



REPUBLIC OF KENYA

High Court at Machakos

Civil Miscellaneous Application 46 of 2012

MERDICK NENKALASH.....APPLICANT

VERSUS

KAJIADO LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE,

KAJIADO.....2ND RESPONDENT

AND

JUSTUS NENKALASH.....INTERESTED PARTY

JUDGMENT

Leave was granted by the **Hon. Justice Dulu** on the 7th March, 2012 to **Merdick Nenkash** who described herself as the applicant herein pursuant to Order 53 Rules 1(2) of the Civil Procedure Rules and Part VI of the Law Reform Act to apply for

(i) An order of *certiorari* to remove proceedings and ruling of the 1st Respondent (*Kajiado Land Dispute Tribunal*) in Kajiado Land Dispute Tribunal Case No. 679/08/2011 for purposes of being quashed.

(ii) An order of *certiorari* to remove proceedings, ruling and order of the 2nd Respondent (Senior Resident Magistrate), Kajiado) in SRM Dispute Case No. 3 of 2012 to this court for purposes of being quashed.

(iii) An order for *prohibition* restraining the respondents by themselves, their agents, employees, servants from implementing or interfering with the said orders and rulings.

This was the commencement of the Judicial Review Proceedings herein.

The application is based on grounds that the order/ruling of the Kajiado Land Disputes Tribunal was ultra vires/ or in excess of its jurisdiction. It was based on Maasai Customary Law and was in breach of natural justice. The irregular and or unlawful order would make the applicant lose her land. This would interfere with her right of ownership of her land.

The respondents did not respond to the application.

Justus Nenkash an Interested Party opposed the application. He averred that parcel No. Kajiado/Kaputiei/South/838 originally part of Buko Group Ranch belonged to his late father Nenkash Lesire. The applicant, his stepmother in collusion with officials of Buko Ranch Group caused parcel No. Kajiado/Kaputiei/South/838 to be registered in her name hence disinheriting her co-wives together with their children.

He called upon the court to ensure justice is done in the circumstances. He alluded to the fact that the Land Disputes Tribunal had been repealed but the Environment and Land Court Act gave the Court wide discretion to tender substantive justice.

Counsel for **Merdick Nenkash** who ideally should have been an *ex parte* applicant filed submissions. He stated that the said person being the registered and absolute owner of parcel No. Kajiado/Kaputiei-South/838 possessed all rights pertaining to the land. Regarding the ruling having been pursuant to customary law, he argued that statutory law supersedes customary law. Therefore the ruling/order made by the 1st Respondent was in breach of natural justice and unlawful as the tribunal exceeded its jurisdiction.

Counsel for the Interested Party on the other hand argued that the claim by the interested party was within the jurisdiction of the tribunal as he was entitled to occupy and work on land parcel No. Kajiado/Kaputiei-South/838. She urged the court to uphold the decision of the Land Disputes Tribunal.

This matter having come up before the **Hon. Justice Dulu** on the 7th March, 2012 being alive to the High Court's unlimited original jurisdiction in civil matters, he granted orders sought by the applicant (*Merdick Nenkash*). Thereafter the matter came up before the Hon. Judge on 25/4/2012 when parties agreed to canvass the application by way of written submissions. They were duly filed. On the 16/10/2012 the Hon. Judge directed that the matter be mentioned on 29th November, 2012 with a view of fixing a date for ruling. Following his transfer from this station, I took over the matter and set the date for ruling. At that point the matter was part-heard. Ideally, with the enactment of the Environment and Land Court Act, 2011 the court that ought to have handled the matter would have been the Environment and Land court a fact alluded to in submissions of counsels.

However pursuant to the practice directions issued by the Hon. Chief Justice in respect of transitional provisions (*vide Kenya Gazette Notice No. 16268*) this court was seized of jurisdiction to write the ruling.

In the substantive motion dated 14th March, 2012 the applicant is indicated as **Merdick Nenkash**. Prerogative orders being sought in the instant case just like in any other Judicial Review matter are used by the courts to review decisions of public bodies. The State has the mandate of ensuring that the decisions made by public bodies are lawful. It is for this reason that State must act on behalf of the party who is dissatisfied by an order made by a public body.

In this case **Merdick Nenkash** appeared before the Land Disputes Tribunal. She took part in the proceedings. The decision reached was not favourable to her, therefore she moved to court seeking leave to apply for a prerogative order. At the point of seeking leave she was in order to refer to herself as an Applicant.

However, at the time of filing the substantive application she ought to have indicated the name of the party who was deemed to have brought the application on her behalf, namely the State.

This position was stated in the case of **Farmers Bus Service vs the Transport Licensing Appeals Tribunal [1959] E.A. 779**. The court proceeded to illustrate the format to be used when drawing up such an application. The applicant must be the Republic.

The position was emphasized by **Justice Ringera** (*as he was then*) in the case of **Welamondi vs The Chairman, Electoral Commission of Kenya. [2002] I KLR, 486** where he stated that orders of *certiorari*, *mandamus* and *prohibition* must issue in the name of the Republic and applications made in that regard must be made in the name of the Republic at the instance of the person affected by the omission or action to issue.

It has been submitted that the spirit of Land and Environment Court Act frees the court of procedural requirements when dispensing justice in disputes relating to land.

This is a Judicial Review matter whereby it is the State that is to act to rectify the irregularity made that perpetrates the injustice the *ex parte* applicant complains of. It is therefore a requirement that the State be made an Applicant. Failure to do so means there will be nobody to supervise the order granted.

In the premises, without going into the merits of the application I find it being incompetent and misconceived. The motion is therefore struck out with costs to the Interested Party.

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of MAY 2013.

L.N. MUTENDE

JUDGE