



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC PETITION NO.268 OF 2010

ALICE WAITHIRA KABIRU
PLAINTIFF

VERSUS

THE KAJIADO DISTRICT LAND DISPUTE TRIBUNAL 1ST
DEFENDANT

RULING

1. The matter is for a motion dated 17.2.2011 seeking orders:
 - a. An order of certiorari do issue to remove into this Honourable Court and quash the order of the Kajiado District Land Disputes Tribunal, adopted by the Senior Resident Magistrate Court, Kajiado and the Decision of the Provincial Lands Disputes Appeals Tribunal, Rift Valley purportedly dated 16th March, 2010.
 - b. Costs of this application be in the cause.

The motion is supported by the grounds on the motion namely:

1. The Applicant has compelling case for relief in the form of the prerogative order set out above and on the grounds more particularly set out in the Statement filed herewith and the facts set out in the accompanying Affidavit of Alice Waithira Kabiru.
 2. Unless this Honourable court intervenes in the manner prayed for in this motion, the Applicant stands to suffer immense prejudice as the named interested party, will have and enjoy the benefit of manifestly unlawful actions and decisions of the Respondents in this matter to the detriment of the Applicant as detailed in the Statement and the Verifying Affidavit.
 3. It is just and equitable to grant relief sought to the Applicant.
2. The motion is grounded on the verifying affidavit sworn by Alice Wamaitha Kabiru sworn on 17.2.2011 and the statement of facts dated 17.2.2011. The Application is opposed by the interested party who has filed replying affidavit sworn on 10.6.2011. The Respondents were served but they have not filed any reply to the motion. The party consented to dispose the motion by way of written submissions which they filed and exchanged.
3. The Applicant case is that she is the registered owner of KajiadoOlchor Onyore/1859 having bought the same from Ernest Parmut Ole Siya. She got title deed of Kajiado/Olchoro Onyore/1859 measuring 2.833 Ha on 31.8.1987. She beaconed the parcel of land and started utilizing the same until 2007 when

she realized that the beacons bordering her property and that of No.1858 had been uprooted according to her by interested party.

4. She lodged claim with Kajiado Land District Tribunal vide No. DLT18/1990 which was heard and award made. She was dissatisfied with the award and thus lodged appeal vide Land Dispute Appeal No.18/2009 upon filing the appeal, the Applicant was advised that the Appeal Tribunal would be out of session for about 8 months and was also told to call a Mr. Maritim in order to be advised on the hearing date of the appeal.

5. She was advised upon calling that the appeal was to be heard on 27.10.09. On the said date the appeal did not proceed as the interested party never attended. The matter was adjourned on various dates due to absence of the interested party. The appeal was later dismissed by the Appeal Tribunal on the grounds that she failed to attend and prosecute it on 13.10.09, 19.10.09 and 28.1.2010, yet in all the summons sent to her non had these dates. She avers that she was condemned unheard contrary to rules of natural justice.

6. The Interested party's case is that the Applicant was aware that appeal was coming for hearing specifically on 13.10.09, 19.1.09, 20.1.2010 and 20.4.2011. The interested party contends that in all the hearings the interested party did attend with copies of summons signed on 10.11.09 by Corporal M. Silas within Muthurwa location in which letter was forwarded to Mr. D. Kasimu (son) on behalf of the exparte Applicant. The Appeal was dismissed for non-attendance.

7. The motion dated 17.2.2011 seeks to quash via certiorari orders the Kajiado District LDT award dated 4.9.08 and the appeals award and/or decision dated 16.3.2010. The Chamber summons for leave orders of certiorari was filed on 3.12.2010 over 2 years from the date of the verdict of LDT Kajiado and over 8 months from the date of the verdict of the Appeal Tribunal. The Applicant opted to move the court to challenge the LDT award by way of an appeal however the appeal tribunal never heard her on merit.

8. In a decision dated 16.3.2010 the tribunal state that the hearing dates ware fixed on 13.20.09, 19.11.09, 28.1.2010 and 20.4.2010. They alleged that the Applicant never attended and thus proceeded ex parte. There is no indication as to whether the date of 16.11.2010 was communicated to her yet it is the day apparently the matter was heard and verdict made. Even if it be only day of the verdict not of hearing same was not communicated to the Applicant. Further there is no evidence nor did Appeal Tribunal allude to any of service of the Applicants in all the other mentioned dates.

9. Rule 11 of the LAND DIPUSTES TRIBUNAL (FORMS & PROCEDURE RULES, 1993 stipulates that:

“The clerk shall prepare a hearing notice..... AND shall effect service to both Claimant and the Objector in the manner provided by the Rules made under the Civil Procedure Act”.

10. Under **Order 6 Rule 6(i) Civil Procedure Rules 2010: documents may either be delivered by hand or by licensed courier provider approved by the court to the address of service or may be posted to it. (ii) Where delivery is disputed a certificate of posting or other evidence of delivery shall be filed.**

11. There is no evidence of the service of the Applicant with hearing notice as required by law cited above and thus the matter proceeded without according her a hearing contrary to Rules on Natural Justice. In **R. –VS MUNICIPAL COUNCIL OF NAKURU EX-PARTE SAMUEL THUO KONGEA KOOME J** held that:

“Judicial review applications, the court is not concerned with the merits of the decisions but with the due process”.

This position was also held in **ONYANGNO VS. AG 1987 KLR. Article 25(c) and 50(1) of the Constitution of Kenya** entrenches due process of law. The Applicant was denied due process of law without any legal justification. This is a breach of her fundamental right to fair trial entrenched in Article 50(1) Constitution of Kenya.

12. The court therefore sets aside the decision of 16.3.2010 and reinstates appeal herein. Under the practice direction issued by the Chief Justice on all matters pending before Land Appeals Tribunal were to be heard by the High Court.

Legal Notice No.1617 of 9.2.2012 paragraph 3 had directed that proceedings pending before provincial land appeals committees as at the date of enactment of land court Act 22011 (which repealed LDT Act) shall be moved in the nearest High Court for hearing and determination. Further the provisions of ELC Act empowers court as follows:

“Section 13(2) ELC Act states that in exercise of its jurisdiction under Article 162 (2) (a), (b) of the Constitution, the court shall have power to make any order and grant any relief as the court deems fit and just...”

The court invokes the provisions of the same directions notes, Article 159 2(a) (b) (d) (e) Constitution of Kenya and Section 1A and 1B of Caps 21 and makes the following orders:

1. **The court quashes decision of 16.3.2010 but declines to quash award of 4.9.2008.**
2. **The Applicant Appeal No. Land Dispute Appeal No.18 of 2009 dated 25.3.09 shall be re-numbered as Appeal of the ELC court, subject to payment of requisite fees within 14 days.**
3. **The appeal will be heard by the ELC Court on merit after parties prepare records within a period of 30 days.**
4. **Direction will be given on 2.2.2015. All parties be served.**
5. **Costs in the main appeal for matters herein.**

Signed and Delivered at Machakos this 5th day of December, 2014.

CHARLES KARIUKI

JUDGE