



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISCELLANEOUS APPLICATION NO. 144 OF 2017

(Formerly Machakos ELC Miscellaneous Application No. 263 of 2011)

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL CASE NO. TC 661/07/2011 AT KAJIADO

AND

IN THE MATTER OF SENIOR RESIDENT MAGISTRATE'S COURT CASE NO. 99 OF 2011

AND

IN THE MATTER OF SECTIONS 45 OF THE LAW OF SUCCESSION CAP 160 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLE 150, 159 & 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER 53 RULE 1(i)

REPUBLIC.....APPLICANT

VERSUS

BENJAMIN MAORA.....1ST RESPONDENT

THE KAJIADO CENTRAL LAND DISPUTE TRIBUNAL....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

PHILIP MAORA.....1ST INTERESTED PARTY

NTOROS MAORA.....2ND INTERESTED PARTY

TIMAYIO MAORA.....3RD INTERESTED PARTY

LASITI MAORA.....4TH INTERESTED PARTY

TAJEU MAORA.....5TH INTERESTED PARTY

RULING

What is before Court for determination is the 1st Respondent's Notice of Preliminary Objection dated the 9th February, 2012 against the application dated the 18th November, 2011 where he seeks the following orders:

1. That the suit be dismissed in limine.
2. That costs be to the 1st Respondent.

It is premised on the grounds that the application as framed is defective, incompetent, frivolous, vexatious, an abuse of the Court process and bad in law as the Applicants' lack locus standi. Further that it is incompetent and the Court lacks jurisdiction unless sitting as a Probate and Administration Court. He contends that the application is actuated by malice, bad faith and is brought mala fides.

The 1st Respondent filed his submissions where he reiterated his arguments and relied on the Constitution, the Civil Procedure Act and the Civil Procedure Rules. He also relied on the following judicial decisions: **Farmers Bus Service Vs Transport Licensing Appeals Tribunal (1959) EA 779; Jotham Mulati Welamondi Vs the Chairman ECK & Others (2002) KLR; the Tribunal on inquiry to investigate the Conduct of Puisne Judge Tom Mbaluto Ex parte Tom Mbaluto (UR) 2009; and Mukisa Biscuit Manufacturing Co. Ltd Vs Westend Distributors Ltd (1969) EA Pp 696 – 701.**

None of the other parties filed their respective submissions.

Analysis and Determination

Upon perusal of the Notice of Preliminary Objection dated the 9th February, 2012 including the submissions filed herein, the issues for determination are:

- Whether the Court lacks jurisdiction to determine the issues of Probate and Administration.
- Whether the suit is incompetent, bad in law and should be dismissed.

Order 53 rule 1 and 2 of the Civil Procedure Rules provides that: **'No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.'**

I note in the application dated the 18th November, 2011 the 1st Respondent seems to be seeking for leave to institute for an order of Prohibition and Certiorari against the decision of the Senior Resident Magistrate in the Land Dispute Tribunal Case No 99 of 2011 arising out of the Kajiado Central Land Dispute Tribunal Case Number 661/07, But I note there is a defect in the Pleading which can be cured with an amendment and I find that it is the 1st Respondent who seeks to rely on technicalities to defeat the instant application. According to section 19(1) of the Environment and Land Court Act it provides that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.

In the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR where Justice Ochieng held that **.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities. '**

In being persuaded with the above cited judicial authority, the Environment and Land Court Act as well as relying on the facts as presented, I decline to allow the Preliminary Objection and direct that the application seeking leave to institute judicial review proceedings be set down for hearing within 21 days from the date hereof, to enable the court determine the same on merit.

Costs will be in the cause.

Dated and delivered this 27th Day of September, 2018.

CHRISTINE OCHIENG

JUDGE