



**REPUBLIC OF KENYA**  
**IN THE HIGH OF KENYA AT MOMBASA**

**Miscellaneous Application 493 of 2009**

**IN THE MATTER OF: AN APPLICATION BY ARTS 680**

**LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE PROCEEDINGS OF THE MSAMBWENI LAND DISPUTE  
 TRIBUNAL**

**AND**

**THE PRINCIPAL MAGISTRATE KWALE**

**AND**

**IN THE MATTER OF: THE LAND DISPUTES TRIBUNAL ACT**

**BETWEEN**

**REPUBLIC OF KENYA.....APPLICANT**

**V E R S U S**

**1. MSAMBWENI LAND DISPUTE TRIBUNAL.....1<sup>ST</sup>  
 RESPONDENT**

**2. MOHAMMED HAMISI MWASENGEZA.....2<sup>ND</sup> INTERESTED  
 PARTY**

**3. JUMA MWINI MBATA.....3<sup>RD</sup> INTERESTED  
 PARTY**

**4. SAIDI HAMISI MWASENGEZA.....4<sup>TH</sup> INTERESTED  
 PARTY**

**JUDGEMENT**

1) On 18<sup>th</sup> October 2009 this Court granted leave to the Applicant to commence these Judicial Review proceedings which seeks-

1. ***That an order of certiorari be issued to remove into the High Court and quash the proceedings and award of the Msambweni Land Dispute Tribunal pertaining to L.R. No. KWALE/GALU KINONDO/53.***
2. ***That an order of certiorari be issued to remove into the High Court and quash the proceedings and decision of the Principal Magistrate Kwale in LAND CASE No. 35 of 2009 touching on L.R. No. Kwale/Galu/Kinondo/53.***
3. ***That an order of prohibition do issue to prohibit the District Land Registrar, Kwale from canceling and/or nullifying the Title Deed in respect of L.R. No. KWALE/GALU KINONDO/53 registered in favour of ARTS 680 LIMITED AND further prohibiting the said District Land Registrar from registering documents of transfer in respect of L.R. No. KWALE/GALU KINONDO/53 pursuant to the Msambweni Land Dispute Tribunal's award and the subsequent decision of the Principal Magistrate Kwale in Land Case No. 35 of 2009."***

2) The facts to the land dispute that gave rise hereto are simple. Arts 680 Limited (the Exparte Applicant) is the registered owner of all that piece of land known and described as Kwale/Galu/Kinondo/53. It measures 2.6 hectares or thereabouts. From the proceedings before the Land Dispute Tribunal at Msambweni there was evidence that the Applicant bought this land from East and Central African Hides and Skins Ltd.

3) Following a claim lodged by the Interested Party, the Tribunal heard and determined the claim on 20<sup>th</sup> August 2009 and declared as follows-

***"In the (sic) view of the above, the Land Dispute Tribunal recommends that the District Land Registrar, Kwale should nullify the Title Deed of Plot No. Kwale/Galu Kinondo/53 currently held by Arts 680 Ltd and revert back to the heirs of Hamisi Athuman Mwasengeza (Deceased) namely-***

- (1) ***ALI HAMISI ATHUMAN***
- (2) ***MOHAMMED HAMISI MWASENGEZA***
- (3) ***JUMA MWINYI MBATA***
- (4) ***SAIDI HAMISI MWASENGEZA***

***on behalf of other family members. The Director/Directors of Arts 680 Ltd can file a suit in a Court of law seeking their refund of their money from the East and Central African Hides and Skins Ltd.***

4) Soon thereafter, on 29<sup>th</sup> September 2009, the Principal Magistrate sitting at Kwale adopted the award of the Tribunal as a judgement of Court. It is that award and adoption that are the subject of these proceedings.

