



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC. CIVIL APPLICATION NO. 121 OF 2006**

**IN THE MATTER OF THE APPLICATION FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF THE DECISION OF THE LAND DISPUTES TRIBUNAL IKUTHA DIVISION**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT**

**AND**

**IN THE MATTER OF PRINCIPAL MAGISTRATE’S COURT AT KITUI CIVIL LAND NO. 25 OF 2006**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE CHAIRMAN LAND DISPUTES TRIBUNAL**

**IKUTHA DIVISION...RESPONDENT**

**AND**

**KAVITA WAMBUA .....INTERESTED PARTY**

**AND**

**KITONYI NDEI .....EX-PARTE APPLICANT**

**RULING**

1. The Exparte applicant sought leave pursuant to the provisions of **Order LIII rule 1** of the **Civil Procedure Rules** to apply for judicial review. He also sought to have the leave if granted to operate

as stay of execution of the order granted by the Senior Resident Magistrate on the **9<sup>th</sup> May, 2006**.

2. The prayer sought in respect of leave was granted on the **8<sup>th</sup> May, 2008**. An order of stay was also granted as prayed. Consequently the ex parte applicant filed a substantive **Notice of Motion** seeking an order of certiorari to remove to the High Court for purposes of being quashed, the award and/or decision of the **Land Disputes Tribunal, Ikutha Division** case **No. LC4 of 2003** and an order of the court in **Kitui PMCC 25 of 2006** adopting the award as the judgment of the court.

3. The application was premised on the grounds that the proceedings before the tribunal were null and void and not properly instituted.

4. The interested party filed a replying affidavit whereby she deponed that the application is frivolous and vexatious as the tribunal had the jurisdiction to deal with issues raised before it.

5. A preliminary objection was raised by the interested party on the grounds that the proceedings were filed out of time, hence an abuse of the court process.

6. According to directions taken on the **17<sup>th</sup> July 2014**, the preliminary objection and Notice of Motion were to be canvassed simultaneously. Only the interested party filed submissions. It was submitted that the judgment sought to be quashed was delivered on the **14<sup>th</sup> March 2003** and the applicant sought leave in 2006, more than 3 years had passed before the court was moved to invoke its special jurisdiction by way of judicial review. This should have been done within 6 months of the date of proceedings.

7. Further, he submitted that it was trite that a party whose judgment seeks to be quashed has to be made a party. The Principal Magistrate who adopted the award has not been enjoined and this affects the substance of the motion. The tribunal is established pursuant to **Section 4** of the **Land Dispute Tribunal** and has jurisdiction pursuant to **Section 3(1) (a)** of the Act which deals with respective boundaries of parties since the applicant was selling portions of land that did not belong to him.

8. It is alleged that leave herein was obtained 3 years after the decision the ex parte applicant seeks to be quashed. In the statement of facts it is stated that the order by the court was made on the **9<sup>th</sup> May, 2006**. There is a stamp impression on the copy of judgment of the Land Disputes Tribunal but the date is not clear. The award was, however, adopted by the court on the **9<sup>th</sup> May, 2006**. It is trite that leave to apply for the prerogative order of certiorari ought not be granted after **six (6) months (see Aga Khan Education Service Kenya V. Republic ex parte Ali Seif and 3 Others (2004 eKLR))**.

9. According to **Section 7** of the **Land Disputes Tribunal Act**, (Now repealed) the Chairman of the Tribunal is obligated to cause the decision made to be filed in the Magistrate's Court whereafter the court enters judgement in accordance with the decision of the tribunal. Judgment of the court having been on the **9<sup>th</sup> May 2006**, time started running on the said date.

10. The application seeking leave was filed on the **22<sup>nd</sup> August, 2006** which was approximately 2 months and 2 weeks later. It is the court that did not exercise its duty of hearing the application soon thereafter. In the premises the preliminary objection raised lacks merit. Accordingly it is dismissed.

11. The 2<sup>nd</sup> limb of the application is for quashing an order made by the Senior Resident Magistrate adopting the award as the judgment of the court. The Senior Resident Magistrate was not enjoined as a party to the suit. There is no way an order can be made against a party who is not a party to the proceedings. In the case of **Wamwea Vs Catholic Diocese of Murang'a Registered Trustees (2003) KLR 389** the court stated thus:

***“The decision of the tribunal or Appeals Committee adopted by the Magistrate’s Court in accordance with the provisions of Land Disputes Tribunal Act becomes a decision of the Magistrate’s Court and ceases to exist as a separate entity***

***challengeable alone.”***

12. From the foregoing, in order for the decision of the Senior Resident Magistrate to be quashed the court should have been enjoined as party. Failure to enjoin it was detrimental to the ex parte applicant's case.

13. In the result the application fails. Accordingly it is dismissed with costs to the 2<sup>nd</sup> Respondent.

**DATED, SIGNED and DELIVERED at MACHAKOS this 28<sup>TH</sup> day of APRIL, 2015.**

**L.N. MUTENDE**

**JUDGE**