



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 54 OF 2009 (J.R)

IN THE MATTER OF CASE NO. 166 OF 1998 OF

MAKUENI DISTRICT LAND DISPUTE TRIBUNAL

AND

IN THE MATTER OF LDTC NO. 13 OF 2002 OF MAKUENI

SENIOR RESIDENT MAGISTRATE'S COURT AT MAKUENI

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 12 OF 1990

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP.300 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

1. MAKUENI DISTRICT LANDS TRIBUNAL

2. THE RESIDENT MAGISTRATE MAKUENI LAW COURTS

3. THE LAND REGISTRAR MAKUENI DISTRICT.....RESPONDENTS

1. MWITHI KASIMU

2. JOSEPHAT KASIMU.....INTERESTED PARTIES

EX PARTE: SHADRACK KIMUKA MUTULU

RULING

1. The Applicant filed a notice of motion dated 2nd March, 2009 seeking judicial review order of prohibition directed to the respondents and the interested parties prohibiting them from applying, enforcing, executing or implementing the decision made on 25th June, 2002 by the 1st respondent in case number 166 of 1998 and adopted as the judgment by the 2nd respondent on 19th August, 2002.

2. The Applicant claim that a dispute arose as to ownership of the parcel of land No. **Nzai/Ikangavya/425** which falls under the 3rd respondent's jurisdiction. As a consequence of the said dispute, the interested parties filed a case no. 166 of 1998 and not case no. 166 of 1988 as erroneously cited in the typed proceedings. That the 1st respondent conducted its proceedings that culminated in an award in favour

of the interested parties issued on the 25th June, 2002. That consequent upon the issuance of the said award by the 1st respondent, and pursuant to provisions of Land Dispute Tribunal Act No. 12 of 1990, the award was filed before the 2nd respondent as case no. LTDC No. 13 of 2002 in which the award of the 1st respondent was read to the parties on 19th August, 2002 by the 2nd respondent and made a judgment. That the effect of the said proceedings was to defeat the applicant's title to the suit premises which is an absolute first registration under RLA Cap. 300 Laws of Kenya. That in making the decision in the matter before it, the 1st respondent acted ultra vires in a matter that it did not have jurisdiction and as such reaching a void decision. That the purported judgment of the 2nd respondent is a nullity for being founded on a void award and that the interested parties claim was brought out of time after adjudication process of 1970's.

3. The Attorney General filed grounds of opposition on 30th September, 2009 that; the application is misconceived, bad in law and an abuse of the court process; that the application is incompetent and incurably defective, that the application offends the provisions of order LIII rules 1, 2 and 3 of the Civil Procedure Rules and that the same being defective should be struck out with costs to the Respondents.

4. The interested parties filed grounds of opposition on 6th December, 2011 that the application is bad in law as Act No. 12 of 1990 does not deal with Land Disputes Tribunals; that the Land Dispute Tribunal had jurisdiction to hear the case under section 3 (1) (a) & (b) of the Land Dispute Tribunals Act as read with section 2 of the same Act; that the application raises serious issues of fact which can only be resolved through an appeal under section 8 (1) of the Land Disputes Act but not by way of judicial review and that the applicant had the remedy of appeal under section 8 (1) of the Land Disputes Tribunal Act which he did not file and he is estopped from seeking the prerogative orders of certiorari and prohibition.

5. I have given due consideration to the application herein. The applicant's contention is that the land in dispute was registered under Registered Land Act, Cap 300 Laws of Kenya and that the dispute was with regard to ownership. This fact was not rebutted on oath by the respondents and interested parties. Having failed to rebut the same, an inference is made that the allegations is true. Lack of rebuttal amounts to admissions of facts. In this regard I associate myself with the holding in **Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR** where it was held as follows:

"The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.

In this regard, the court held in Kipyator Nicholas Kiprono Biwott Vs George Mbuguss and Kalamka Ltd Civil Case No. 2143 of 1999

...From the facts and the law, I have analysed in this case, I do find the Defendants have no defence to this suit...having filed no replying affidavit to rebut the averments in the plaintiff's affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability..."

6. Relying on the above case the next issue is whether or not the respondents had the jurisdiction to hear disputes regarding such land. Section 159 of the Registered Land Act (now repealed) provided that Civil suits and proceedings relating to the title to, or the possession of land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease, charge, being an interest which is registerable or registrable under this Act, or which is expressed by this Act to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty-five pounds, by the Resident Magistrate's Court; or, where the dispute comes within the provisions of section 3 (1) of the Land Tribunals Act, in accordance with that Act. In the said circumstances, the Respondents were without authority to adjudicate the matter since the suit land was registered in the names of the Ex parte Applicant. Hence the action of the Respondents were ultra vires and void. I find the Application merited and is allowed as follows:-

a) An order of prohibition directed to the respondents and the interested parties do issue prohibiting them from applying, enforcing, executing or implementing the decision made on 25th June, 2002 by the 1st respondent in case number 166 of 1998 and adopted as the judgment by the 2nd respondent on 19th August, 2002 is hereby granted.

b) Each party to bear their own costs.

Orders accordingly.

Dated and delivered at **Machakos** this **9th** day of **October**, 2018.

D.K. KEMEI

JUDGE