



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGYA
MISC CIVIL APPLICATION NO. 22 OF 2013 (JUDICIAL REVIEW)

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT

AND

IN THE MATTER OF NYERI PROVINCIAL LAND DISPUTES

APPEAL NO. 25 OF KIRINYAGA 5/2005

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL NO. D 26D/VIL.4/232

AND

IN THE MATTER OF LAND PARCEL NO. MUTITHI/CHUMBIRI/493

AND

IN THE MATTER OF WANG'URU S.R.M. ARBITRATION CASE NO. 31 OF 2004

REPUBLICAPPLICANT

VERSUS

THE CHAIRMAN CENTRAL PROVINCIAL

LAND DISPUTES APPEAL COMMITTEE 1ST RESPONDENT

THE CHAIRMAN MWEA DIVISIONAL LAND

DISPUTES TRIBUNAL..... 2ND
RESPONDENT

THE S.R.M 'S WANGURU3RD
RESPONDENT

JOHN NJAMA MWANGI 4TH
RESPONDENT

ELIUD WARUIEX-PARTE
APPLICANT

AND

CYRUS MUNENE MWENJE INTERESTED
PARTY

JUDGMENT

Having obtained leave on 10th October 2011 from Ong’udi J., the applicant filed this Notice of Motion on 28th October 2011 seeking the following orders:-

1. ***That an order of certiorari do issue to quash un-dated award of Mwea Division Land Disputes Tribunal and the resultant decree in Wang’uru Resident Magistrate’s Court in Land Disputes Tribunal No. 31 of 2004 in respect of land parcel No. MUTITHI/CHUMBIRI/493.***
2. ***That an order of prohibition do issue against the Central Provincial Land Dispute Appeals Committee to stop it from proceeding with the hearing and determination of Appeal No. KIRINYAGA 5 of 2005 in respect of land parcel No. MUTITHI/CHUMBIRI/493***
3. ***That costs be provided for.***

The Notice of Motion was grounded upon the affidavit of ELIUD WARUI the applicant and statement of facts. What is raised in the verifying affidavit and statement of facts is basically that both the award of the Mwea Land Disputes Tribunal and the resultant judgment of the Wang’uru Resident Magistrate’s Court are a nullity which should be quashed. Further, that the said Tribunal acted ultra vires as the parcel of land MUTITHI/CHUMBIRI did not exist when proceedings were initiated at the Tribunal.

The 4th respondent filed a replying affidavit in opposition to the said application in which he states, inter alia, that the issue of jurisdiction was never raised at the Tribunal or the Wanguru Court. Most significantly, the 4th respondent has deponed that this Judicial Review application was filed out of time as the award sought to be quashed was read on 3rd February 2005. By consent order dated 31st July 2013, CYRUS MUNENE MWENJE was made a party to these proceedings and he filed a replying affidavit in which he deponed that even at the time leave was being sought in this matter, the parcel of land MUTITHI/CHUMBIRI/493 did not exist and further, that he is the registered owner of land parcel No. MUTITHI/CHUMBIRI/975, 976, 977 and 978.

Submissions have been filed by the applicant, the 4th respondent and the interested party with respect to the said Notice of Motion. A Notice of Preliminary Objection to the said application was also filed but the issues raised therein can easily be disposed of together with the Substantive Notice of Motion.

I have considered the application, the reply thereto, the various annexures and the submissions by counsels.

What is sought to be quashed is the award of the Mwea Division Land Disputes Tribunal and the resultant decree in Wanguru Resident Magistrate’s Court Land Disputes Tribunal Case No. 31 of 2004 in respect of land parcel No. MUTITHI/CHUMBIRI/493. According to the applicant, the award of the Mwea Division Land Disputes Tribunal is un-dated. However, it is clear from the said award which is annexed to the said application that the award is dated 2nd December 2004. It is not therefore true that the award is un-dated. The said award was adopted as a judgment of the Court on 3rd February 2005 and on 16th August 2005, a decree was drawn and signed by the Senior Resident Magistrate’s Court at Wanguru in Arbitration Cause No. 3 of 2004. As stated above, leave to file this Judicial Review application was granted on 10th October 2011. The award sought to be quashed was dated 2nd December 2004 and even if there was any doubt about the date of the award, the resultant decree was drawn on 3rd February 2005. That means that the application for leave to file this Judicial Review application was brought almost six

years after the decree had been drawn in the Wanguru Magistrate's Court. Under **Order 53 Rule 2** of the **Civil Procedure Rules**, it is provided that 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 made not later than six months after the date of the proceedings. See also **Section 9 (3) of the Law Reform Act**. It is clear that by the time the applicant moved Court on 10th October 2011, the application was already statute barred. An order of certiorari would therefore not be available to the applicant.

