



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISCELLANEOUS CIVIL APPLICATION NO. 40 OF 2012

REPUBLIC APPLICANT

VERSUS

KAPLAMAI L. D. T. COMPRISING OF:

KIPCHANA KIBORON.....}

ZIPPORAH NYONGESA.....}

BEN M. SIMIYU} 1ST RESPONDENT

CM'S COURT KITALE} 2ND RESPONDENT

JOSEPHAT KIPLAGAT} INTERESTED PARTY

MICHAEL BARTENGE} EX-PARTE APPL.

RULING

The ex-parte Applicant Michael Bartenge took out Notice of Motion dated 03/08/2012 under the provisions of Order 53 Rule 3 of the Civil Procedure Rules seeking an order of certiorari to bring into this Court for quashing the decision of Kaplamai Land Disputes Tribunal which was adopted as judgment in Kitale Chief Magistrate's Court Land Case No. 42 of 2004 on 04/04/2005.

The interested party Josephat Kiplagat filed a claim against the ex-parte Applicant at the Kaplamai Land Disputes Tribunal. In a verdict dated 23/11/2004, the Tribunal decided that the interested party gets 12 acres out of the 14 acres held by the ex-parte Applicant. The decision was based on alleged commitment signed by the ex-parte Applicant.

The ex-parte Applicant was aggrieved with the decision of the Tribunal and filed a motion seeking orders of certiorari on the following grounds:-

1. *That there was no claim that was registered against the Applicant as required by Section 3(3) of the Land Disputes Tribunal Act.*
2. *That the Applicant was never served with any claim as per section 3(4) of the Land Disputes Act.*
3. *That the decision of the Tribunal was made by strangers who were not appointed as per Section 4 and 5 of the Land Disputes Tribunal Act.*
4. *The letter referred to as "commitment" purported to be drawn by the Land Disputes Tribunal is unknown to the Applicant and was not of any importance to the evidence of the Respondent.*

The application was opposed by the first and second Respondents who were represented by Mr. Wabwire from the State Law Office who contended that the leave to bring the motion was brought outside the required time and that the application is defective.

Interested party opposed the application through grounds of opposition filed on 14/05/2013 as well as Replying Affidavit sworn by the ex-parte Applicant on 10/05/2013 and a Further Affidavit sworn 11/07/2013.

The ex-parte Applicant contends that leave to file the motion was irregularly obtained and in any case was obtained outside the statutory period required by the rules. The ex-parte Applicant contends that the prayers in the statement are not in tandem with prayers in the main motion. The ex-parte Applicant also contends that the Chairman of the tribunal was not sued.

The decision which is being subjected to Judicial Review, was passed by Kaplamai Land Disputes Tribunal which is a public body established pursuant to the provisions of the Land Disputes Tribunal Act (now repealed). This being a public body which existed before repeal of the Act, its decisions are amenable to Judicial Review. The role of this Court in its supervisory jurisdiction is to ensure that decisions arising from such public bodies are reached in accordance to the law and that parties appearing before such bodies are treated fairly.

The Respondents and the interested parties have not addressed themselves to the issues raised by the ex-parte Applicant. They have attacked the competency of the motion. Before I go to the merits of the issues raised in the Notice of Motion, I have to address the issues raised regarding the competency of the motion as well as the application for leave to bring the motion itself. It has been argued that the application for leave to bring the substantive motion was filed out of time. Order 53 Rule (2) provides as follows:-

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by an 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 the present case, the decision of the Tribunal was made on 23/11/2004. The same was adopted as judgment of the Court on 04/04/2005. The six months period for bringing an application for leave should have expired by the 23/05/2005. The ex-parte Applicant filed the application for leave on 21/04/2005. This was within the period of six months. Though this application remained unprosecuted until 27/07/2012, the same was filed within the required time.

There was an argument by Mr. Limo for the interested party that the statement in the application for leave was different from the one in the main motion. I do not see this difference. The statements are basically the same except that in the heading, one contains the words Verifying Affidavit when the other does not contain the words. This does not make any difference as to render the motion incompetent. There was also another argument by Mr. Limo that the ex-parte Applicant did not sue the Chairman of the Tribunal who is the D. C. I do not think that failure to cite the Chairman in the motion is fatal. Since the Tribunal is made a party, there was no need of specifying that it is the D. C. as Chairman being sued.

