



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 90 OF 2004

MIKILE NTHIWA MANYALA OBJECTOR/ APPELLANT

VERSUS

THERESIA KANONO KANGUTA CLAIMANT/RESPONDENT

(Being an appeal from the decision of the Hon. P.M. Kariuki (R.M) in the Resident Magistrate's Court at Kilungu Resident Magistrate's Court Civil Case No. L. 5 of 2003 dated 14th October 2004)

(Before B. Thurania Jaden J)

J U D G M E N T

1. On the 26/3/2003, the **Makueni District Land Disputes Tribunal** in case **No. 36 of 2002** made the following award:-

“The Objector to remove all his developments from the disputed portion and meet the costs of the suit.”

2. The award of the Tribunal was on 30/0/2003 adopted by the **Resident Magistrate's Court, Kilungu**.
3. The Respondent, **Theresia Kanono Kanguta** who was described as the Claimant in the proceedings before the Tribunal filed a Bill of Costs before the lower court on 18/5/2004.
4. The Appellant, **Mikile Nthiwa Manyala** who is described in the proceedings before the Tribunal as the “Objector” filed the application dated 27/7/2004 seeking orders that the Bill of Costs aforesaid be struck off.
5. According to the affidavit in support, the **Land Disputes Tribunal Act No. 18 of 1990** did not confer any jurisdiction on the magistrate to tax a Bill of Costs or assess any costs. That the powers of the magistrate are limited to entering judgment in accordance with the Award of the Tribunal and to draw the decree thereof. It was further stated that the Tribunal had no power to award costs.
6. A **Preliminary Objection** dated 27/7/2004 was filed. The Preliminary Objection raises the same issues as the application aforesaid.
7. The application was opposed. The Respondent filed the grounds of opposition dated 3/8/2004. The application was termed as an abuse of the court process meant to deny the Respondent of the fruits of the Tribunal's award.
8. The Respondent also filed a Preliminary Objection dated 30/8/2014 seeking to have the applications struck off on the grounds that the application was incompetent and bad in law.
9. On 6/9/2004 the lower court made the following ruling:-

“This court has no jurisdiction to tax the bill of costs under section 7 (2) of the Land Dispute Tribunal Act 18 of 1990 and therefore the bill of costs is struck out.”

10. The Respondent thereafter filed the application dated 17/9/2004 seeking a review and/or setting aside of the orders made on 6/9/2004. It was stated that the Award of the Tribunal included costs and therefore the court had the requisite jurisdiction to assess the same.
11. A Preliminary Objection was raised in the said application on the grounds that the court had no jurisdiction to review the orders in question.
12. Upon hearing the application, the lower court ruled *inter alia* as follows:-

“In my opinion I have gone through the application and found it merited in that the Land Disputes Tribunal Act No. 18 of 1990 is silent on costs and there was an error on the face of the Record in that the previous magistrate had confirmed the Award as read by the Tribunal of Makueni Land Dispute Tribunal Case No. 36 of 2002 and I therefore allow the bill to be taxed by this Court and allow this application as costs follow the cause under section 27 of the Civil Procedure Act.”

13. It is the said ruling that has triggered this appeal. The grounds of appeal can be summarized as follows:-

- **That the magistrate heard the Preliminary Objection only but went ahead to allow the application for review which was still pending and had not been heard.**
- **That the magistrate misdirected himself on the law and procedure relating to an application for review.**
- **That the magistrate erred in holding that he had the jurisdiction to tax the bill of costs.**
- **That the Tribunal had no jurisdiction to award costs.”**

14. The appeal was canvassed by way of written submissions which I have duly considered.

15. A perusal of the lower court record shows that the application dated 17/9/2004 was heard on 4/10/04 with **Kisongoa Advocate** appearing for the Respondent/Applicant and the Appellant/Respondent appearing in person. The Applicant therein made an application for “the court to review its orders and tax the bill.” **Mr Kisongoa** is on record as having opposed the application and made submissions that **O.XLIV r. 1** of the **Civil Procedure Rules** (repealed) was not applicable and that the court had no jurisdiction to review the orders. It appears that what was not argued before the court was the Preliminary Objection.

16. Under **O.XLVV r 1** of the Civil Procedure Rules (repealed), the court has to satisfy itself that there has been a discovery of new and important matter or evidence which after the exercise of due diligence was not within the Applicant’s knowledge or could not be produced during the hearing, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason.

17. **Rule 21** of the **Land Disputes Tribunal (Forms and Procedure) Rules 1993** as revised by Legal Notice No. 4/2010, provides as follows:-

“The Chairman shall award costs and expenses to the witnesses and any other person who deserves to be awarded costs and expenses and in so doing he may be guided by the Advocates Remuneration Order.”

My understanding of the said provision is that the Chairman of the Tribunal is the one empowered to award costs. The Chairman is the one to assess the costs, guided by the **Advocates Remuneration Order**.

18. The magistrate’s jurisdiction is provided for under **section 7 (2)** of the **Land Disputes Tribunal Act No. 18 of 1990** which stipulates as follows:-

“The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the

manner provided for under the Civil Procedure Act.”

19.The magistrate therefore has no jurisdiction to add or subtract anything from the Tribunal’s Award.

20.With the foregoing, the appeal has merits and I allow the same. Taking into account the circumstances of this case, each party into account to bear own costs of this appeal.

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **11th** day of **March** 2015.

B. THURANIRA JADEN

JUDGE