



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC. APPLICATION NO. 26 OF 2008

REPUBLIC.....PLAINTIFF

VERSUS

DISTRICT LAND DISPUTE TRIBUNAL, KABARNET.....1ST RESPONDENT

DISTRICT LAND REGISTRAR KABARNET.....2ND RESPONDENT

AND

CHARLES KANDAGOR.....INTERESTED PARTY/RESPONDENT

EX-PARTE AFRICAN INLAND CHURCH (AIC)

REGISTERED TRUSTEES, KABASIS.....SUBJECT/APPLICANT

RULING

The African Inland Church (AIC), Registered Trustees (KABASIS), (*the Applicant*) were on 26th July 2007 granted leave to commence Judicial Review Proceedings for orders of certiorari and prohibition of the proceedings and decision of the District Land Disputes Tribunal Kabarnet and the subsequent judgment entered in terms of the award by the Senior Resident Magistrate Kabarnet on the 18th May 2007, vide Kabarnet SPMCC No. 03 of 2007 in respect of Title No. SACHO/KABASIS/386 within a period of 21 days and serve the main application (Motion) within 8 days of filing. The leave was also ordered to operate as a stay of both the decision of the Tribunal and also the order of the subordinate court making the decision, a judgment of the court.

The Motion (*the substantive application dated 8.08.2007*) was duly filed on 10th August 2007, within the 21 days, and was served apparently upon the Interested Party on a date unknown as there appears to be no Affidavit of Service upon the Interested Party. I say apparently because the Interested Party appointed the firm of Kimwere Josphat & Co. Advocates of Princely House, 3rd Floor, Room 5, Moi Avenue, Nairobi who filed on 14.09.2007 a Notice of Appointment of Advocates dated 13.09.2007.

Thereafter neither counsel took any steps to prosecute the Notice of Motion until the Hon. Lady Justice Wendoh on 3.12.2007 directed the file be sent to the High Court Nakuru with a view to taking directions. The file was received in Nakuru High Court Registry on 21.01.2008, and the Advocates concerned were notified by the Deputy Registrar of the court per letters dated 19.02.2008, and 26.02.2008 to come and fix a fresh date in the Registry for directions and/or hearing date for the Motion. Neither counsel took action.

A Notice of Change of Advocates dated 21st August 2008 was filed on 06.10.2008 by the Interested Party replacing the firm of Kimwere & Co. Advocates, with the firm of Kiplenge and Ogola Advocates. Again no further action was taken to prosecute the Motion.

Two years later there was a further Change of Advocates from Kiplenge & Ogola Advocates to Kiplenge and Kurgat. The Notice of Change of Advocates is dated and was filed on 26.01.2010.

Following that Notice of Change of Advocates, the Interested Party, through the new Advocates, Kiplenge and Kurgat filed on 26.01.2010, a Notice of Motion of even date seeking orders for dismissal of the *ex parte* Applicant's Notice of Motion dated 8.08.2007.

The Notice of Motion for dismissal came before me on the same 30.11.2010 and I allowed it. It is that decision which the *ex parte* Applicant, now seeks me to set aside the order of dismissal and reinstate the application dated 8th August 2007 (*the Motion for orders of certiorari and prohibition*).

The said Application was supported by the Affidavit of its counsel, Joel Kimutai Bosek sworn on 8th July 2011, the essence of which is that the application for dismissal was never served upon the firm of J. K. Bosek & Co. Advocates for the *ex parte* Applicant. The Advocates contention that his firm was not served was vehemently denied by Nelson Kisolei the process server. In his Affidavit sworn and filed on 10th November 2011, he contends that he did serve the Application for dismissal of the Notice of Motion upon the said firm of J. K. Bosek & Co. Advocates. Unfortunately the said Affidavit is not expressed to be served upon the said J. K. Bosek or his firm. His response to it may have assisted the court in establishing the probable true position. There is therefore the lingering doubt the *ex parte* Applicant's Notice of Motion for the Judicial Review orders was dismissed without proper notice to its counsel then on record.

Counsel for both parties filed written submissions for and against the application by the Interested Party. Both Counsel discussed the application for dismissal and for setting aside the orders of dismissal as if this was a matter under the Civil Procedure Act (*Cap. 21*) and the Civil Procedure Rules. This is however a matter under the Law Reform Act, (*Cap. 26, Laws of Kenya*), Section 8(1) thereof specifically prohibits the High Court from issuing in its Civil and Criminal Jurisdiction any orders of certiorari, prohibition or mandamus. Though Order 53 of the Civil Procedure Rules appears as part of the Civil Procedure Rules, it must be noted that it is included in those Rules for convenience of counsel and litigants. It is not made pursuant to Section 81 of the Civil Procedure Act, but under Section 9 of the Law Reform Act. It therefore follows that any application under those provisions of the Law Reform Act must be made under the court's inherent power under the Constitution and the Judicature Act (*Cap. 8, Laws of Kenya*).

This means for instance the Interested Party's Notice of Motion (*of 26.01.2010*) under Order L rule 1 and Order XVI rule 5(3) of the former Civil Procedure Rules and Section 3A of the Civil Procedure Act, was incompetent.

It also means that the *ex parte* Applicant's Notice of Motion of under Order 22, rule 22, Order 45, rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, is equally incompetent.

These findings put both the *ex parte* Applicant and the Interested in untenable positions, and both cry out for justice in respect of their claims. The situation therefore calls for resolution by way of Article 159(2) (d) of the Constitution of Kenya 2010, that in exercising judicial authority, the courts and tribunals shall be guided by the principles inter alia "*that justice shall be administered without undue regard to procedural technicalities.*"

The *ex parte* applicant essentially seeks two orders namely, setting aside of the orders of 30.11.2010 dismissing their judicial review application of 8.08.2007, and secondly the reinstatement of that application.

From both the Applicant's grounds and Affidavits, what I see is a very casual attempt to prosecute the

judicial review application. There is no cogent explanation for the non-prosecution of the Notice of Motion dated 8.08.2007 and filed on 10.08.2007. The delay can only be attributed to the casual attitude of counsel.

Similarly the reference to Order 22, rule 22 of the Civil Procedure Rules as the basis for stay of execution is equally attributable to counsel's casual attitude. Order 22 rule 22 refers to orders made and transferred to this court for execution from another court. The orders herein were made by this court and if they were made under the usual Civil Procedure Rules, the orders of stay pending appeal could only have been made under Order 42, rule 6 of the Civil Procedure Rules. That would have been the basis of such arguments as inordinate delay, substantial loss and security.

Except for the inordinate delay, over one year since the dismissal was made, and nearly six years since the Motion of 8.08.2007, the question of loss and security could be argued both ways. For the Applicants, they have been on the premises (*suit land for over 42 years*), the land having been donated by the Interested Party's family. For the Interested Party the donation by his father is a loss to him and perhaps other members of his family.

From the point of the view of the law, without deciding the question, there may be argument that the decisions by the Tribunal were made without jurisdiction. In addition, there is the question also of the paramountcy of public interest, education over the individual's will.

For those reasons, and notwithstanding the very casual manner in which this matter has been handled by counsel, the justice of this matter demands that I set aside the orders of dismissal made on 30.11.2011, and reinstate the application dated 8.08.2007.

The ex parte Applicant will however pay the Interested Party's costs to-date, which I assess at this stage at one half of the sum of shs 82,710/=.

I also direct that the ex parte Applicant's Motion of 8.08.2007 be heard within the next 120 days.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 21st day of June, 2013

M. J. ANYARA EMUKULE

JUDGE