



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC MISC NO. 23 OF 2017**

**MICHAEL KIANGI.....PLAINTIFF**

**VERSUS**

**MAKINDU LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> DEFENDANT**

**BENSON MUTUNGI MWOTO .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Ex-parte Applicant by his notice of motion application expressed to be brought under order 53 rules 3 and 4 of the Civil Procedure Rules sought for an order of prohibition to issue to prevent the Respondents and the interested party from enforcing the Makindu Land Disputes Tribunal dated 21/9/2010 in Tribunal Case no. 1 of 2010 with costs of the application being provided for.
2. The application is dated 7<sup>th</sup> March, 2012 and was filed in court on even date. It is accompanied by statement of facts, supporting and verifying affidavits, the former being dated 17<sup>th</sup> February, 2012. The latter two documents were sworn at Machakos on the same date as the statement of fact. On the 23<sup>rd</sup> April, 2012 the Respondent filed his grounds of opposition dated the 20<sup>th</sup> April, 2012 while on the 23<sup>rd</sup> April, 2012 the interested party filed his notice of appointment of advocate dated the 23<sup>rd</sup> April, 2012. He did not file any response to the application. And on the same date, directions were issued to the effect that the application be disposed off by way of written submission. When the matter came up for mention on the 18<sup>th</sup> March, 2013, it was fixed for highlighting of submissions on the 14<sup>th</sup> May, 2013 but no further steps appear to have been taken by the parties to move the court until the 12<sup>th</sup> July, 2017 when this file was transferred to this court from the High Court of Kenya at Machakos.
3. A quick perusal of the file shows that the Respondent filed his submissions on the 11<sup>th</sup> May, 2012 while the Ex-parte Applicant filed his on the 19<sup>th</sup> July, 2012. The interested party did not file any submissions.
4. Having highlighted the above sequence of events, I will now proceed to make my determination.
5. The Applicant's counsel in his submissions informed the court that the Applicant is not out to quash the proceedings as he is out of time but rather his intention is to prevent the implementation of the decision of the Land Disputes Tribunal by the interested party through the court. The counsel further submitted that under section 7(1) of the Land Disputes Tribunal Act (*now repealed*), the Tribunal is mandated to cause its decision to be filed in magistrate's court. He submitted that this is part of the implementation that the Applicant seeks to have an order of prohibition.
6. The counsel further submitted that the case of ***Kenya National Examination Council Vs Republic Ex-parte G.G.Njoroge Civil Appeal No. 266 of 1996*** is not applicable in this case for what the counsel termed as an opinion by the court that was not efficacious since the decision complained of had already been made.
7. The Applicant's counsel went on to submit that the Makindu Land Disputes Tribunal lacked the requisite jurisdiction to entertain the matter before it and that it acted ultra vires.
8. The counsel pointed out that the Tribunal's jurisdiction to deal with land was stated in section 2 of the Land Disputes Tribunal Act. The counsel added since that the Tribunal dealt with a land that in was Makindu Market it therefore lacked jurisdiction because the land in question is outside agricultural land as defined in section 2 of the Land Control Act Chapter 302 of Kenya (emphasis are mine)
9. The counsel further submitted that the Tribunal purported to deal with a suit for contract of sale of land which it lacked jurisdiction to deal with.
10. On the other hand, the Respondents counsel submitted that once the Tribunal gave its decision, its mandate was spent and such decision

could only have obtained legal authority if it was filed in the magistrates' court and judgement entered as provided for in section 7 of the Land Disputes Tribunal Act. The counsel added that it is unclear whether the decision of the Tribunal was filed in court and therefore it is doubtful whether it is enforceable legally. The counsel went on to submit that in any case, an order of prohibition cannot issue under the circumstances since such an order is issued to stop a decision and is futuristic in nature and cannot look to acts or complaints of the past.

11. The counsel submitted that the law on prohibition was comprehensively restated by the Court of Appeal in the case of *Kenya National Examinations Council Vs Republic Ex-parte GG Njoroge Civil Appeal number 266 of 1996* where the court held thus;

***“Prohibition looks into future and does not lie to “correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits if the decision ..... where a decision has been made whether in excess or lack of jurisdiction or whether in violation of rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of contemplated decision.”***

12. Arising from the above, the Respondent's counsel submitted that an order of prohibition cannot issue since there is nothing to prohibit the Land Disputes tribunal from doing.

13. The counsel submitted that the Ex-parte Applicant is guilty of undue delay and therefore judicial remedies being discretionary in nature, the court ought to consider the conduct of the Applicant and deny him the orders sought. The counsel added that the decision which forms the basis of the application was made on the 21<sup>st</sup> September, 2010 while the Ex-parte Applicant moved the court more than an year after it was made.

14. Lastly, the Respondent's counsel termed the application as an abuse of the process of the court in that in general, judicial review will lie against anybody charged with the performance of a public duty. The counsel added that the Ex-parte Applicant seeks an order of prohibition against the Respondent and interested party from enforcement of the decision. He pointed out that the interested party being a private citizen, the Applicant should have sought private remedy against him.

15. Having carefully read the application together with the verifying affidavit and the statement of facts filed by the Ex-parte Applicant as well the replying affidavit by the Respondent and having considered the submissions filed by the parties, I am in agreement with the Respondent's counsel that this application lacks merit, is misconceived and is an abuse of the court process. In my view, the Land Disputes Tribunal has already made its decision. There is nothing for this court to prohibit. Whether its decision was made without jurisdiction, an order of prohibition cannot stop that which has already been done. It is not lost on me that the Land Disputes Tribunal which is the Respondent herein ceased to exist upon the repeal of the Land Dispute Tribunal Act chapter 303 A of the Laws of Kenya by the Environment and Land Court Act of 2011.

16. I further note the Ex-parte Applicant has not explained the delay in filing this application. He is therefore guilty of delay and cannot be granted the orders that he seeks.

17. Arising from the foregoing, I hereby proceed to strike out the Ex-parte application with costs to the Respondent. It is so ordered.

Signed, dated and delivered at **Makueni** this **15<sup>th</sup>** day of **November, 2018**.

**MBOGO C.G,**

**JUDGE**

**In the presence of:**

Mr. Loki holding brief for Mr. Kamanda for the interested party

R.N Mutuku for the Ex-parte Applicant Absent

No appearance for the Ex-parte Applicant.

Court Assistant – Kwemboi

**MBOGO C.G, JUDGE**

**15/11/2018**