



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C.A JR NO 20 OF 2009

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN, MBEERE LAND DISPUTES TRIBUNAL..... RESPONDENT

AND

PAUL IRERI KANYOTI.....INTERESTED PARTY

AND

NYONGA MUGO.....EX-PARTE /APPLICANT

RULING

Introduction:

Mr Nyonga Mugo, the Ex-parte applicant has by his chamber summons of 4th December, 2008, sought the following orders from this court:

1. An order granting him ex-parte leave to apply for an order of certiorari to quash the orders made by the respondent on 12th June, 2008 in its tribunal case number 315 of 2006.
2. An order granting him leave to apply for an order of prohibition to restrain the respondent or his agents from adopting as judgement of court the award made by the respondent.
3. That the grant of the leave do operate as a stay of the proceedings in Siakago Senior Resident Magistrate case number 3 of 2008 in which the award is sought to be adopted as judgement of that court.
4. That costs of this application to be provided for.

Factual Basis and Procedural History:

Mr Paul Ileri Kanyoti, the interested party, filed a claim over land parcel number Evurore/Nthambu/304 in the Mbeere Disputes Tribunal in case number 315 of 2006 in which he claimed to be entitled to a portion of the said piece of land. The ex-parte applicant opposed his claim on the basis that he was the lawful owner of the entire piece of land. Both parties called witnesses in support of their rival claims.

At the end of the evidentiary hearing, the tribunal made the following findings:

1. That in 1993, the suit land was registered in the name of the ex-parte applicant.
2. The suit land previously belonged to Mr Mugo Mbaririe who had three sons including the interested party and the ex-parte applicant's late husband (sic).
3. The registration of the suit land in the name of the applicant was illegal as the other two sons of Mr Mugo Mbaririe were not involved in the registration.

Following those findings, the tribunal ordered the District Land Surveyor to sub divide the suit land into three equal portions, so that each son would get a share. Additionally, the three sons of Mr Mugo Mbaririe were to share the costs of the District Land Surveyor.

The order of the Land Disputes Tribunal was made on 12th June, 2008. Thereafter, the interested party filed the award of the Land Disputes Tribunal in the Senior Resident Magistrate's court at Siakago in that court's case number 3 of 2008 seeking the adoption of the Land Disputes Tribunal award as a judgement of that court.

The ex-parte leave to apply for an order of certiorari is directed at the order of the Land Disputes Tribunal, which directed the suit land to be divided into three portions. The adoption proceedings are also sought to be prohibited by the issuance of an order of prohibition.

The application for the ex-parte leave to file for an order of certiorari was filed on 4th December, 2008 in the Nairobi Registry. The notice to commence the ex-parte application was served on the registrar of the High Court on 3rd November, 2008 in terms of the law as it then stood.

Issues for Determination:

I have perused the grounds that are set out in the chamber summons, the verifying affidavits and statement of facts and I have also considered the submissions of the ex-parte applicant. In my view, the issues for determination are as follows:

1. Whether or not the application for the ex-parte leave to file for an order of certiorari is within the time permitted by law.
2. Who is to bear the costs of this application.

The Applicable Law:

The provisions of the law that govern the grant of the order of certiorari are set out in **Section 9(3) of the Law Reform Act Chapter 26** of the Laws of Kenya. There are further enabling provisions in **Order 53, Rule 7 of the Civil Procedure Rules of 2010**. In addition to these statutory provisions, there are superior court judgements that have interpreted these provisions.

According to **Section 9(3) of the Law Reform Act**, the order for certiorari should be applied for not later than six months from the order, judgement or proceedings complained of. In terms the provisions of that section state as follows:

“In the case of an application for an order of certiorari to remove any judgement, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgement, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgement, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time

for appealing has expired”

In addition to the provisions of **Section 9(3) of the Law Reform Act**, there are further enabling provisions in **Order 53 Rule 7 of the Civil Procedure Rules** which provide as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgement, 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 proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by Law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

In terms of the **Section 9(3) of the Law Reform Act**, the court does not have any discretion to extend the time either on its own motion or upon application by the parties within which to file for leave to apply for an order of certiorari. The six months limitation period is absolute. It does not permit any party to apply for the extension of time after the expiry of the six months period. As a result, once the six months period has expired, the order, judgement or proceeding that is sought to be quashed is not subject to be challenged by way of judicial review.

Evaluation of the Facts and the Law:

From what I have stated in the above paragraphs, it is clear that the application is within the time permitted by law. This is based on the fact that the order sought to be quashed was made on 12th June, 2008. The application of the applicant seeking ex-parte leave to file for an order of certiorari was filed on 4th December, 2008. I now turn to the issue of costs.

The issue of costs in these proceedings is unique. The proceedings proceeded in the absence of the other parties on record, that is the interested party and the Chairman of Mbeere Land Disputes Tribunal. On 17th November, 2014, the court notified the interested party that his presence was not necessary as the application was ex-parte. He therefore did not participate in these proceedings. The nature of the ex-parte proceedings is provided for in **Order 53 Rule 1(2)**. The provisions of that rule are as follows:

“An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on”

In the circumstances, the ex-parte applicant has to bear the costs of this application.

Verdict and Disposal Order:

The ex-parte applicant's application is hereby granted. All orders made as a result of the award of the tribunal including that of the magistrate adopting the award as a judgement of the court are hereby set aside. The notice of motion should be filed within 21 days and all interested parties should be served. As regards the issue of costs, the ex-parte applicant will bear the costs of this application.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this15thday ofDecember, 2014

In the presence of

M/S Muriuki holding brief for Mr Namasake and in the absence of both the Respondent and the Interested Party.

Court clerk Mr Muriithi

Right of Appeal under Order 43 explained to the parties.

J.M. BWONWONGA – JUDGE

15.12.14