5) It is said on behalf of the applicant that-

- (a) ***The Tribunal lacked jurisdiction to order cancellation of a duly issued Title Deed.***
- (b) ***The Claimants lacked locus standi to institute the claim on behalf of a deceased person without the necessary letters of administration.***
- (c) ***The Applicant was never afforded a chance to present its case before the Tribunal as well as before the Kwale Principal Magistrates Court.***

6) There was no response from the Respondents but the Interested Parties filed a replying affidavit through Mohamed Hamisi Mwasengeza the 2<sup>nd</sup> Interested Party herein raising the following issues-

- (a) That the application for leave was incompetent for not being accompanied by an affidavit verifying the facts relied on and that no notice of the application was given to the Registrar.
- (b) That the Notice of Motion itself was incompetent as a copy of the proceedings under attack were not verified and that the affidavit is not sworn with the authority of the Applicant.
- (c) That both the application for leave and the application itself are not properly instituted.

7) I think it would be appropriate to start with considering the competence or otherwise of the proceedings before Court. When seeking leave of Court, the Applicant sought and obtained permission of the Court to dispense with the service of notice of the application upon the Registrar due to the urgency of the matter. Prayer 2 of the application for leave dated 17<sup>th</sup> October 2009 made this specific request-

***“That service of Notice of this application upon the Registrar be dispensed with due to the urgency surrounding the matter.”***

That request was granted by Ibrahim, J (as he then was) when he said-

***“I do hereby grant prayers 1, 2, 3 and 4 ...”***

The request was made and granted within the provisions of Order LIII Rule 1 of the previous edition of the Civil Procedure Rules which reads-

***“The Applicant shall give notice of the application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the statements and affidavits:***

***Provided the Court may extend this period or excuse the failure to file the notice of the application for good cause shown.” (emphasis mine)***

The Judge, in his discretion, excused the failure to file the notice. That would be the end of that matter as the order of the Judge was never challenged.

8) In support of that application Oliver Seki swore an affidavit on 17<sup>th</sup> October 2009 verifying the statement of facts. It seems therefore that the criticism on the competence of the application for leave are not well founded.

9) What about the Notice of Motion itself. The Motion is supported by an affidavit of OLIVER SEKI sworn on 2<sup>nd</sup> November 2009 in which he states as follows in the opening paragraphs-

***“THAT I am a Director of the Applicant company duly conversant with the issue in dispute herein and duly authorized by the Applicant Company’s board to swear this affidavit on its behalf and therefore competent to swear the same.” (emphasis mine)***

Mr. Seki stated that he had authority to make the affidavit on behalf of the Applicants Company. That in my view was enough. There is no requirement that he displays a copy of the authority.

10) In respect to the proceedings which were filed with the Motion, I must find that indeed they were not verified as required by the Order LIII Rule 7 (1) which reads-

***7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition***

***or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court.***

Yet this failure cannot render the application incompetent as it is not the case of the Interested Parties that the proceedings and award attached to the application are not a true copy of the proceedings and decision sought to be impugned by the application for Judicial Review. In any event no prejudice is said to have followed this omission. To uphold that technical objection would be to give undue regard to procedural technicalities. That is not how Article 159(2) (d) of The Constitution instructs the Courts to exercise judicial authority.

11) On the substance, it is evident that the Tribunal overstepped the mandate given to it by Section 3(1) of The Land Dispute Tribunal Act No. 18 of 1990 (now repealed). That Section reads-

***“3(1) Subject to this Act, all cases of a civil nature involving a dispute as to-***

***(a) The division of, or the determination of boundaries to land, including land held in common;***

***(b) A claim to occupy or work land; or***

***(c) Trespass to land,***

***shall be heard and determined by a Tribunal established under Section 4.”***

12) In entertaining a dispute involving ownership to the land and proceeding to order the cancellation and nullification of the Exparte Applicants Title the Tribunal was acting without jurisdiction. That the Tribunal does not have jurisdiction to deal with a dispute involving ownership of land is such a well established position that it would be needless to cite any of the many Judicial decisions in support. The Tribunal acted ultra vires and its proceedings and order are amenable to Judicial Review.

13) I therefore grant all the prayers sought on the Notice of Motion dated 2<sup>nd</sup> November 2009 with costs.

***Dated and delivered at Mombasa this 11<sup>th</sup> day of September, 2012.***

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Adagi for the Applicant**

**Eredi for the Respondent - absent**

**Timamy for Interested Parties - absent**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**