



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
JUDICIAL REVIEW NO. 64 OF 2011

REPUBLIC OF KENYAAPPLICANT

VS

MATHIOYA DISTRICT L.D.T. & 3 OTHERS.....RESPONDENTS

JUDGMENT

On the 7/12/2011, the ex parte applicant was given leave to apply for orders of ***Certiorari*** and ***Prohibition*** bringing into Court Mathioya Land Disputes Tribunal case No. L.D.T 6/2/2011 for quashing. He also obtained leave to apply for Prohibition to prohibit the execution of orders issued on 28/10/2011 by the senior Resident Magistrates Court Kangema. The granted leave was to operate as stay of any execution of the said decisions. The applicant was given 21 days to file the notice of motion for substantive prayers.

On the 23/11/2011 the ex parte applicant filed the Notice of Motion dated the same date seeking for the substantive orders for which leave had been granted **THUS:-**

1. ***That the applicant be granted orders for Certiorari and Prohibition, bringing into Court, Mathioya Land Dispute Tribunal case No. 6/2/2011 and Senior Resident Magistrate, Kangema LDT. No. 32/2011 for quashing.***
2. ***That the Senior Resident Magistrate Court Kangema be prohibited from in anyway executing its orders of 26/10.2011 or any other order in furtherance of LDT 32/2011 with reference to access roads to Land Parcel Number LOC. 19 GACHARARGEINI/2743 and 2745.***

In the statement of facts, the applicants states that the ex-parte applicant is the registered proprietor of Land Parcels numbers LOC.19/GACHARARGEINI/2743 and LOC.19/GACHARARGEINI/2745, previously sold to him. He is the objector in Mathioya Land Dispute Tribunal case Number LND/DISP./TRI/6/2/2011. He is also named defendant in S.R.M.C. LDT. 32/2011. That the two parcels of land with each individual access were excised from two different parcels of land to wit Loc. 19/GACHARRARGEINI/2351 and LOC. 19 GACHARARGEINI/2352. That the two roads of access were duly approved by the then registered proprietor of two parcels of land who is Stanley Kagotho Muchunu.

The application is based on grounds that the land Dispute Tribunals decision purporting to arbitrate on roads access to the ex-parte applicants Land parcels LOC. 19/GACHARARGEINI/2743 and LOC. 19/GACHARARGEINI/2745, is erroneous and without jurisdiction. That the decision of MATHIOYA Land Disputes Tribunal is unconstitutional Ultra vires the Law and a nullity. He faults the decision of the Senior Resident Magistrate Court for being based on an ultra vires decision and therefore

also a nullity. That the Mathioya LDT NO. 6/2/2011 was made on 15/8/2011 while Kangema S.R.M. LDT. No. 32/2011 was made on 26th October, 2011 in absence of ex-parte applicant. The application is supported by a verifying affidavit filed on 25/11/2011 where the ex-parte applicant states that:

1. ***That I am the deponent herein.***
2. ***That I am the applicant in this application.***
3. ***That I hereby verily that the facts set out in the statement of facts are true to the best of my knowledge and belief.***
4. ***That I am the registered owner of land parcels Number LOC.19/GACHARAGEINI/2743 and LOC.19/GACHARAGEINI/2745.***

The second verifying affidavit filed on 23/12/2011 is a reiteration of the affidavit filed on 25/11/2011 with the statement and chamber summons however the exparte applicant has added paragraphs 5-7 where he states that the Mathioya Land Disputes Tribunal arbitrated on roads of access lawfully made for LOCc.19/GACHARAGEINI/2743 and LOC/19/GACHARARAGEINI/2745 by the land office and therefore overstepped its mandate and jurisdiction and that the decision of Kangema Court in S.R.M. Kangema LDT 32/2011 is a nullity. Lastly, that if the decisions of Mathioya Land Dispute Tribunal in LDT 6/2/2011 AND S.R.M. Kangema LDT No. 32/2011 are maintained the two parcels of land will remain without any road of access.

The filing of the second verifying affidavits with the Notice of Motion without leave was unprocedural. The annexing of the exhibits in the statement was a serious flout on the Rules of Procedure and law of Evidence as the statement is only required to describe the ***parties, relief sought, and grounds relied upon***. The statement has no evidential value hence the facts and annexures in the statement have no evidential value too. In the case of ***Commissioner General K.R.A VS Silvano Anema Owakii Kisumu Court of Appeal Civil Appeal No 45 of 2000*** the Court of Appeal held, that it is not correct to lodge a statement of all facts verified by an affidavit. The facts relied on should be in the verifying affidavit. The application before this court is bare and has no evidence to support it. This renders the instant Notice of Motion incompetent.

This position is confirmed by the following passage from the ***Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7***:“The application for leave “By a statement” - The facts relied on should be stated in the affidavit (*see R. V. Wandsworth JJ., ex p. read (1942) 1 K.B. 281*). The statement: should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.”

At page 283 of the report of the case of ***R.V. Wandsworth Justices, Viscount Caldecote C.J. Said:***

“The court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.”

The Court in the Wandsworth case was considering the provisions of Order 53 of the English Rules of the Supreme Court which are in ***pari materia*** with our ***Order LIII of the Civil Procedure Rules***. This application must, therefore, fail and dismissed with costs .

DATED AND SIGNED AT ELDORET THIS.....DAY OF.....2015

A.OMBWAYO

JUDGE

DELIVERED AND SIGNED IN NYERI THIS 4TH DAY OF FEBRUARY,2015

LUCY WAITHAKA

JUDGE