



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISCELLANEOUS APPLICATION 139 OF 2009**

REPUBLIC ..... APPLICANT

VERSUS

1. MACHAKOS DISTRICT LAND DISPUTES TRIBUNAL
  2. MACHAKOS CHIEF MAGISTRATE'S COURT
  3. MACHAKOS DISTRICT LAND REGISTRAR..... RESPONDENTS
- TABITHA LOKO.....INTERESTED PARTY
- EX PARTE*.....MWIKALI MUEKE

**J U D G M E N T**

1. On 14<sup>th</sup> May 2009 the *Ex Parte* Applicant herein obtained leave to apply for judicial review in respect to an award by a Land Disputes Tribunal given on 12<sup>th</sup> August 2008 which was adopted as a judgment of the court on 19<sup>th</sup> March 2009.

2. The substantive application was filed on 19<sup>th</sup> May 2009 by **notice of motion of the same date**. Four main orders were sought as follows -

- (i) An order of **certiorari** to quash the judgment by the Chief Magistrate, Machakos entered on 19<sup>th</sup> March 2009 by which the decision of the Machakos Land Disputes Tribunal in its case No. 37 of 2008 was adopted.
- (ii) An order of **certiorari** to quash the subsequent decree and orders of the said court issued pursuant to the said judgment.
- (iii) An order of **prohibition** to prohibit the Respondents and the Interested Party from “applying, enforcing, executing or in any manner implementing the decision of the Tribunal or the judgment of the lower court that adopted the decision of the Tribunal in Machakos CM Miscellaneous Civil Case NO. 122 of 2008.
- (iv) An order of **prohibition** to restrain the District Land Registrar, Machakos from registering any interest in the suit land or in any way altering its register pursuant to the said decision of the Tribunal and the judgment that adopted it.

3. The application was filed together with the statement of facts dated 27<sup>th</sup> April 2009 and verifying affidavit filed with the chamber summons for leave. The facts upon which the reliefs are sought are -

(i) That a dispute arose between the *Ex Parte* Applicant and the Interested Party as to the ownership of the suit land, L.R. No. Kangundo/Kangundo/789 which was part of the estate of the deceased father of the *Ex Parte* Applicant.

(ii) That as a consequence the dispute the *Ex Parte* Applicant filed Case No. 37 of 2008 before the Machakos Land Disputes Tribunal.

(iii) That the Tribunal gave its award on 12<sup>th</sup> August 2008, which award was in favour of the Interested Party.

(iv) That on 9<sup>th</sup> March 2009 the said award was adopted as a judgment of the court vide Machakos CM Misc. Civil Application No. 122 of 2008, and decree issued on 19<sup>th</sup> March 2009.

(v) That the estate of the *Ex Parte* Applicant's deceased father had not been duly administered in accordance with the law.

(vi) That the Tribunal acted *ultra vires* its powers as it did not have jurisdiction to deal with the dispute presented before it.

(vii) That the award of the Tribunal and the subsequent order adopting it as a judgment of the court were null and void.

4. I have considered the submissions of the learned counsels made on behalf of the *Ex Parte* Applicant and the Respondents. I have also considered the submission made by the Interested Party who was unrepresented.

5. The entire proceedings of the Tribunal are annexed to the verifying affidavit filed with the application for leave. It is clear from these proceedings and the award of the Tribunal that the dispute between the *Ex Parte* Applicant and the Interested Party was not over title to land but over rights to occupy and work land they held in common and which had belonged to their deceased father.

6. The Tribunal's specific award was as follows-

**“(i) Loko (Interested Party) will uphold the 5 benches and inherit the homestead of the late Mary.**

**(ii) Muskali (*Ex Parte* Applicant) should move to her 4 benches given legally and in Akamba tradition by her mother Ndawa since she is not married.**

**(iii) Daudi Mueke should stay with her mother Tabitha Koko (Interested Party).**

**(v) Anybody not satisfied has the right to appear after the confirmation of judgment by the Chief Magistrate, Machakos within 30 days.”**

7. It is to be noted that it was the *Ex Parte* Applicant herself who took the dispute before the Tribunal, not the Interested Party. The dispute, as is clear from the proceedings of the Tribunal, was: which party should occupy and work which portions (“benches”) of the suit land? The dispute was not who should be registered as proprietor of the suit land.

8. The dispute was thus within the jurisdiction of the Tribunal as set out in **section 3(1) of the Land Disputes Tribunals Act, No. 18 of 1990**, which provided -

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

- (a) the decision 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.”**

9. It is also to be noted that the *Ex Parte* Applicant has not challenged the award of the Tribunal. What she has done in the present application is to challenge the subsequent adoption of the award as a judgment of the court. The reason for this is quite mischievous and will become obvious if you consider the following facts -

- (i) The decision of the Tribunal was given on 12<sup>th</sup> August 2008.
- (ii) The award was adopted as a judgment of the Chief Magistrate’s Court on 19<sup>th</sup> March 2009.
- (iii) Leave to apply for judicial review was sought by chamber summons filed on 27<sup>th</sup> April 2009 and granted on 14<sup>th</sup> May 2009.

10. The award of the Tribunal having being made on 12<sup>th</sup> August 2008, any leave to apply to quash the same would have had to be applied for within six months - that is on or before 11<sup>th</sup> February 2009. See **Order LIII, rule 2** of the then Civil Procedure Rules. Leave herein was sought on 27<sup>th</sup> April 2009 way out of time. That is why the *Ex parte* Applicant did not challenge the award of the Tribunal as such.

11. As long as the award of the Tribunal remains in place, the subsequent adoption of it as a judgment of the court cannot be legitimately challenged. This is because the role of the Magistrate’s Court was merely to adopt the award of the Tribunal. That court did not have jurisdiction to refuse to adopt the award. See **section 7** of Act No. 18 of 1990 which provided -

**“7. (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.”**

11. In the circumstances therefore I find no merit in the notice of motion dated 19<sup>th</sup> May 2009. The same is dismissed with costs to the Interested Party. It is so ordered.

12. The delay in preparation of this judgment is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF SEPTEMBER 2012**

**H. P. G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....

**JUDGE**