



**REPUBLIC OF KENYA**

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

**CIVIL MISCELLANEOUS APPLICATION NO 77 OF 2008**

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

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

AND

IN THE MATTER OF THE MAKUENI LAND TRIBUNAL CASE NO. 50 OF 2007 AND NO. 8 OF 2006

**BETWEEN**

**THE CHAIRMAN KATHONZWENI**

**LAND DISPUTES TRIBUNAL.....RESPONDENT**

AND

**MATULANI EARTH DAM SELF HELP GROUP.....1<sup>ST</sup> INTERESTED PARTY**

**MASAKU COUNTY COUNCIL .....2<sup>ND</sup> INTERESTED PARTY**

AND

**MUTUNGA MULANDI.....1<sup>ST</sup> EXPARTE APPLICANT**

**MUTISYA MWOVA.....2<sup>ND</sup> EXPARTE APPLICANT**

**KISILU MULWA.....3<sup>RD</sup> EXPARTE APPLICANT**

**NDULEVE MUSILI.....4<sup>TH</sup> EXPARTE APPLICANT**

**RULING**

1. The application herein dated **21<sup>st</sup> May, 2008** was filed pursuant to the provision of **Order LIII rules 3 and 4** of the **Civil Procedure Rules** and **Section 8 & 9** of the **Law Reform Act**.
2. In the application, the *Exparte* Applicants seek issuance of orders of *certiorari* and *prohibition* directing that the award made by the Chairman Kathonzweni District Lands Disputes Tribunal

- Case No. 50 of 2007 on the 15<sup>th</sup> day of January, 2008 and read to the parties in the Senior Magistrate's Court Case No. 4 of 2008 and all subsequent orders and proceedings be called forth into this court for purposes of being quashed and/or set aside for being clearly *null* and *void ab initio* and *ultra vires*.
3. The application is based on the grounds that the *ex parte* applicants are registered owners of Plot Parcel Numbers **129, 138, 136** and **134 Muusini/Kathonzweni**. They share a common boundary and they dug a dam in the 1960's which they use. A group of people calling themselves **Matulani Earth Dam Self Help Group** sought registration of the said dam and were allocated Plot No. 135 without the knowledge of the applicants. Being aggrieved by the registration they filed a claim in the Tribunal (*tribunal Case No. 8 of 2006*) where the file disappeared. With leave of the tribunal another claim was instituted.
  4. The *ex parte* applicants were however aggrieved by the decision of the Tribunal which they fault on grounds that it lacked jurisdiction since the land in issue was registered under statute; the chairman was biased; the matter was subjudice and the decision was null and void for being *ultra vires*.
  5. The 2<sup>nd</sup> *ex parte* applicant having been authorized by his *co-ex parte* applicants deponed that having given out portions of the land the dam remained privately owned. However, they later discovered that the dam had been alienated by the Masaku County Council and that they had taken bigger portions than what they (*ex parte applicants*) had surrendered, and that the 1<sup>st</sup> interested party being not a registered owner has no *locus standi*.
  6. In a response thereto the 2<sup>nd</sup> Interested Party deponed that the application is bad in law and should be dismissed. The land comprising the dam is its property as it holds it in trust for local people, having been registered in its name after adjudication.
  7. Rival submissions by the *ex parte* applicants and the Interested Party have been considered.
  8. It was submitted by interested party that the application should fail for failure to comply with the laid down rules. The application in their opinion contravened the requirements of **Order LIII of the Civil Procedures Rules**. This argument arises from the fact that the statement of facts and verifying affidavit attached to the substantive motion which is dated **21<sup>st</sup> May 2008** have a different date as those filed at the stage of seeking leave which are dated the **11<sup>th</sup> day of 2008**.
  9. Further, they argue that, the subsequent documents (the statement of facts and verifying affidavits) were filed without leave of court being sought as required by the law.
  10. A perusal of both statements of facts reveals that the one dated **21<sup>st</sup> May, 2008** has an additional fact "iii" which states:-

***"The said Matulani Earth Dam had no locus standi in the matter as it is not shown as the registered owners and the award is therefore a nullity."***

That particular fact does not appear in the previous statement of facts that was relied upon when they sought leave of the court to institute the proceedings. In order to tell whether or not the position taken by the applicant is detrimental to the matter we must address the intention of judicial proceedings.

