



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT MISC. CIVIL APP. NO. 105 OF 2011 (JR)

IN THE MATTER OF: BY JOSEPH SENJA FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: LAND DISPUTES TRIBUNAL ACT, NO. 18 OF 1990, NOW REPEALED

AND

IN THE MATTER OF: KEYIAN LAND DISPUTES TRIBUNAL

AND

IN THE MATTER OF: SENIOR RESIDENT MAGISTRATE'S COURT AT KILGORIS

BETWEEN

REPUBLIC APPLICANT

VERSUS

KEYIAN LAND DISPUTES TRIBUNAL 1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT AT KILGORIS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

JOSEPH OLE RANKAS INTERESTED PARTY

AND

JOSEPH SENJA EX PARTE APPLICANT

RULING

1. The Keyian Land Dispute Tribunal, the 1st respondent herein on 31st August 2011 made a decision awarding the interested party herein a portion of 2 acres of **land parcel Transmara/Enosaen/217** then registered in the name of the ex parte Applicant. The award was filed in the Senior Resident magistrate's

court at Kilgoris as Land Dispute No. 4 of 2011. On 14th November 2011 the magistrate's court adopted the award by the Tribunal as judgment of the court. The record of the magistrate's court indicates both the ex parte applicant and the interested party were present in court when the award was adopted as the judgment of the court.

2. On 17th November 2011, the ex parte applicant, Joseph Senja filed a chamber summons application pursuant to Order 53 Rules 1 and 2 of the Civil Procedure Rules inter alia seeking grant of leave to commence judicial review proceedings. The application for leave was placed before Hon. Lady Justice Sitati J. on 18th November 2011 in chambers who apparently granted leave to institute the judicial review but owing to some apparent contradiction in the orders she had granted the matter was once again placed before the Honourable Judge on 22nd November 2011 and she proceeded to review the orders she had granted on 18th November 2011 to clear the apparent contradiction or error on the face of the record.

3. The ex parte applicant filed the substantive notice of motion dated 21st November 2011 on the same date. The interested party filed his replying affidavit to the ex parte applicant's said notice of motion vide the affidavit sworn by Joseph Ole Rankas on 16th February 2012. Following directions given by the court both the ex parte applicant and the interested party filed their submissions to the notice of motion on 5th July 2012 and 10th July 2012 respectively. On 18th March 2013 when the matter came up for mention, the counsel of the applicant indicated that the notice of motion dated 21st November 2011 was filed without leave, as leave to file the notice of motion was granted when the orders granted on 18th November 2011 were reviewed by the judge on 22nd November 2011. The ex parte applicant sought leave to file an application to seek for extension of time for the filing of the judicial review application prompting the court to adjourn the matter generally to afford the ex parte applicant the opportunity to file the appropriate application.

4. The resultant application by the ex parte applicant dated 8th December 2014 is the subject of this ruling. The application seeks inter alia an order that:-

“The honourable court be pleased to deem the notice of motion application dated the 21st day of November 2011 as properly filed and the same be heard and determined on merit.”

The application is supported on the grounds that appear on the face of the application and on the supporting affidavit sworn by **Ouma Maurice Otieno** Advocate for the ex parte applicant on 8th December 2014. The applicant by the application states that the filing of the substantive notice of motion on 21st November 2011 was inadvertent and suggests the court stamp made on the application should have been for 22nd November 2011. Mr. Otieno advocate states in the supporting affidavit that he perused the court file on the morning of 22nd November 2011 after Hon. Lady Justice Sitati had made her orders reviewing the orders of 18th November 2011 and discovered that leave to file the judicial review application had been granted and he immediately instructed his clerk to process the application for filing in court. He states his clerk dated the application 21st November 2011 erroneously and also states the court registry wrongly embossed the application with the date of 21st November 2011 instead of 22nd November 2011.

