



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

JUDICIAL REVIEW NO. 46 OF 2012

**IN THE MATTER OF AN APPLICATION BY APOLLO OSAMA MAINDO FOR JUDICIAL
REVIEW ORDERS OF CERTIORATI**

AND

**IN THE MATTER OF THE MUMIAS LAND DISPUTES TRIBUNAL SITTING ON THE 22ND
JULY 2009 PURSUANT TO THE PROVISIONS OF THE LAND DISPUTES TRIBUNAL ACT
NUMBER 18 OF 1990 AND READ AND ADOPTED AS THE JUDGMENT OF THE COURT
VIDE THE RESIDENT MAGISTRATE'S COURT AT MUMIAS IN MISC. AWARD CASE
NUMBER 21 OF 2009 IN RESPECT OF LAND PARCELS NO. S/WANGA/LUREKO/131, 118
AND 119**

BETWEEN

REPUBLICAPPLICANT

VERSUS

1. THE CHAIRMAN, MUMIAS LAND DISPUTES TRIBUNAL 1ST RESPONDENT

2. THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

EX-PARATE:

APPOLO OSAMA MAINDO APPLICANT

AND

1. DEBLA KUTOYI LUNG'ANYI

2. DISMAS WASWA INGUYISI.....INTERESTED PARTIES

JUDGMENT

1. This is a Notice of Motion dated 11th February 2013, brought under Order 53 rule 3 of the Civil Procedure Rules 2010, Section 3 and 3A of the Civil Procedure Act, and all other enabling provisions of the law. Appolo Osama Maindo, the Ex-parte Applicant, has brought this motion pursuant to leave of the court granted allowing the ex-parte applicant to apply for Judicial Review orders of Certiorari to remove

into this court for purposes of quashing the award of Mumias Divisional Land Disputes Tribunal in Tribunal Case No. 10 of 2009 sitting on 22/7/2014, and adopted as a judgment of the court by the Resident Magistrates Court at Mumias, in Misc. Application Number 12 of 2009 in respect of land parcel No. SOUTH WANGA/LUREKO/131, 118 AND 119.

2. The application has grounds on the face of the motion, and there is also annexed to the motion, the applicant's supporting affidavit and statement of facts. After the Notice of Motion was served, the interested parties' counsel filed a Notice of Preliminary Objection to the motion. On 1.7.2014, parties agreed to file written submissions on the Preliminary Objection. The interested parties filed their submissions, but the ex-parte applicant did not and the court proceeded to write a judgment.

3. The ex-parte applicant's Notice of Motion, seeks an Order of Certiorari to bring into this court for purposes of quashing the decision of the Mumias Land Disputes Tribunal made on 22/7/2009, and according to the ex-parte applicant, adopted as a judgment of the court on 19/9/2012. The ex-parte applicant sought and was granted leave to commence judicial Review proceedings and more specifically to apply for orders directed at the respondent to quash the decision of the 1st respondent and adopted by the court vide Misc. Award No. 21 of 2009 Mumias Court on the 19/9/2012. The order for leave was made on 17/10/2012.

4. The Ex-parte applicant did not file his submissions, which means I have only the Interested Parties submissions to consider in respect of the Preliminary Objection. What then is the nature of the Preliminary Objection?

5. From the Notice of Preliminary Objection, the interested parties are of the view, that the proceedings herein are a nullity, that the application for leave was made out of the six (6) months window period, hence the leave granted to the applicant on 17/10/2012 is a nullity and that the Notice of Motion dated 11/2/2013 was filed outside the mandatory twenty one (21) days in contravention of Order 53 rule 3 (1) of the Civil Procedure Rules, 2010. The interested parties Counsel has also adopted the same arguments in his submissions, maintaining that the leave granted ought not to have been granted, and further, that the Notice of Motion was filed out of time.

6. The application for leave was granted on 17/10/2012. The leave granted was for challenging a decision made on 19/9/2010. If that be the case, the leave was granted within six (6) months. However, the interested parties argue that the award was made on 22/7/2009 and adopted on 25/11/2009. That would clearly take the leave outside the six months period within which an application for leave should be sought.

7. My view is that if the interested parties were aggrieved by the grant of leave to the ex-parte applicant, and wanted to challenge that leave, the challenge ought to have been made in those proceedings whereby the interested parties would have applied to set aside the order granting leave. In **REPUBLIC –VS- PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD & ANOTHER – EX-PARTE KENYA AIRPORTS AUTHORITY [2005] 1KLR 628**, it was held that **“The party who wishes to challenge an order granting leave, must file a formal application which ordinarily ought to be heard by the Judge who granted the leave”**. As that was not done, the interested parties cannot challenge the leave in the manner they have.

8. The more important objection to consider is the one challenging the Notice of Motion on grounds that it was filed out of time. As stated above, leave was granted to the ex-parte applicant on 17/10/2012, but the Notice of Motion was filed on 11/2/2013. This is clearly outside the twenty one (21) days period. For the avoidance of doubt, Order 53 rule 3 (1) of the Civil Procedure Rules, (2010) provides as follows:-

“Where leave has been granted to apply for an order of Mandamus, Prohibition or Certiorari, the application shall be made within twenty one days by notice of motion to the High Court....”

9. The rule uses the word 'shall' which is mandatory, and leaves no ambiguity. Clearly, the Notice of

Motion before court was filed outside time and on that ground alone the Notice of Motion is incompetent and ought to be struck out.

10. However, there is a second ground, though not taken up by the interested parties, I feel bound to deal with it for the conclusiveness of this matter. The award was made and adopted by the magistrate's court thus became a judgment of the Court. Once the award was adopted by the magistrate's court, it became the judgment of the court and Judicial Review Proceedings could not be brought against the Tribunal in isolation of the magistrate's court. That court having adopted the award, became a necessary party to the Judicial Review Proceedings.

11. In **REPUBLIC –vs- CHAIRMAN, LAND DISPUTES TRIBUNAL, KIRINYAGA DISTRICT AND ANOTHER EX-PARTE KARIUKI [2005] KLR 10** Justice Khamoni expressed himself in the following words:-

“Where the decision of a Land Tribunal has been adopted by a magistrate’s court in accordance with the provisions of the Land Disputes Tribunal Act, that adoption makes the decision of the Tribunal or the decision of the Appeals Committee be a decision of the Magistrate’s court. Consequently, the decision of the Tribunal or Appeals Committee, in law, ceases to exist as an independent decision challengeable separately in appeal or judicial review.”

12. I fully agree with Khamoni, J. The decision of the Mumias Land Disputes Tribunal award ceased to exist the moment it was adopted by the magistrate's court. The Ex-parte applicant could not file this motion in isolation of the Mumias Resident Magistrate's Court whose decision he was challenging.

13. For those reasons, I find that the Preliminary Objection is well founded and succeeds. The Notice of Motion dated 11/2/2013 is hereby struck out with costs to the Interested Parties.

Dated and delivered at Kakamega this 28th day of October, 2014

E. C. MWITA

J U D G E