



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT BUSIA.

MISC. APP. NO. 72 OF 2012.

CHARLES OSENYI OKIRIMONYI.....APPLICANT

=VERSUS=

CHAIRMAN BUSIA MUNICIPALITY LAND

DISPUTE TRIBUNAL1ST RESPONDENT

CHIEF MAGISTRATE, BUSIA.....2ND RESPONDENT

VERONICA NASIRUMBI.....INTERESTED PARTY.

R U L I N G.

CHARLES OSENYI OKIRIMONG, hereinafter referred as the Applicant filed his application dated 16.4.2012 through M/S. Maloba & co. Advocates for leave “to file application for orders of Judicial Review and or certiorari out of time from the judgment made by Busia Municipality Land Disputes Tribunal dated 23rd June, 2011.....and adopted by Busia Principal Magistrate’s court on 3rd August, 2011 vide Busia PMCC Land case No. 75 of 2011.” The application is stated to be brought under section 95 and 3A of the Civil Procedure Act and Order 51 Rules 1, 2, 3 and 4 of the Civil Procedure Rules. It is based on the grounds on the face of the application and supported by the Applicant’s affidavit sworn on 16th April, 2012.

The application is opposed by the Interested Party who filed grounds of opposition dated 12th July, 2012 through M/S. Ashioya & co. Advocates.

Both counsel filed written submission. Those for the Applicant are dated 2nd December, 2013 and those for the Interested party are dated 9th April, 2014.

I have carefully considered the grounds on the application, the supporting affidavit, grounds of opposition and submission by counsel and find as follows;-

1. The award the applicant intends to challenge was delivered by the Tribunal on 23.06.2011 and adopted by the lower court in Busia PMCC. Land case No. 75 of 2011 on 3rd August, 2011.
2. That Order 53 Rule 1 of the Civil Procedure Rules requires one intending to apply for orders of certiorari to obtain the leave of the court first. Rule 2 of the same order indicates clearly that **“Leave shall not be granted to apply for an order of certiorariunless the application for leave is made not later than six months after the date of the proceedings.....”**
3. Order 53 Rule 2 of the Civil Procedure Rules is in the same words with section 9 (3) of the Law

Reform Act and superior courts have held, time and again, that unlike an application under the Civil Procedure Rules where the court may extend time, the period of six months in Order 53 Rule 2 of the Civil Procedure Rules cannot be extended. This is because the period is set by statute which does not give the court the leeway to consider extension. The position is illustrated in the following decided cases;

- a. Nyeri HCC. Misc. App. No. 90 of 2003, **MOTOKAA NTHAUTHO –VS- JOSEPH NJERU & 3 others** where the court held that the court did not have jurisdiction to grant leave to extend time in view of the mandatory terms of Order 53 of Civil Procedure Rules and section 9 (3) of Law Reform Act.
- b. **JAMES GITHINJI KIARA –VS- WILLIAM WACHIRA MWANIKI (2005)** eKLR where the court referred to order 53 (LIII) of the Civil Procedure Rules and held;

“ This rule is almost identical with section 9 (3) of the Law Reform Act (cap 26) which provides similar provision. It is apparent that the power of the court to extend time to apply for orders of certiorari after 6 months from the time the action complained of, has been taken away by this provisions which are mandatory provision; the court has therefore no powers to extend time if the application for leave is not made within the 6 months provided.”

- c. **REPUBLIC –VS- CHAIRMAN MERU CENTRAL DISTRICT LAND DISPUTE TRIBUNAL & 2 others** Exparte. **STEPHEN MUKUMU MWIRICHIA (2006)** eKLR where Lenaola J, stated;

“Often times deserving litigants are shut out because of the operations of Order LIII Rule 2 ...

A judge in that position wishes he could extend time for such a party but he has no power to do so. I am in that position and like I said earlier there are good reasons for the ex parte applicant to challenge the decision of the tribunal but once I have said he is out of time, that consideration is irrelevant and the doors of justice must close for the ex parte applicant.”

- d. Nyeri HCC. Misc. App. No. 112 of 2008 , **DICKSON MWIRICHO MURIUKI –VS- CENTRAL PROVINCIAL LAND DISPUTES APPEAL COMMITTEE** where Makhandia J, (as he then was) held;

“Certiorari proceedings can only be initiated and or commenced and successfully mounted within 6 months of making of the decision sought to be quashed and or impugned.”

4. The Court of Appeal, whose decisions are binding on this court, has in various cases confirmed the position set out in the cases listed above that the provisions of Order 53 Rule 2 of the Civil Procedure Rules and Section 9 (3) of the Law Reform Act do not confer any discretion to the court to extend the six months within which applications for leave to file applications for certiorari orders should be filed. The following two cases confirm this position.
 - a. **KIMANZI MBOO –VS- DAVID MULWA** C.A.C.A NO. 233 of 1996 where the court held that no application for leave can be entertained under Order 53 Rule 2 of the Civil Procedure Rules and section 9 (3) of the Law Reform Act, unless it is made within six months of the date of the award or order.
 - b. **WILSON OSOLO –VS- JOHN OJIAMBO & another** (1996) eKLR where the Court of appeal was dealing with an appeal in a matter where the High Court had allowed an application for extension of time to apply for an order of certiorari beyond the six months and held that the six months period for an order of certiorari could not be extended as it was a creature of the Law Reform Act.

The above being the position of the law, it follows that the Applicant herein had only six months from the date the order he seeks to challenge was made to file the application for leave. The tribunal's award carries a date of 23rd June, 2011 but it is not clear whether that is the same date the award was brought

to the attention of the parties. The award was subsequently filed in Busia PMCC. Land Case No. 75 of 2011 and adopted as judgment of the court on 3rd August, 2011. The Applicant had six months from 3rd August, 2011 to file the application for leave and did not do so within that time. The application before this court was filed on 25th April, 2012. Even assuming that the Applicant only got to know of the award after it was adopted by the court, he filed the application for leave over eight months from the date the award was adopted by the lower court.

As shown in the cases above, this court has no jurisdiction to extend the six months period set out in Order 53 Rule 2 of Civil Procedure Rules and the Applicant's application dated 16th April, 2012 is dismissed with costs to the Interested party.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED IN OPEN COURT ON 21ST DAY OF MAY, 2014.

IN THE PRESENCE OF ;

JUDGE.