



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
FAMILY DIVISION
AT MOMBASA
MISCELLANEOUS CAUSE NO. 29 OF 2012 (JR)
IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI
AND
IN THE MATTER OF THE LAND DISPUTES TRIBUNAL CASE NO. 09 OF 2009
AND
IN THE MATTER OF JUDICIAL REVIEW
REPUBLIC..... APPLICANT
VERSUS
1. PRINCIPAL MAGISTRATE (KWALE)
2. THE CHAIRMAN LAND DISPUTES TRIBUNAL MSAMBWENI
3. LAND REGISTRAR KWALE
4. SAID OMAR MWIJI
5. HAMISI S. MUHINDI..... RESPONDENTS

RULING

Before court is the Notice of Motion dated 28th June, 2012 by which the Ex-parte Applicant **DR. KARIN FREUDENBERG ILONA** seeks the following orders

“1. THAT this Honourable court do issue an order

of certiorari to quash the award of the Msambweni Land Dispute Tribunal given on the 15th March, 2011, award which directed the Ex-parte Applicant’s Title Deed in respect of the suit property namely Kwale/Msambweni/

A2608 (then registered under the Registered Land Act (Cap 300) Laws of Kenya) be cancelled and that the said suit property be registered in the name of Janus Mosque Committee.

2. THAT this Honourable court do also quash the

ruling of the Principal Magistrate's Court, Kwale that was given on the 8th February, 2012 adopting the said Tribunal's award.

3. THAT costs be in the cause."

The application arises out of a dispute over the ownership of plot No. Kwale/Msambweni A2608. A dispute No. 9 of 2009 was filed in the Msambweni Land Disputes Tribunal. Evidence was heard and parties were allowed to cross-examine the witnesses. The decision of the Tribunal delivered on 15th March, 2011 was that the Land Registrar revoke the Title to the suit land which had been issued to the Ex-Parte Applicant and issue a new Title Deed for the suit land to Janus Mosque Committee. The award in the Tribunal was referred to the Senior Resident Magistrate's Court at Kwale for adoption vide a Notice of Motion dated 25th July, 2011. On 8th February, 2012 the court delivered its ruling adopting the award as a judgment of the court, relying on the transitional Clause of the Environment and Land Court Act. This application is based on the grounds that

1. The Msambweni Land Disputes Tribunal acted contrary to the law and in excess of its jurisdiction in determining a matter relating to land that had already been registered and a title deed issued in respect therefore.

2. The Tribunal acted *ultra vires* its mandate under section 3(1) of the Land Disputes Tribunal Act and the Registered Land Act which stipulates that disputes pertaining to registered land should be determined by the High Court.

3. The award adopted by the Principal Magistrate's Court at Kwale on 8th February, 2012 is therefore *void ab initio* and incapable of enforcement.

4. The Principal Magistrate had no jurisdiction to adopt the said tribunal's award on the ground that the award was void ab initio.

The application for Judicial Review was opposed by the 3rd respondent **SAID OMAR MWITU** who filed a replying affidavit on 26th June, 2012. The application was disposed of by way of written submissions which submissions were duly filed in court. I have carefully perused this application, the annexures and affidavits on record as well as the written submissions filed in court. I find that this application raises two issues which require determination by this court.

1. LIMITATION OF TIME

For the 2nd respondent it was argued that the application for leave filed in the High Court on 29th March, 2012 was incompetent as the leave was granted over six (6) months after 15th March, 2011 the date when the Tribunal made its award. Such leave was therefore averred to have been acquired irregularly. It was further submitted that since this application was time barred from quashing the award of the Tribunal, it is also time barred from quashing the ruling of the Kwale Court adopting that award. The Ex-parte applicant had in her supporting affidavit admitted to having had knowledge of the award but she did not take action until 4th July, 2012.

Section 9(3) of the Law Reform Act provides that

"9(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of the judgment, order, decree, conviction, or other proceeding or such shorter period as maybe prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal and a time is limited by law for the bringing the appeal, the court or Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

Based on this provision of law the application for leave filed on 29th March, 2012 was certainly time barred.

2. JURISDICTION

The Msambweni Land Disputes Tribunal was governed by the Land Disputes Tribunal Act (now repealed). The jurisdiction of the tribunal is set out in section 3(1) of said Act which provides

“(1) Subject to this Act, all cases of a civil nature involving dispute as to:-

- 1. Boundaries of or the determination of boundaries to land including land held in common.**
- 2. A claim to occupy or work land**
- 3. Trespass to land”**

The claim presented to the Msambweni Land Disputes Tribunal was not a boundary dispute it was a claim for **ownership** of land. The Tribunal therefore exceeded its mandate in hearing and determining the matter. They had no jurisdiction to sit over the matter and as such their decision being *ultra vires* was *void ab initio*.

This court is therefore faced with a situation where on the one hand the present application has been found to be time-barred, but on the other hand the decision which this application sought to challenge has also been found to be *ultra vires*. A decision which is *ultra vires* is *void ab initio* and is therefore a nullity. It would be as if such decision had never been made. Which then takes precedence and ought to be given greater weight – is it the time limitation or the limit in jurisdiction. In the case of **MAPIS INVESTMENT (K) LTD. VS. KENYA RAILWAYS CORPORATION (2005) 2KLR 410** the Court of Appeal held that

“no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of contract or transaction which is illegal if the illegality is brought to the notice of the court”

My learned brother Hon. Muriithi J. grappled with this same question in the case of **REPUBLIC VS. LAND DISPUTE TRIBUNAL TAVETA SENIOR RESIDENT MAGISTRATE TAVETA & OTHERS 2013 e KLR**. I am persuaded by his decision to uphold the lack of jurisdiction over and above the time limitation. My learned brother cited section 165(6) of the Constitution of Kenya which states that

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.”

He therefore held thus

“Needles to say, the provisions of Article 165 of the Constitution would prevail against the time limitation of section 9 of the Law Reform Act.”

As stated earlier I am persuaded by this reasoning. I therefore find that notwithstanding the fact that this application was time barred, the decision of the Msambweni Tribunal was *ultra vires*, *void ab initio* and therefore a nullity. Therefore on this basis do I find in favour of the Ex-parte applicant and quash the award of the Msambweni Land Dispute Tribunal in terms of prayer (1) of the notice of motion dated 28th June, 2012. I further quash the ruling of the Principal Magistrate’s Court, Kwale adopting the said award. I direct that each party bear its own costs.

Dated and delivered in Mombasa this 28th day of April,

2014.

M. ODERO

JUDGE

In the presence of:

Mr. Otwere h/b Applicant

Court Clerk Mutisya