I have considered the cases cited by counsel for all the parties. Although counsel for the applicant cited the case of **REPUBLIC VS JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS EX-PARTE MWALULU & OTHERS (2004) e K.L.R** as authority for the proposition that Courts have inherent powers to quash nullities notwithstanding the six month period provided for under the law, a reading of that case shows clearly that the Court in that case although stating that **Order 53 Rule 2 of the Civil Procedure** which prescribes the time limit does not also include anything covered by the principle of ultra vires or any nullities or decision made without jurisdiction at all, the same High Court went on to make the following finding:-

“A careful scrutiny of Section 9 of the Law Reform Act pursuant to which Order 53 Rules were made and in particular Rule 2 and 7 which it is contended denies this Court jurisdiction to grant or give orders of certiorari outside 6 months reveals that only formal judgments, orders, decrees, convictions or other proceeding of an inferior Court or Tribunal fall within the six months period stipulated - see Order 53 Rule 2”

The same Court goes on to make the following findings:-

“The act of publishing a rule cannot be said to be a proceeding or any of the orders mentioned in Order 53 Rule 2. Neither is the decision to formulate the rule a proceeding, judgment, order, decree or a conviction”

My understanding of the above finding is that so long as the order complained of and sought to be quashed is an order, formal judgment, decree, conviction or other proceeding, then the six months period within which to seek Judicial Review applies. But where the decision sought to be quashed is a rule which is ultra vires, then the six months period does not apply.

Even assuming that my interpretation of the High Court's finding in the **GOLDENBERG** case (supra) is incorrect, the Court of Appeal in the case of **AKO VS SPECIAL DISTRICT COMMISSIONER KISUMU AND ANOTHER 1989 K.L.R 163** dealt with the same issue in the following terms:-

“It is plain that under sub-section 3 of Section 9 of the Law Reform Act Cap 26, leave shall not be granted unless application for leave is made inside six months after the date of judgment. The prohibition is statutory and is not therefore challengeable under the Procedural Provisions of the Civil Procedure Rules, more specifically Order 49 Rule 5 which permits for enlargement of time”

The Court of Appeal then went on to state as follows:-

“We have no doubt that the prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provisions of sub-section 3 of Section 9 of the Law Reform Act”.

Being a decision of the Court of Appeal, the judgment in the AKO case (supra) is binding on me and I must therefore apply it unless another contrary authority of the same Court is cited before me and none has been cited. It is abundantly clear from the two cases cited above that a Judicial Review application seeking to quash an order, judgment, decree or conviction cannot be allowed after the six months period

stipulated in the law. The application herein seeks to quash the award of the Mwea Divisional Land Disputes Tribunal dated 2nd December 2004 and the resultant decree of the Wanguru Court dated 3rd February 2005. This application was filed on 28th October 2011 well beyond the six months period allowed by the law. The leave granted to the applicant was obtained on 10th October 2011 also well beyond the statutory period of six months. In the premises, I find that the order of 10th October 2011 granting the applicant leave to file the application dated 28th October 2011 was a nullity and cannot be allowed to stand. In the circumstances, the applicant's Notice of Motion filed on 28th October 2011 on the strength of the leave granted on 10th October 2011 is defective and is dismissed with costs to the interested party and 4th respondent.

The second order sought by the applicant is an order of prohibition to issue against the Central Provincial Land Disputes Appeal Committee stopping it from proceeding with the hearing and determination of Appeal NO. KIRINYAGA 5 of 2005 in respect of land parcel No. MUTITHI/CHUMBIRI/493. The Appeals Committee were creatures of the Land Disputes Tribunal Act No. 18 of 1990 which was repealed on 30th August 2011 when the Environment and Land Court Act (**Act No. 19 of 2011**) was enacted. The Appeals Committees are therefore no longer in existence and there can be no appeal pending before them. Indeed by the Hon. Chief Justice's Circular dated 9th November 2012, any pending appeals were transferred to this Court. An order of prohibition looks to the future. It is prospective rather than retrospective. Since the said Appeals Committee are no longer in existence, no purpose would be served by issuing such an order. Court orders are not issued in vain.

Ultimately therefore, upon considering the applicant's Notice of Motion filed herein on 28th October 2011, I find the same to be defective for reasons given above. It is accordingly dismissed with costs to the interested party and 4th respondent.

B.N. OLAO

JUDGE

18TH JULY, 2014

18/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Kiama for Applicant – absent

Mr. Murage for Kahiga for 4th Respondent – present

Ms Munene for Interested party – absent

COURT: Judgment delivered this 18th day of July 2014 in open Court.

Mr. Murage for Mr. Kahiga for 4th Respondent – present

No appearance by the other parties

Right of appeal explained.

B.N. OLAO

JUDGE

18TH JULY, 2014