



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION 272 OF 2006**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDER OF  
JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF KITUI DISTRICT LAND DISPUTES TRIBUNAL LAND CASE NO. 01  
OF 2005**

**AND**

**IN THE MATTER OF KITUI RESIDENT MAGISTRATE'S LAND CASE NO. 42 OF 2006**

**AND**

**IN THE MATTER OF INTERPRATION AND APPLICATION OF THE LAND DISPUTES  
TRIBUNAL ACT NO. 18 OF 1990 AND THE PROCEDURES AND RULES MADE PURSUANT  
THERE TO**

**REPUBLIC ..... APPLICANT**

**VERSUS**

- 1. KITUI DISTRICT LAND DISPUTES TRIBUNAL**
- 2. KITUI SENIOR RESIDENT MAGISTRATE**
- 3. THE ATTORNEY GENERAL ..... RESPONDENT**

**AND**

- 4. PETER MUSYOKA MWANZIA ..... INTERESTED PARTY**

**EXPARTE**

- 1. MBITI KASANGO**
- 2. SILA KASANGO**

**RULING**

Before me is a Notice of Motion dated 21<sup>st</sup> May 2008 filed under Order LIII Rules 3 & 4 of the Civil Procedure Rules. Leave to file the said Notice of Motion was granted by court (**Lenaola J**) on 21<sup>st</sup> May 2008. The prayers in the application are that:

- 1. This Honourable Court be pleased to issue order for judicial review directing that the decision/award of Kitui Land Disputes Tribunal dated 10/7/2006 and subsequent order of the Kitui Resident Magistrate adopting the same as judgment of the court dated 28/9/2006 be declared null and void and the same be removed and brought forth to this court for purposes of being granted (sic) and set aside.**
- 2. Costs of this application be provided for.**

The application is against the respondents who are Kitui District Land Disputes Tribunal, Kitui Senior Resident Magistrate, and the Attorney General. **Peter Musyoka Mwanzia** is named as the Interested Party.

The application is opposed by the respondents. The Attorney- General filed grounds of opposition in the following terms:-

- 1. The application is misconceived, bad in law and an abuse of the court process.**
- 2. The application is incompetent and incurably defective.**
- 3. The application does not comply with the Law Reform Act Cap 26 and Civil Procedure Rules Cap 21 Order LIII rule 1, 2, 3 and 4.**
- 4. The award/decision being sought to be declared null and void by way of judicial review is dated 10<sup>th</sup> July 2006 and the application is dated 27<sup>th</sup> February 2008.**
- 5. The application has been amended and such amendments have not been provided for under Order LIII of the Civil Procedure Rules Cap 21.**
- 6. The application should be dismissed with costs.**

The Interested Party **Peter Musyoka Mwanzia** opposed the application by filing a replying affidavit sworn on 7<sup>th</sup> October 2008. It was deponed that the application was an afterthought, frivolous, vexatious and an abuse of court process; that he bought the parcel of land in dispute from his grandfather the late **Mbithi Sumbu** in 1989 at a purchase price of Kshs.3,200/=; that during land adjudication it was not surveyed and the applicants who were his cousins began trespassing on the same and claiming it belonged to them; that he lodged a case before the elders against **Kasango Mbithi** and the clan committee vide letter dated 16/8/1989 decided that the land belonged to him; that despite the said decision the two *ex-parte* applicants began cutting trees on the parcel of land and the Interested Party made a report to the Divisional Officer Matinyani and later to the Kitui Central Division Officer; that thereafter, he filed a case with the Land Disputes Tribunal; and an award was pronounced on 10/7/2006; that the applicants were granted a right to cross-examine witnesses but opted to leave the venue; that two of the applicant's brothers **Mukungu Kasango** and **Kinyaaika Kasango** testified in support of his case; that after the award was adopted by the court as a judgment, mutation was done and the parcel in dispute was now **Matinyani/Kalindilo/1065**; that the first award was rejected by the court because it was heard by the Land Disputes Tribunal Matinyani Division instead of Kitui District Land Disputes Tribunal.

The applicant through counsel filed written submissions on 10/9/2009 and other submissions on 30/11/2011. The Interested Party filed submissions on 6/1/12. The counsel who appeared on the hearing day, Mr Kilonzi for applicants and Mr Sila for Interested Party relied on written submissions filed. I have perused the said submissions.

Having considered the matter, documents filed and submissions, I am of the view that the issues for consideration are two. Firstly, whether the Notice of Motion is incompetent. Secondly, whether the Tribunal had jurisdiction.

