



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Judicial Review 111 of 2012**

**REPUBLIC..... APPLICANT**

**VERSUS**

**CHAIRMAN KANDUYI LDT TRIBUNAL ..... RESPONDENT**

**EXPARTE**

**EVERLYNE N. KHAEMBA ..... EXPARTE APPLICANT**

**BUSURU RICHARD MARK ..... INTERESTED PARTY**

**RULING**

This is a Judicial Review application filed in court on 3rd December 2012 pursuant to leave granted on 12th November 2012.

The application seeks orders of certiorari to remove into this court and quash the proceedings and award of Kanduyi Land Disputes Tribunal read and adopted as judgment of the court vide Bungoma CMCC LDT case No 43 of 2011 on 8th May 2012. She also prayed for orders of prohibition directed at the chief magistrate court barring it from enforcing the said order. The application was supported by an affidavit of the applicant sworn on 3rd December 2012 and a supplementary affidavit sworn on 16th April 2013.

The application is opposed. The interested party swore a replying affidavit dated 8th February 2013. Both parties made oral submissions before me in support of their claims.

Mr. Murunga for the exparte applicant submitted that the question is whether the Tribunal had jurisdiction to entertain the claim as provided under Section. 3 (1) of the Act which he answered in the negative. He submitted that the decision adopted by the magistrate amounted to rectification of the register which power is vested only in the high court since matters of contract are outside the purview of the tribunal. He cited the case of Benjamin Lubekho vs. Martin Wabwire & another – Bungoma HCC No. 33 of 2009 to support his submissions.

Mr. Samba opposed the motion and raised the first issue that application for leave to file the Judicial

Review proceedings was made out of time. According to him, leave was granted on 12th November 2012 which is outside the 6 months given under order LIII rule 2. The leave was therefore irregularly given and ought to be set aside which then results into the substantive motion be dismissed. He also submitted that once the award was adopted by the magistrate's court, it ceased to exist. What remains to be quashed is a judgment and there is no such application. The only remedy available according to them is an appeal. He referred this court to the case of ***R. Vs. Chairman Kirinyaga District LDT & another*** where Justice Khamoni as per Mr. Samba's submissions that after adoption of a tribunal's award, it is futile for a party to seek to quash that award. Finally he submitted prayer 2 of the motion cannot be granted as it was not included in the application for leave. He distinguished the case law cited by the applicant as being different from the instant case.

Mr. Murunga in brief replied that the application was filed within time. That the judgment of the court is not independent of the award and that prayer 2 is merely administrative.

Before dealing with the substance of the motion, I seek to first establish if the leave was granted within/outside time. The award sought to be quashed was read and adopted on 8th May 2012.

Time in my view started running from 8th May and six months therefore lapsed on 7th November 2012. The application for leave was filed on 5th November 2012. According to Mr. Samba, he avers that the court granted leave on 12th November 2012. Order 53 Rule 2 provides that “..... ***unless the application for leave is made not later than six months after the date of the proceedings or suit shorter period as may be prescribed by any Act.***” It does not say the court must grant leave within six months but it's the application which must be made. The submission of Mr. Samba is therefore not proper interpretation of the rule.

The application was made before the lapse of the six months and is therefore regular and valid.

The second limb is did the Tribunal have jurisdiction to entertain the matter before it?. A perusal of the proceedings before the Tribunal shows the interested party had purchased land from the exparte applicant.

He partly paid this money to redeem the expartes application land that was up for auction by a bank. This created a contractual relationship between them. It is unfortunate that the exparte applicant is backing out on their agreement but the Tribunal was the wrong forum for the interested party to use to compel the applicant to oblige.

The jurisdiction of the Tribunal is limited to powers conferred to it by Section 3 (1) of the Act. The said Section does not confer powers to arbitrate on contractual matters between parties. I thus hold that the Tribunal exceeded it's mandate by giving an award in the nature of enforcing a contract.

The final issue for determination is whether the application was proper in seeking to quash a decision of an award of a Tribunal when such an award ceased to exist after it was adopted.

The wordings in prayer 1 read as follows;

***“The Judicial Review Orders of certiorari to remove into this court and quash the proceedings and award of Kanduyi Land Disputes Tribunal read and adopted as judgment of the court vide Bungoma CMCC LDT case No 43 of 2011 on 8th May 2012.”***

The award of the tribunal in my understanding is incapable of being enforced unless and until it is adopted by the court. There is nothing to quash then at that stage. The wording of in the prayer has combined the award and adoption appropriately. I have read through the decision of Khamoni J, in Misc. No. 129 of 2004 annexed to the submissions. It is distinguishable from the instant case because,

1. The case number cited was not related to the proceedings sought to be quashed (page 16).
1. The party sued was also not clear (page 13) as elders tribunal and Kirinyaga LDT which the judge

found were different entities.

This application is proper. In any event the Attorney General was made a party to the proceedings. Even if the magistrate's court was to be sued, it is the Attorney General that is the legal representative of all government departments. The magistrate's court was performing such official role for which the Attorney General can be sued.

In conclusion, I hold that the application has merit, is properly before the court and allow it as prayed with costs to the exparte applicant.

**RULING SIGNED, DELIVERED AND READ** in open court this 28th day of May 2013.

**A. OMOLLO**

**JUDGE.**