



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 126 OF 2009(JR)

REPUBLIC..... APPLICANT

VERSUS

HOMA-BAY DISTRICT LAND DISPUTES TRIBUNALRESPONDENT

AND

JOSEPH MWANGO ORACHA INTERESTED PARTY

EX PARTE

MARGARET ADHIAMBO JULU

RULING

1. The ex parte applicant, **Margaret Adhiambo Julu** in her capacity as the legal representative of Andericus Julu Miyawa (hereinafter referred to only as “**Miyawa**”) brought the application herein against the respondent, **Homa Bay District Land Disputes Tribunal** by way of Notice of Motion dated 26th January, 2012 under Order 53 rule 3 (1) of the Civil Procedure Rules as read with section 8 of the Law Reform Act for the following orders :-
 - i. **An order of certiorari directed at the Homa-Bay District Land Disputes Tribunal quashing its award made on 5th March 2007 and adopted on 10th June 2009 in respect of Land Parcel No. Gem/Kamagawi/70.**
 - ii. **The costs to be awarded to the applicant.**

The application was premised on the following grounds:-

- a. **That Miyawa was the sole registered proprietor of Land parcel No. Gem/Kamagawi/70 (hereinafter referred to as “the suit property”) on first registration and his title to the said property was indefeasible thus the respondent lacked jurisdiction to interfere with such title.**
- b. **In September 2007, the interested party lodged a claim against Miyawa with the respondent while Miyawa was ailing and was mentally incapacitated and thus had no capacity of suing or being sued.**
- c. **That notwithstanding, the interested party’s claim was heard and determined on the 12th February 2007 although they were not given a copy of the decision of the elders neither were they informed when the same would be read in court.**
- d. **They were then summoned to attend court at Homa Bay on the 10th day of June 2009 when the said decision was read to her as Miyawa had already passed on over one and half years**

earlier.

- e. **The decree that was issued by the court in which it was alleged that the award was read to the claimant and objector was therefore false and defective.**
 - f. **Since the death of Miyawa nobody has filed a succession cause or obtained a grant of letters of administration authorizing any dealing with the suit property thus the conduct of respondents herein amounts to intermeddling.**
 - g. **The 6 months period prescribed for making an application for certiorari begins to run from the date of adoption of the respondent's award by the court and the issuance of a decree and therefore the delay by the chairman of the respondent to release a copy of the respondent's decision that was intended to defeat the cause of justice is misconceived.**
 - h. **That following the said decision of the respondent that awarded the interested party half portion of the suit property, the interested party entered into the suit property and recklessly damaged the ex parte applicant's banana plants growing thereon, the boundaries and threatened to evict the ex parte applicant therefrom although the suit property had not been subdivided.**
2. The application was not opposed by the respondent. The same was however opposed by the interested party. The interested party filed a replying affidavit sworn on 2nd October 2013 in opposition to the application. In the said affidavit, the interested party contended that:
- a. **The deceased (Andericus Julu Miyawa) died on 26th November 2007 after the Homa-Bay District Land Disputes Tribunal had made the decision complained of.**
 - b. **The said decision was read and thereafter signed by the elders in the presence of both parties.**
 - c. **It was only in the month of June 2009 when the interested party was summoned to attend court for the adoption of the said decision as judgment of the court.**
 - d. **The interested party occupied a portion of the land in dispute long before the death of the late Andericus Miyawa and to date he is still in occupation thereof.**
 - e. **The applicant's application is misconceived as no such order of certiorari can be issued against the interested party as he is not a statutory body.**
 - f. **The applicant's application is statutorily time barred and lacks merit.**

When the application came up for hearing before me on 5th February 2014, Mr. G. S. Okoth, advocate appeared for the applicant while the interested party appeared in person. Mr. Okoth informed the court that the applicant wished to rely entirely on her statutory statement and the verifying affidavit in support of the application. On his part, the interested party also informed the court that he wished to rely entirely on his replying affidavit in opposition to the application. I have considered the ex parte applicant's application and the interested party's affidavit in opposition thereto. In my view, the following are the issues that present themselves for determination by this court:-

