



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC APPLICATION NO.148 OF 2008

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF: KITUI LAND DISPUTES TRIBUNAL CLAIM NO. 16 OF

15.7.2006

AND

IN THE MATTER OF: KITUI PRINCIPAL MAGISTRATES LAND CASE NO.23 OF 2007

AND

IN THE MATTER OF: INTERPRETATION AND APPLICATION OF THE LAND DISPUTES TRIBUNAL

ACT NO. 18 OF 1990 AND THE PROCEDURES AND RULES MADE PURSUANT THERETO

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KITUI LAND DISPUTE TRIBUNAL.....1ST RESPONDENT

KITUI PRINCIPAL MAGISTRATE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MUTUNGA MWEU.....INTERESTED PARTY

EX PARTE: KYEMBENI MWIWA

RULING

1. Pursuant to the *Leave* granted by the Court on 29th July, 2008, to the Ex-parte Applicant herein to apply for an *Order of Certiorari*, the Ex-parte Applicant filed a *Notice of Motion* dated 1st August, 2008, and sought for the following orders:-

1) **An Order of Certiorari to remove into this court for purposes of being quashed the decree dated 17th March, 2008 issued by the Kitui District Magistrate II for being null and void.**

2) **Cost of this application be provided for.**

2. The application was supported by the grounds stated on the **Statutory Statement** of the Ex-parte Applicant, dated 22nd July, 2008 and these grounds are:-

a) That the claim lodged herein by the interested party was in violation of Rule 2 of the Land Disputes Tribunal (forms and procedure) Amendment Rules, 2001 hence all proceedings undertaken in furtherance of such a claim are null and void.

b) That the Kitui Land Disputes Tribunal exceeded its powers and acted ultra vires in entertaining a dispute over inheritance in total usurpation of the powers conferred to the High Court under the Law of Succession Act Cap 160 and delegated to the subordinate courts under Section 47 and 48 of the Act.

c) That the decree issued by the Kitui District Magistrates II on 17.3.2008 is null and void as it stems from null and void proceedings and the entire proceedings in the Kitui Principal Magistrates Land Case 23 of 2007 as well as those by the Kitui Land Disputes Tribunal ought to be removed and brought to the high court for purposes of being quashed as the high court is the only one with supervisory powers over a tribunal.

3. In her **Affidavit in Verification** of the statement, the Ex-parte Applicant annexed the decree of the Kitui Principal Magistrate dated 17th March, 2008 as well as the decision/ award of the Kitui **Land Disputes Tribunal** dated 27th September, 2006 together with the proceedings thereto. Further, he annexed a copy of the sketch map of the disputed land and a letter threatening to evict the applicant.

4. Vide submissions filed on 19th November, 2009, Learned counsel for the applicant submitted that the tribunal usurped its powers by vesting proprietary rights to land forming part of the intestate estate of the Late Mwiwa to the interested party therefore the court is vested with powers to quash and set aside the said decision.

5. The **Notice of Motion** was served upon the Respondents and the Interested Parties. The interested party and the respondents filed grounds of opposition. The respondents averred that an application for certiorari ought to be made within 6 months from the date of the ruling as per Order 53 of the Civil Procedure Rules and that the tribunal's award was dated 27th September, 2006 and the same was adopted on 17th March, 2008 therefore it was more than six months since the award was made hence the application was fatal by fact of it being time barred. Counsel for the Respondents in their submissions cited the case of **Kenya Breweries Limited v Municipal Council of Mombasa and 4 Others (2009) eKLR** that made the same observation.

6. The interested party in their grounds of opposition also found the application as being time barred and vide submissions filed on 22.5.2019 relied on Section 9(3) of the Law Reform Act CAP 26 and Order 53 Rule 2 of the Civil procedure Rules.

7. Having considered the pleadings and the rival submissions, the issues for determination are whether the application is time barred and what orders may the court grant.

8. Order 53 of the Civil Procedure Rules provides that:

“2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired..”

9. The meaning of that Rule has been persuasively determined by the learned Judges in the case of **Kenya Breweries Limited v Municipal Council of Mombasa and 4 Others (2009) eKLR** that was cited by counsel above where the court stated that the same is of mandatory application, and an applicant who is outside the 6 month deadline is time barred.

10. **Green MR** in *Hilton Sutton Steam Landry (1946) 1 KB 61 at P.81*.

“But the Statute of limitations is not concerned with merits. Once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights.”

