



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA.

JUDICIAL REVIEW NO. 19 OF 2012.

REPUBLIC.....PETITIONER.

AND

THE KWANZA LAND DISPUTES TRIBUNAL COMPRISING:-

WAFULA BIBI – CHAIRMAN)

MATHEW NABULIKI – MEMBER)

SAMWEL KIGEN – MEMBER).....1ST RESPONDENTS.

THE CM'S COURT, KITALE & 3 OTHERS.....2ND RESPONDENTS.

R U L I N G.

Pursuant to the leave granted by this court on the 14th March, 2012, the applicants **Marcela Bosibori Kiboit** and **Jonathan Kiboit**, filed this application dated 4th April, 2012, against the respondents, Kwanza Land Disputes Tribunal and the Chief Magistrate's Court Kitale with Maria Chebosio Boit and Henry Boit being mentioned as the Interested parties.

The application is for an order of certiorari to remove and bring before this court for purposes of quashing the undated decision of the Kwanza Land Disputes Tribunal adopted as a judgment of the court on 20th December, 2011 in Kitale CMCC Land Case No. 37 of 2011.

A verifying affidavit by the applicants dated 13th March, 2012 is annexed to the application in support thereof but it is not accompanied by a statement of particulars.

The interested parties response to the application is based on the averments in their replying affidavit dated 25th June, 2012.

At the hearing of the application, **Mr. Bundi**, Learned Counsel for the applicants submitted that the land tribunal lacked jurisdiction in as much as it determined issues relating to ownership of registered land and relating to matters of succession. That, the applicants had been in occupation of the land in dispute from 1979 upto 2009 when the first applicant's husband passed away. That, the tribunal purported to decide on a succession matter where there was a Will setting out the mode of distribution of estate property. That, the applicants were not served to appear before the tribunal and were never given a hearing.

That, the land tribunal could not purport to award two (2) acres of registered land.

It is for the foregoing reasons that the applicants prayed for an order of certiorari against the respondents.

The respondents did not file any response but were represented at the hearing by the Learned litigation counsel, **Mr. Odongo**, who did not oppose the application and contended that the land tribunal had no jurisdiction to adjudicate on a succession matter.

Mr. Ngeiywa, Learned counsel for the interested parties opposed the application by submitting that the application is incompetent in that it contravenes Order 53 Rule 1 (2) of the Civil Procedure Rules in as much as it does not contain a statement of facts. In that regard, reliance was placed in the decision of the High Court in **Michael Oyugi & Others Vs. Budalangi Land disputes tribunal & Another [2005] e KLR**. Further, the application was filed out of time on 4th April, 2012 contrary to Order 53 Rule 2 of the Civil Procedure Rules.

With regard to jurisdiction, the interested parties submitted that the land tribunal adjudicated on the right to occupy land and not ownership of land. That, the land in dispute was occupied by both the applicant and the first interested party being the widows of the deceased and that the land was never registered under any known regime of the law. That, although succession is a matter falling within the jurisdiction of a Succession Court, the Land tribunal did not handle such a matter and did not administer the estate of the deceased apart from determining the portions for occupation by either party.

The interested parties therefore prayed for the dismissal of the application.

From the foregoing submissions, the issues for determination are firstly, whether the application as presented is competent and secondly, whether the applicants are entitled to an order of certiorari.

With regard to the first issue, the procedural law for judicial review is found in Order 53 of the Civil Procedure Rules and Rule 1 (2) of the same provides that an application for leave shall be accompanied by a statement setting out the time and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

Herein, the application is not accompanied by a statement of facts thereby rendering it incompetent and defective in form. However, there is a verifying affidavit which may be applied to decipher the grounds upon which the application is based and since the failure to provide a statement of facts borders on technicality, the omission is curable in terms of Article 159 (2) (a) of the Constitution of Kenya, 2010.

Under Rule 2 of Order 53, an order for certiorari cannot be sought after the expiry of six (6) months from the date of the disputed decision.

Herein, the disputed decision is the annexure marked "MBK 5 (b)" in the applicants' verifying affidavit dated 13th March, 2012.

It is clearly dated 26th April, 2011 thereby implying that it was made on that date and was confirmed as a judgment of the court on 20th December, 2011 (see, annexure marked MBK "6" in the verifying affidavit)

The application for leave was dated 13th March, 2012 and necessary leave was granted on 14th March, 2012. This meant that this application for an order of certiorari was made after the expiry of the prescribed six (6) months period. It is to that extent incompetent and suitable for striking out as there is no prospect of success where the decision sought to be quashed was made more than six (6) months prior to an applicant coming to court (see, **Aga Khan Education Service Kenya Vs. Republic & Others (2004) e KLR**).

It is for that reason alone that this application must be dismissed and even if the application was filed within time, the applicants, in answer to the second issue for determination, would not be entitled to certiorari because from the decision of the elders made on 8th March, 2010, which was adopted by the land tribunal, the disputed portion of land was to be occupied by both the first applicant and the first

interested party. The land tribunal in effect adjudicated on the right to occupy land and not ownership of land. It had the necessary jurisdiction to do so as provided by section 3 (1) of the Land Disputes Tribunals Act (Cap 303A LOK).

Its proceedings showed that it divested itself from adjudicating on matters of succession and left it to the Succession Court.

In the upshot, this application is lacking in merit and is hereby dismissed. The parties shall bear own costs of the application.

Ordered accordingly.

[Read and signed this 17th day of June, 2014.]

J.R. KARANJA.

JUDGE.