- i. **Whether the ex parte applicant's application time barred?**
 - ii. **If the answer to (a) above is in the negative, whether the applicant has established a case for the grant of an order of certiorari against the respondent?**
3. From the record, the applicant brought an application under certificate of urgency on 27th October, 2009 by way of Chamber Summons dated 23rd October, 2009 for leave to apply for orders of certiorari and prohibition against Homa-Bay District Land Disputes Tribunal, the Senior Resident Magistrate's Court, Homa-Bay, the District Land Registrar, Homa-Bay and Joseph Mwangi Oracha who were cited in the said application as 1st, 2nd, 3rd, and 4th respondents respectively. For reasons which are not clear from the record, the court file was not placed before the duty judge for the necessary orders or directions. While this application was pending, the applicant lodged yet another chamber summons application dated 13th October, 2009 on 19th April, 2010 for leave to apply for similar reliefs as the applicant had sought in the earlier application that was filed on 27th October, 2009.
4. The reason for the filing this second application while the first application was still pending is not

- clear from the record. I can only hazard a guess. My perusal of the applicant's application dated 23rd October, 2009 that was filed on 27th October, 2009 reveals that the same was defective in form. The application was brought in the name of the Republic instead of being in the name of the applicant as an application for leave should be. I am of the view that the applicant realized this procedural blunder and decided to file a fresh application for leave now in the name of the applicant. This explains the reason behind the second application. Again, the reason why the applicant did not withdraw the defective application is not clear. I believe we may have an answer to that question later in this ruling.
5. After the filing of the applicant's second application for leave aforesaid, the court file is said to have been misplaced. The said application for leave dated 13th October, 2009 that was filed on 19th April, 2010 was not placed before the judge for necessary orders until 9th November, 2011 when the same was placed before R. Lagat-Korir J. who granted to the applicant leave on the same date to apply for orders of certiorari to quash the decision of the 1st respondent herein that was made on 5th March, 2007 and adopted as a judgment of the court on 10th June, 2009. The application for judicial review before me was not filed until 27th January, 2012 over two (2) months after leave was granted. From the history of the present application that I have set out herein above, the following facts cannot be disputed. The decision of the 1st respondent being challenged herein was adopted as a judgment of the court on 10th June, 2009.
 6. According to section 9(3) of the Law Reform Act, Cap 32 Laws of Kenya and Order 53 rule 2 of the Civil Procedure Rules, 2010, the application for leave to challenge the said decision of the 1st respondent should have been made within six (6) months from 10th June, 2009. The applicant's application for leave pursuant to which the present application was filed on 19th April, 2010 more than ten (10) months from the date of the decree sought to be quashed. The applicant's application for leave was therefore filed out of time. The application herein which, was filed pursuant to leave that was granted out of the time limited by statute cannot stand. In the case of, **Kimanzi Mboo – vs- David Mulwa, Court of Appeal Civil Appeal No. 233 of 1996 (unreported)** 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.** In the case of **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 period, the court 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, Cap 26 Laws of Kenya.
 7. In the event that I am wrong on my findings above, I am of the opinion that the applicant's application is also time barred on another account. Under Order 53 rule 3(1) of the Civil Procedure Rules, 2010, an application for judicial review must be lodged within 21 days from the date of leave. In the present case, leave was granted to the applicant on 9th November, 2011 and the applicant did not file the application herein until 27th January, 2012 more than 60 days after the date of leave. There is no evidence before me that the applicant obtained an extension of time (assuming that such extension could be granted) to file the present application outside the time prescribed under Order 53 rule 3(1) of the Civil Procedure Rules, 2010 aforesaid. The present application was therefore filed out of time. In view of this finding, I am in agreement with the interested party's contention that the application herein is statute barred and as such is not maintainable.
 8. Those being my findings on the applicant's application so far, I am not obliged to consider the merit of the application. In conclusion, the applicant's application dated 26th January, 2012 must fail. The same is hereby struck out for being time barred. Each party shall bear its own cost.

Delivered, signed and dated at KISII this 7th day of August, 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A

for the applicant

N/A

for the respondent

Mr. Mobisa

Court Clerk.

S. OKONG'O

JUDGE