11. In the instant case, the applicant ought to have applied for Judicial Review within 6 months as per Rule 53(2) Civil Procedure Rules, or would have applied for extension of time within which to file the application. The court may be inclined to have applied a liberal human rights approach, and applied article 159 of the Constitution, and Section 1, 3 and 3A of the Civil Procedure Act as well as Order 51 to allow the application to proceed though brought outside the 6 month limitation. I however notice that the applicant has not moved the court to that regard and there are no arguments regarding that point.

12. The question therefore appears to be “did the applicants apply for extension and if so, did they have good reason?”. I have not found any good reason on record to justify why the applicants sat on from 27th September, 2006 to 22nd July, 2008 a period of almost 1 ½ years since the impugned decision was made. I do find that the application was and is time barred, and accordingly cannot stand.

13. In answering the 2nd issue, Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies and other persons holding quasi-judicial functions or who engage in the performance of public acts and duties. The question to pursue is “was there a decision made by the Respondents in pursuit of a quasi-judicial function?”

14. In the case of *OJSC Power Machines Ltd, Trans Century Ltd and Civicon Ltd (Consortium) v Public Procurement Administrative Review Board, Kenya & 2 Others, NRB CA 28 of 2016 (2017) eKLR*, the Court of Appeal held that:-

“The purpose of Judicial Review is to ensure that a party receives fair treatment in the hands of public bodies; that is the purpose of Judicial Review to ensure that public body after according fair treatment to a party reacts on a matter which it is authorized by law to decide on itself, a conclusion which is correct in the eyes of the court in the Judicial Review proceedings....

Judicial Review is concerned with the decision making process, not with the merits of the decision itself”.

15. The subject of Judicial Review is the decision making process, and not the decision per se. There is on record evidence regarding what the decision making process being complained of was in form of records of proceedings attached to the application in order for the court to peruse and ascertain what transpired during the process. The court is able to see the decision complained of, how it was reached and who instigated it.

16. The applicant prayed for a writ of certiorari. According to **Grahame Aldous** and **John Alder** in their text **Applications for Judicial Review- Law and Practice of the Crown office** (Butterworth-1993) it states:

“The function of certiorari is to quash an invalid decision. Even where a decision is a nullity so that certiorari is strictly unnecessary, certiorari can be granted so as to remove any question of the decision being ostensibly valid.”

17. For certiorari to issue,

a) The decision must be of a public interest as opposed to a private character. According to **Law v. National Greyhound Racing Club Ltd (1983) 3 ALLER 300**, Certiorari does not lie in respect of contractual powers nor powers derived from property rights, these being regarded as private law matters. In the above case, the Court of Appeal refused to strike out originating summons issued in the Chancery Division to restore greyhound trans licences which were needed by the applicants for their livelihood, on the ground that the basis of the licenses and such rights to them as the applicants may have had was contractual and therefore enforceable as a matter of “private” rather than “public” law. In these circumstances no prerogative order would lie.

18. Similarly in **R. V. East Berkshire health Authority exparte Walsh (1985) QB 554** the Court of Appeal reasoned that where private rights have been breached under a private arrangement like a contract, judicial review can’t apply, rather a party should proceed by ordinary action.

19. *Halsbury’s Laws of England, 4th Edition at Para 46* states as follows:-

“The courts have inherent jurisdiction to review the exercise by public bodies or offices of statutory powers impinging on legally recognized interest. Powers must not be exceeded or abused.”

20. It is not in doubt that the ex-parte Applicant had a land dispute over land that belonged to Mbaa Mwiwa and the *Land Disputes Tribunal Act, of 1990* sets out the jurisdiction of the *Land Disputes Tribunals* specifically *Section 3(1)* which states:-

“The jurisdiction of the Land Dispute Tribunals are:-

a) To determine boundaries to the land held in common.

b) Claim to occupy or work on land and finally;

c) Trespass to land.

21. It is evident that disputes over inheritance did not fall under the jurisdiction of the tribunal and thus it did not have jurisdiction to entertain such dispute and therefore the said Land Disputes Tribunal exceeded its jurisdiction therefore whatever award they made was **null** and **void for want of jurisdiction**. Since the award of the Tribunal was **null** and **void**, the **Principal Magistrates Court** had no jurisdiction to read and confirm an award that was null and void.

22. Lord Denning in *Macfoy vs. United Africa Co. Ltd [1961] 3 All ER 1169* at **1172** that

“where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse”

23. Having now carefully considered the *instant application*, the written submissions and the relevant provisions of law, the Court finds the said application lacks merit, and is dismissed. However having found that the decision complained of was a nullity, it would not be legal to allow the same to stand and there would be no need for the court to make a declaration in respect of the same. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 26th day of September, 2019.

D. K. Kemei

Judge