11. It has been held severally that judicial proceedings are considered to emanate from a special jurisdiction that is neither civil nor criminal. This jurisdiction is donated by **Section 8 and 9 of the Land Reform Act**. Consequently the laid down procedure must be followed. Failure to do so renders proceedings fatally defective.
12. In the case of **Kenya National Chamber of Commerce & County Council of Makueni versus County Council of Makueni [2003] eKLR** the court held that:

***"I have taken an overview picture of the complaints raised by the respondents and considered them in the light of the provisions of Order 53 of the CPR and the findings of this court is that though the applicants had genuine grievances their application cannot pass the test set in Order 53 of the Civil Procedure Rules. It is correctly submitted by counsel for the respondents that the procedure under Order 53 of the CPR and the Law Reform Act is unique in itself. It is also special and other provisions of the Civil Procedure Act cannot be imported into it. I do agree that there are errors noted in the proceedings"***

*before this court which go to the root of the entire application destroying it in the process. I also agree with the submissions of the respondent's counsel that there are no safety valves in order 53 of the CPR."*

13. In another case of *Republic versus Chairman, Kajiado Central Land Tribunal & 2 Others Ex parte Timaiyo Kirtari [2012] eKLR*, Justice Makhandia (as he then was) held thus:

*"This being a special jurisdiction and with a mandatory procedure, failure to comply with mandatory procedural law is not a technicality that can be cured under either the constitution and/or "the double O" principle. In any event the "the double O" principle would apply to civil proceedings. However, as we have already demonstrated, Judicial Review Proceedings do not fall in that category."*

14. It is apparent that **Order LIII** of the **Civil Procedure Rules** requires the applicant to seek leave. At the point of seeking leave the applicant demonstrates based on documents attached the foundation of his case. Once these documents are considered by the judge, they must form part of the documents in support of the substantive motion. Tampering with the document by adding facts like in the instant case becomes an illegality which cannot be overlooked by this court. This becomes detrimental to the matter.
15. In the application it has been stated that the award was adopted by the Senior Resident Magistrate. No such evidence was exhibited. The law requires adoption of the award of the tribunal. This is stipulated by the Land Disputes Tribunal Act (*now repealed*) **Section 7** thereof provides:-

*"(1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.*

*2) 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"*

16. It is a requirement that the Magistrate's Court adopts the award and proceeds to enter judgment in accordance to the decision of the tribunal. The orders of *certiorari* sought would be directed to a public body or an entity who is a party to the proceedings for compliance. **Khamoni, J** was faced with a similar situation. Having considered it he addressed it in the case of *Wamwea versus Catholic Diocese of Muranga Registered Trustees [2003] KLR 389* – thus:-

*"The decision of the Appeals Committee adopted by the magistrate's court in accordance with the provisions of Land Disputes Tribunal Act becomes a decision of the Magistrate's Court and cease to exist as a separate entity challengeable alone".*

17. Without evidence of the Order of the court, it cannot be assumed that the award was read by the Senior Resident Magistrate's Court and adopted. Secondly, failure to enjoin the Senior Resident Magistrate's Court as a party was detrimental and for that matter un-procedural as orders of *certiorari* cannot be issued against a party not in the suit.
18. Looking at the facts as presented the dispute between the parties is ownership of the dam. The jurisdiction of the Land Disputes Tribunal is clear. (*see Section 3(1) of the Land Disputes Tribunal Act (now repealed)*). Ownership of the land with title does not fall within the ambit of the respondent. This was a preserve of the High Court as was stated in the case of *Dominica Wamuyu Kihu versus Johana Ndura Wakaritu [2012] eKLR*, the Court of Appeal held thus;

*"This provision clearly puts disputes relating to ownership of title to land beyond the Tribunals' Jurisdiction. In this case the dispute is on ownership of Title No. Magutu/Gathehu/53. That was a dispute outside the jurisdiction of the Tribunal. The High Court Judge was therefore right in holding that both the Tribunal and the Appeals Committee had no jurisdiction to entertain the dispute."*

19. That notwithstanding, as aforesaid failure to follow the mandatory provisions of the law was detrimental to the applicant's case. In the premises, it is dismissed with costs to the Respondent/Interested parties. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 12<sup>TH</sup> day of JUNE, 2014.**

**L.N. MUTENDE**

**JUDGE**