I now come to the merits of the motion itself. The Applicant contends that he was not served with any claim as per Section 3 (4) of the Land Disputes Tribunal Act. Section 3 (4) of the Land Disputes Tribunal Act provides as follows:-

“Every claim shall be served on the other party, or, where there are more than one, on each of the parties to the dispute and the provisions of the Civil Procedure Act as regards service of summons shall thereafter apply”.

In any proceedings where a hearing is to follow, service is central to that process. A party will not be expected to know what he is facing if there is no service. The Land Disputes Tribunal Act expressly provided that service is to be done in accordance with the provisions of the Civil Procedure Act. Under the Civil Procedure Act, service is provided for under Order 5 of the Civil Procedure Rules. This order provides for various modes of service and the persons authorized to serve processes. In the instant case, it appears from the proceedings of the Tribunal that the claim in those proceedings was given to a village elder for service. There was no Affidavit of service prepared and filed as required. A village elder is not recognized as a process server under Order 5 of the Civil Procedure Rules. I therefore find that there was no service of the claim as provided by law. The Tribunal overlooked a very basic and fundamental procedure which makes the entire decision to be brought to question and thus amenable to Judicial Review.

Another issue raised by the ex-parte Applicant is that the decision of the Tribunal was made by strangers who were not gazetted as provided for by the Land Disputes Tribunal Act. Section 5(1) of the Land Disputes Tribunal Act provides as follows:-

“The minister shall, by notice in the Gazette, appoint a panel of elders for each registration district”

Section 4(1) provides as follows:-

“There shall be established a Tribunal, to be called the Land Disputes Tribunal for every registration district”.

2. ***Each Tribunal shall consist of:-***

(a) a Chairman who shall be appointed from time to time by the District Commissioner from the Panel of Elders appointed under Section 5; and

(b) either two or four elders selected by the District Commissioner from a Panel of Elders appointed under Section 5”.

The registration District under which Kaplamai Land Disputes Tribunal falls is Trans-Nzoia District. The Minister for Lands then pursuant to his powers under Section 5 (1) of the Land Disputes Tribunal Act vide Gazette Notice No. 8344 of 21/11/2003 appointed 50 members for Trans-Nzoia District. It was the duty of the District Commissioner to constitute Tribunals from among the 50 members gazetted by the Minister for the respective Tribunals within the registration district.

A look at the whole list for Trans-Nzoia District shows that none of the three members who made the decision the subject of this review appears on the list of those gazetted under Trans-Nzoia District. A closer scrutiny of the names of the three members who comprised Kaplamai Land Disputes Tribunal shows that two members were brought from the neighbouring Uasin Gishu District. The two are the Chairman Kipchana Kiboron and member Ben Simiyu. The third member Zipporah Nyongesa neither appears on the list of Trans-Nzoia District nor Uasin Gishu District. It is therefore clear that the decision of Kaplamai Land Disputes Tribunal was made by unauthorized members. The District Commissioner who constituted the Tribunal members acted contrary to the provisions of the Land Disputes Tribunal Act. He not only brought two members from a different registration district but also allowed a person who had not been gazetted to be a member of the Tribunal.

The then District Commissioner Trans-Nzoia District Solomon O. Ouko in a letter under confidential cover sent a letter to the District Officer Kaplamai Division forwarding a list of 10 members who had purportedly been gazetted as members of Kaplamai Division Land Disputes Tribunal which was not the case. It is in this letter that the name of Zipporah Nyongesa appears and not in the Gazette Notice which the District Commissioner referred to in his letter. The District Commissioner had no power to forward names of people who had not been gazetted as members of the Tribunal. I therefore find that the decision of the Kaplamai Land Disputes Tribunal was made by unauthorized persons. The decision of the

unauthorized persons is therefore null and void. The upshot of this is that the ex-parte Applicant's Notice of Motion dated 03/08/2012 is hereby allowed. The proceedings and decision of Kaplamai Land Disputes Tribunal as well as the subordinate Court proceedings in Kitale Senior Principal Magistrate's Court Land Case No. 42 of 2004 are hereby quashed.

It is so ordered.

Dated, signed and delivered in Open Court on this 20th day of August, 2013.

E. OBAGA

JUDGE

COURT

In the presence of the ex-parte Applicant Michael Bartenge.

Court Clerk: Bett.

E. OBAGA

JUDGE

20/08/2013