



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**MISCELLANEOUS CIVIL APPLICATION 41 OF 2006**

**REPUBLIC .....APPLICANT**

**VERSUS**

**1 CHIEF MAGISTRATE MOMBASA**

**2 MSAMBWENI LAND DISPUTES TRIBUNAL**

**3 LAND REGISTRAR, KWALE .....RESPONDENT**

**AND**

**HASSAN ATHMAN MJINGA..... INTERESTED PARTY**

**EX-PARTE APPLICANT ..... AL-JIZA LIMITED**

**RULING**

The substantive matter in this ruling is the motion dated 20<sup>th</sup> march 2006 in which Al-Jiza ltd, the exparte applicant herein is seeking for the following orders intealia:-

1 THAT the exparte applicant be granted judicial review orders of:-

a.Certiorari to remove to this court and to quash the decision of the Chief Magistrate Mombasa dated 15<sup>th</sup> September 2005 in land Case No. 2 of 2005 and to also remove and quash the earlier decision of Msambweni Land Disputes Tribunal dated 28th June 2005 in land Dispute No. 21 of 2005.

b.Mandamus to compel the third respondent to remove the registration of Hassan Athman Mjinga or any transferee of Hassan Athman mjinga as the proprietor of KWALE/GALU KINONDONI/31 and to compel the third respondent to register al-Jiza limited as the proprietor of Title Number KWALE/GALU KINONDONI/31.

2.THAT costs of these proceedings to be to the applicant.

The aforesaid motion is accompanied by a statement of facts and verified by the affidavit of Saleem Esmail. When the motion came up for interpartes hearing Hassan Athman Mjinga, the interested party herein raised a preliminary objection through the firm of Stephen Oddiaga & co. advocates. The preliminary Objection had to be disposed of first.

The preliminary Objection is expressed in the notice dated 30<sup>th</sup> June 2008. It is said that Hassan Athman Mjinga died on 28<sup>th</sup> March 2007 hence the suit has abated by dint of order XXIII of the civil procedure Rules. The exparte applicant strenuously opposed the preliminary objection on the ground that the provisions of the Civil Procedure Act and Rules do not apply.

I have considered the competing arguments put forward for and against the preliminary objection. It would appear that there is no dispute that the interested party passed away on 28/3/2007. By then these proceedings were pending. Basically the substantive motion seeks to have the decision of the Chief magistrate dated 15<sup>th</sup> September 2005 quashed together with the decision of the Msambweni land Dispute tribunal dated 28<sup>th</sup> June 2005 vide land Dispute no. 21 of 2005. It is now said that since the interested party is dead, then the suits have abated. That cannot be true. What the motion seeks to do is to quash a decision already made.

The court of Appeal expressed itself succinctly in the **Commissioner of Lands =Vs= Kunste Hotel Ltd C.A. no. 234 of 1995 [unreported] at page 9** as follows:-

***“But it must be remembered that judicial review is not concerned with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”***

The motion before this court seeks to question how the decision of the Msambweni land Disputes tribunal was reached. The decision was adopted by the chief magistrate’s court. The decision will always remain irrespective as to whether the beneficiary is dead or alive. Nothing will abate as proposed by the learned advocate for the interested party. These proceedings are not brought by or against Hassan Athman Mjinga, deceased. It is incumbent upon the legal representatives of the deceased’s estate to come forward to be heard because at the end of the day the decision arising from these proceedings may affect the deceased’s estate. In fact even where the tribunal or the body which made the decision is no longer in existence, the proceedings will still stand. The position was made clearer by the Court of appeal in **David Mugo T/a Manyatta Auctioners –Vs- R. C.A 265 of 1997 [unreported]** at pg. 7 as follows;-

***“The learned judge held that since the court brokers licensing Board had ceased to exist as a result of repeal of Cap 20, the appellant’s application for certiorari was merely technical and academic. With respect here the judge fell in error of law. Certiorari was sought to quash the board’s decision revoking the appellant’s licence. It [certiorari] was not to keep the Board in continuous existence, where the body or authority against which certiorari is sought has ceased to exist or has become functus officio, but a decision it [body or authority] made is still enforceable, certiorari must issue to quash or nullify that decision, if it is bad”***

In the end and on the basis of the above reasons the preliminary objection is dismissed with costs to the exparte applicant. Let the motion be listed for hearing on priority basis.

**Dated and delivered this 6<sup>th</sup> day of May 2009**

**J. K. SERGON**

**JUDGE**