On the first issue as to whether the application is incompetent, it was argued by the Interested Party that the application for leave was filed after the lapse of six (6) months from the date on which the complaint arose. Secondly, that there was a purported amendment to the Chamber Summons for leave, which is not allowed in law.

It is not in dispute that the decision of the tribunal being challenged was dated 10/07/2006. It was adopted as an order of the court on 28/09/2006. In my view, the operating date for the computing of six (6) months period of limitation required in applications for orders of *certiorari* was 28/09/2006. Before then the right to institute judicial review proceedings did not accrue. What was there was a right of appeal to the Provincial Appeals Committee. The application for leave therefore, having been dated 14<sup>th</sup> December 2006 and having been filed on 14<sup>th</sup> December 2006, was within the six (6) months limitation period for filing applications for leave to file judicial review proceedings for *certiorari*.

As to whether the Chamber Summons for leave can be amended, no law has been cited which says that there is prohibition against amending the application for leave before leave is granted. Secondly, the amendments made merely inserted a new date of 27<sup>th</sup> February 2008 and also changed the persons to be served. These amendments do not go to the substance of the application.

Thirdly, and most importantly, the judge who granted leave was aware of the amendments. He decided on 12<sup>th</sup> May 2008, to grant not only leave to file judicial review proceedings for *certiorari*, but also to grant stay orders. None of the objecting parties has come to court specifically to apply for setting aside the leave granted or the stay orders. I find no merits in the objection and dismiss the same. In my view the application is competent and properly on record.

Now, did the Tribunal have jurisdiction to grant the orders it granted? The Tribunal's decisions annexed to the supporting affidavit to the Chamber Summons for leave are in two copies. One is headed **Land Dispute Tribunal (Matinyani Division)**. The other is headed **Kitui District Land Disputes Tribunal**. The subject matter is the same. The membership is the same. The first proceedings commenced or were conducted on 30/9/2005. The decision of the Tribunal is as follows:-

- 1. This Tribunal has awarded Mr Peter M Mwanzia the piece of land under dispute.**
- 2. Secondly, this tribunal recommends the respondent Mr M Mbiti Kasango and Mr Sila Kasango to pay the complainant Mr Peter M Mwanzia costs of the same arising since the case started.**
- 3. Dated 11<sup>th</sup> October 2005.**

This is the award that the Interested Party said were rejected by the court, as they were conducted by the **Matinyani Land Disputes Tribunal**.

The second proceedings are dated 1/10/2005. The decision was made on 10/7/2006 and adopted by the subordinate court on 28/09/2006. The decision is as follows:-

- 1. This tribunal has awarded Mr Peter Musyoka Mwanzia piece of land under dispute. We pray the honourable court to order District Land Registrar to give the said land a number or to number it in the name of Mr Peter Musyoka Mwanzia.**
- 2. Secondly, this tribunal recommends the respondent Mr Mbiti Kasango and Mr Sila Kasango to pay the complainant Mr Peter Musyoka Mwanzia cost of the same arising since the case started.**

**3. Respondents have a right to appeal within the period of thirty days (30 days).**

These are the proceedings of the Machakos Land Disputes Tribunal whose decision was adopted by the subordinate court, and the subject of the present judicial review proceedings.

As was held by **Lenaola J** in **Machakos H.C. Misc. Civil Case No. 295 of 2007 R –vs- Machakos District Land Tribunal – Ex Parte Makuyu Mulwa** – the jurisdiction of the Land Disputes Tribunal is donated by Section 3(1) of the Land Disputes Tribunal Act No. 18 of 1990. The tribunal has jurisdiction only with regard to division, determination of boundaries of land; a claim to occupy or work on land; and trespass to land. In purporting to award the land herein in dispute to **Peter Musyoka Mwanzia** and advising the Land Registrar to give the land a number under that name, the tribunal went into determining ownership of the subject land. The Tribunal did not have jurisdiction to do so. The decision is therefore *ultra vires*, null and void. It calls for quashing by this court through *certiorari*.

Consequently, I allow the Notice of Motion dated 21<sup>st</sup> May 2008 and quash the decision of the Kitui Resident Magistrate and the Kitui Land Disputes Tribunal herein through *certiorari*. Costs to the *ex parte* applicants from the Interested Party.

Dated and delivered at Machakos this **8<sup>th</sup>** day of **October** 2012.

.....  
**George Dulu**  
**Judge**

**In the presence of:**

Sila Kasango – *ex parte* applicant present in person

Mbithi Kasango – *ex parte* applicant – absent

Mr S.A. Makau holding brief for Mr Sila for Interested Party present

Peter Mwanzia – Interested Party present

N/A for Attorney General

Nyalo Court Clerk