



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPL. NO. 260 OF 2013

BETWEEN

REPUBLICAPPLICANT

AND

SENIOR RESIDENT MAGISTRATE'S

COURT KAJIADO.....1ST RESPONDENT

KASULO JUMA2ND RESPONDENT

EX PARTE

OLE MATAIYAN

JUDGMENT

1. Pursuant to leave granted on 1st August 2013, the *ex-parte* applicant ('the applicant') moved the court for the following orders;
 1. *That this Honourable Court may be pleased to issue an order of Certiorari removing into this Honourable Court for purposes of being quashed forthwith the said Surveyor's Report dated 27th June 2012 read and adopted as judgment of the Court in Kajiado Senior Resident Magistrate's Court in Land Dispute Tribunal Case No. 77 of 2011 on 29th November 2012.*
 2. *That costs of this application be in the cause.*
2. According to the applicant's verifying affidavit sworn on 28th May 2013, the applicant is the registered owner of original land parcel Kajiado/Ololoitokoshi/Kitengela/1818. The 2nd respondent is the registered owner of Kajiado/Ololoitokoshi/Kitengela/1934. The 2nd respondent filed a boundary dispute before the Kajiado North Land Dispute Tribunal ("The Tribunal"), No. TC 270/03/2011 claiming that the 1st respondent encroached on his land.
3. The Tribunal visited the land and identified the beacons which were confirmed by the Land Demarcation Committee. Thereafter it re-visited the disputed land and fixed the original boundaries. Thereafter its verdict was as follows, *"That permanent beaconed boundary should never be interfered with from now and ever. That the permanent boundary be adopted and*

maintained. That this Tribunal allows fencing of the lands at stake as per ruled boundaries.”

4. Consequently, the Tribunal award was filed in the Senior Resident’s Magistrate’s Court Kajiado (*Land Dispute Tribunal Case No. 77 of 2011*). On 15th December 2011, the learned Magistrate ordered that the District Surveyor enter the parcels of land to confirm the acreage and the beacons according to the titles issued. The survey was duly conducted and a report presented to the Court on 29th November 2012. The District Surveyor’s report was duly adopted as an order of the Court.
5. The applicant contends that the order adopting the surveyor’s report is *ultra vires* the ***Land Disputes Tribunal Act (Repealed)***. He further contends that the court lacked jurisdiction to proceed to adopt the surveyor’s report after it had adopted the award of the Tribunal as a judgment. The applicant depones the effect of the order of the court is that part of his land which is occupied by third parties will be hived off.
6. The 2nd respondent filed grounds of opposition dated 25th September 2013 and a replying affidavit sworn on the same dated. The respondents oppose the application on the ground that it is time barred having been brought after the expiry of six months after the court adopted the award of the Tribunal contrary to **Order 53 rule 2** of the ***Civil Procedure Rules***. They also contend that the decision of the learned magistrate adopting the surveyor’s report was *intra-vires*. The 2nd respondent avers that the third parties, who would be affected by the decision of the court, are not named or joined to these proceedings.
7. The respondents attacked the application on the ground the application is time barred under **Order 53 rule 2** of the ***Civil Procedure Rules*** which states, “*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 heard not later than six months after the date of the proceeding...*” The Court decision adopting the surveyor’s report which is to be quashed was issued on 29th November 2012 while the Chamber Summons seeking leave was filed on 28th May 2013. My calculation of the time shows that the time is precisely 6 month less one day. I therefore find that this argument is not well founded as the application for leave was filed on the very last day contemplated by the rule and it was therefore filed within time.
8. The issue then is whether the decision of the learned Magistrate is *ultra vires*. The jurisdiction of the Magistrate’s Court in respect of the Tribunal awards is set out in **section 7** of the ***Land Disputes Tribunal Act (Repealed)*** which provides as follows;
 7. (1) *The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate’s court together with any depositions or documents which have been taken or proved before the Tribunal.*
 - (2) *The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act*
9. Under **section 7** of the **Act**, the Court has no jurisdiction to review the award or enter into a fresh inquiry to determine the correctness thereof. The learned Magistrate erred in calling for the Survey Report and adopting the surveyor’s report as the judgment of the court. The ***Land Dispute Tribunal Act*** does not permit such a course. The Surveyor’s Report is not the Tribunal award capable of being enforced under **section 7** of the **Act**. A party aggrieved by the decision of the Tribunal had a right of appeal to the Provincial Tribunal or seek an order for judicial review to quash the decision in appropriate circumstances. The award of the Tribunal must be adopted by the Court as it is.

10. I therefore find and hold that the decision of the Subordinate Court made on 29th November 2012

is *ultra vires* the ***Land Disputes Tribunal Act***, it is accordingly quashed.

11. The consequence of my findings is that the Notice of Motion dated 19th August 2013 is allowed on the following terms;

- a. **The District Surveyor's Report dated 27th June 2012 read and adopted as the judgment in Kajiado Senior Resident Magistrate's Court in Kajiado North Land Dispute Tribunal Case No. 77 of 2011 on 29th November 2012 be and is hereby quashed.**
- b. **There shall be no order as to costs.**

DATED and DELIVERED at NAIROBI this 26th day of May 2014.

D.S. MAJANJA

JUDGE

Ms Ngetich instructed by Ng'etich and Associates Advocates for the *ex-parte* applicant.

Ms Sirai, Litigation Counsel, instructed by the State Law Office for the 1st respondent.