5. The interested party filed a statement of grounds of opposition dated 9th December 2014 in opposition to the ex parte applicant's application and states that the substantive notice of motion having been made before leave was granted the application was unmaintainable. The parties filed written submissions to canvass the ex parte applicant's application. The court before considering the merits of the application dated 8th December 2014 perused the court record to appreciate the sequence of events leading up to the filing of the impugned application dated 21st November 2011. The chamber summons by the ex parte applicant dated 18th November 2011 sought the following orders:-

1. The application herein be certified urgent and same be heard on priority basis.

2. The honourable court be pleased to grant leave to the applicant to institute judicial review proceedings seeking for writ and/or order of judicial review in the nature of certiorari, to remove into the high court and quash, the proceedings and decision of Keyian Land Disputes Tribunal dated the 31st day of August 2011 whereby the 1st respondent irregularly and illegally awarded the ex parte applicant's land LR No. Transmara/Enosaen/217, measuring 2 acres, to the interested party herein, one, Joseph Ole Rankas.

3. The honourable court be pleased to grant leave to the ex parte applicant to institute judicial review proceedings in the nature of writ and/or order of judicial review in the nature of prohibition, against the senior resident magistrate's court Kilgoris, prohibiting the said court and/or any other court of co-ordinate and competent jurisdiction from enforcing and/or dealing or further dealing with the said decision of Keyian Land Disputes Tribunal, dated the 31st day of August 2011, as lodged vide Kilgoris SRMC Land Case No. 4 of 2011, or other cause.

4. That the leave so granted by this honourable court do operate as an order of stay of the proceedings and decision of the 1st respondent dated the 31st day of August 2011 and the decree issued by the 2nd respondent dated the 14th day of November 2011, vide Kilgoris SRMC Land Case No. 4 of 2011, wherein the 2nd respondent intends to enforce the said unlawful decision as if it were its judgment and/or decree.

5. The applicant be at liberty to apply to the honourable court for all necessary and/or consequential orders that, the honourable court may deem fit to grant.

6. Costs of t his application do abide the substantive application for judicial review.

6. Upon consideration of the chamber summons on 18th November 2011 Hon. Lady Justice Sitati J. granted the following orders;

1. That the application is hereby certified urgent

2. Prayer 3 of the application is refused as the same could be made in vain;

3. The applicant to file and serve the main motion within 21 (twenty one) days from today.

4. Costs in the cause.

Order 2 above quite clearly allowed the filing of the application seeking an order of certiorari and prohibition as sought in prayers 2 and 3 of the chamber summons. Order 3 contradicted the order as granted under Order 2 as it refused leave to seek a prohibitory order in the judicial review application which order 2 had infact granted. Noting this apparent contradiction the file was placed before Hon. Lady Justice Sitati on 22nd November 2011 who made an order in the following terms:-

“Have seen my orders made on 18th November 2011. There is a clear error on the face of the record in respect of paragraphs 2 and 3 of the order. Accordingly, I hereby review and revise the said order by deleting paragraph 3 thereof and substituting a new para 3. Orders shall now read as follows:-

1. The application be and is hereby certified urgent.

2. Same allowed in terms of prayers 2 and 3 thereof.

3. Prayer 4 of the application is allowed for a period fo 60 days only.

4. The applicant shall file and serve the main application within 21 (twenty one) days from

today.

5. Costs in the cause.”

7. My understanding of the orders granted on 18th November 2011 and 22nd November 2011 is that the review of the orders effected on 22nd November 2011 was to clarify the orders that were made on 18th November 2011. The judge was clear when she stated thus:-

“Accordingly, I hereby review and revise the said order by deleting paragraph 3 thereof and substituting a new paragraph 3. Orders shall now read as follows...” (emphasis mine). The judge in my view was restating the orders as made on 18th November 2011 and was not making new orders. There was no new application before her. The judge merely deleted paragraph 3 in the order of 18th November 2011 and replaced it with a new paragraph 3 and that is why she states **“orders shall now read...”**. The orders of 18th November 2011 that remained included Order 2 that granted the applicant leave to bring an application for judicial review for orders of certiorari and prohibition.

8. The present application in my view was unnecessary as the notice of motion dated 21st November 2011 was filed in compliance with the leave granted on 18th November 2011. It is my considered opinion that the leave was granted on 18th November 2011 and not 22nd November 2011 as the ex parte applicant has misconstrued the position to be. The notice of motion dated 21st November 2011 is therefore properly on record and the parties should proceed to have the same determined on merit.

9. As I have found the ex parte applicant’s application to be misconstrued, I accordingly order the same struck out with costs to the interested party.

10. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 15th day of April, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the ex parte applicant
..... for the 1st respondent
..... for the 2nd respondent
..... for the 3rd respondent
..... for the interested party

J. M. MUTUNGI

JUDGE