the judgement of the court, it was ordered that the land in dispute was awarded to the complainant. The record clearly shows that the dispute which the tribunal dealt with was one of ownership of land which was not within their jurisdiction. They acted ultra vires their mandate in deciding issues of ownership of land.

A look at the proceedings clearly shows that the proceedings were incomplete. Under Rule 5 of the Land Disputes Tribunal Rules, the claim will usually be filed in terms of Form A. There is no claim or complaint filed as provided for in the above rule. All there is on record is the proceedings of 23.11.2000 when the matter was heard. The defendant can not therefore have known what case he was going to meet. It was an ambush and hence a breach of the rules of natural justice.

Counsel also raised the issue of whether or not fees was paid by the complainant in respect of the case

before Land Dispute Tribunal as provided by Rule 4 of Land Disputes Tribunal Rules and that since there is no evidence of payment of the fees, the proceedings are null and void. There is no evidence that Rule 4 was complied with.

It is also argued for the applicant that the tribunal that heard this case does not exist in law because it is Land Disputes Tribunal of Mathima Location and yet the law provides that there shall be one tribunal for every administrative District. Section 4 (1) of the Land Disputes Tribunal provides as follows:

“There shall be established a tribunal, to be called the Land Disputes Tribunal for every registration district”

Section 2 of the Act provides that Registration District refers to administrative District which the land the subject of the dispute is situated. The administration district is Kitui District and so the tribunal should be the Land Disputes Tribunal Kitui District. Section 5 (1) of the Act further provides that by notice published in the gazette the minister shall appoint a panel of elders for each Registration District. The proceedings of the Land Disputes Tribunal clearly show that they belong to Disputes Tribunal Mathima Location, Mitemu sub location. No such tribunal is provided for under the law. The proceedings bear the stamp of the Land Disputes Mathima Location. Since the tribunal does not exist in law it follows that their decision is therefore null and void.

Section 4 (2) gives the composition of the tribunal as the chairman appointed by the District Commissioner and either 2 or 4 elders elected by the District Commissioner. It is the applicants contention that the tribunal was not properly constituted as it had 4 members. The proceedings before the Land Disputes Tribunal speak for themselves. The elders named at page 4 of the Land Disputes Tribunal proceedings clearly shows that they were a total of 4 members which is irregular. The number is supposed to be 3 or 5 member an odd number. It is important that they are an odd number for purposes of decision making so that the majority The presence of 4 members in the tribunal renders the proceedings irregular, null and void.

Another error noted in the proceedings is that the secretary took the proceedings whereas the chairman should always act as secretary and take down the proceedings. Section 6 (2) (a) provides that the chairman shall preside at the hearing before the Land Disputes Tribunal. It is apparent from the record at page 4 that the elders had a chairman and secretary. There is no provision for a secretary and the appointment of a secretary offends Section 6 (2) and it renders the proceedings null and void.

From the foregoing it is apparent that there were many errors made by the tribunal, the tribunal acted ultra vires its powers and breached rules of natural justice and the court finds that there is need to bring forth the proceedings of Land Disputes Tribunal, its award and judgement of the court to be quashed by authority of certiorari and they are hereby quashed.

Orders accordingly.

Dated at Machakos this 25th day of November 2004.

R. V. WENDOH

JUDGE