REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 109 OF 2013

IN THE MATTER OF AN APPLICATION FOR ORDER OF CERTIORARI ADN PROHIBITON

AND

JOSEPH MOSASI

DAVID KOIN TOPIKA

PARTIMO OLE MOISASI .....APPLICANTS

VERSUS

KAJIADO CENTRAL LAND DISPUTE TRIBUNAL...1ST RESPONDENT

THE SENIOR RESIDENT

MAGISTRATE KAJIADO.....2ND RESPONDENT

AND

LANTEI KISERIAN .....INTERESTEDPARTIES

RULING

Introduction

1. By a Motion on Notice dated 8th April 2013, the ex parte applicants herein, **Joseph Mosasi, David Koin Topika** and **Partimo Ole Moisasi** seek the following orders:

1. **That this Honourable Court be pleased to issue an order of Certiorari to quash the proceedings and Award made by KAJIADO Central Land Dispute Tribunal being Ltd Case No: 19 of 2012.**
2. **That this Honourable Court do issue an Order of certiorari to remove the proceedings and Ruling of the 2nd Respondent.**
3. **That this Honourable Court do issue an Order of prohibition restraining the 1st and 2nd Respondent by themselves, agent, employees or authorized persons from implementing or enforcing the said Order.**
4. **The costs be in the cause.**

Applicant's Case

2. The same Motion is supported by Statutory Statements filed together with the Chamber Summons herein and the joint verifying affidavit sworn by the applicants on 16th April 2013.
3. According to the Statement, the application is based on the following grounds:

1. That the 2nd Respondent made the Order/Ruling ultra-vireo and/or in excess of its jurisdiction.

2. That the 1st Respondent and the 2nd Respondent purports to invalidate an existing title KJD/KAPUTIEI-SOUTH/1915.

3. That the 1st Respondent purported proceeded and determine matters related to eviction and land ownership.

4. That the 2nd Respondent confirmed Orders/Ruling by the 1st Respondent which was irregular, unlawful and ought to be quashed.

5. That the 2nd Respondent confirmed Orders/Ruling by the 1st Respondent which was irregular, unlawful and ought to be quashed.

6. That it's manifest and apparent that the Order/Ruling by the 1st and 2nd Respondents unless quashed shall result in dispossessing the applicant of their land and interfere with his right of ownership to their land.

7. The decision was made in breach of the Rules of natural justice.

8. That in the interest of justice and the law that this Honourable Court do grand the Orders.

Interested Party's Case

4. The application was opposed by a replying affidavit sworn by **Lantel Kiserian**, the interested party herein on 13th May 2013.
5. The gist of the said affidavit is that the suit land was registered in the names of the applicants by mistake. It is further contended by the interested party that the applicants had earlier on filed a similar matter in Machakos High Court which was dismissed. To the interested party since the Tribunal nolonger exists no orders can be made against it. The interested party's position is that not being a public body no orders can issue against him.

Determinations

6. Before dealing with the merits of this application it is clear that the intitulement of the application at leave stage was improper. As appears from the title to this application, the applicants are indicated as **Joseph Mosasi, David Koin Topika** and **Partimo Ole Moisasi**. In judicial review applications, the applicant is always the Republic rather than the person or persons aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**
7. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

8. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is:-

"REPUBLIC……..……..……..APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

9. The application was clearly incompetent on that score.
10. Apart from that he said joint verifying affidavit was a three paragraph affidavit which apart from exhibiting various documents did not contain any factual averments. That is not the kind of verifying affidavit contemplated under judicial review proceedings.
11. In **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** the Court of Appeal held:

"We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the *Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7*: 'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see *R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281*). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.' At page 283 of the report of the case of *R v. Wandsworth* Justices, Viscount Caldecote CJ said: 'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.'"

12. On the issue of non-existence of the Tribunal a similar issue arose in **David Mugo vs. The Republic Civil Appeal No. 265 of 1997** in which the Court of Appeal expressed itself as follows:

"The learned judge held that since the Court Brokers Licensing Board had ceased to exist as a result of repeal of Cap. 20, the appellants' application for certiorari was merely technical and academic. With respect here the judge fell in error of law. Certiorari was sought to

quash the Board's decision revoking the appellant's licence. It (certiorari) was not to keep the Board in continuous existence. Where the body or authority against which certiorari is sought has ceased to exist or has become functus officio, but a decision it (body or authority) made is still enforceable certiorari must issue to quash or nullify that decision, if it is bad."

13. Accordingly the mere fact that the Tribunal is nolonger in existence does not bar this Court from reviewing its decision.
14. From the record it is clear that the 2nd Respondent's decision adopting the award of the 2nd Respondent was made on 22nd May 2012. These proceedings were however instituted on 27th March 2013 which was 9 months later.
15. Section 9(3) the ***Law Reform Act***, Cap 26 Laws of Kenya provides:

In the case of an application for an order of certiorari to remove any judgment, 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 judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, 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.

16. The decision being challenged is a decision made by the Court in adopting an order of the Tribunal. It was therefore in the nature of a decree or order and under the foregoing provision it is clear that the proceedings for an order of certiorari were clearly brought outside the time prescribed. In the said circumstances if the matter had been brought to the Court's attention I am certain the Court would not have granted leave to apply for the said order and without leave the said proceedings would have been a nonstarter.
17. With respect to the prayer for prohibition, it is clear that the said relief cannot quash an order which has already been made. A was held in In **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR**:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....an order of prohibition.....cannot quash what has already been done…Only an order of *certiorari* can quash a decision already made."

18. In the present application, the award of the Tribunal has already been adopted by the Court. To grant the prohibitory orders sought without likewise quashing the same would not be efficacious. As was held by the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572**, as a matter of common-sense the judicial order of prohibition must be pre-emptive in nature, that is, it must be directed at preventing what has not been done. In other words prohibition is meant to close the stable before the horses bolt.
19. Since limitation goes to the jurisdiction of the Court, as was held in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** by **Nyarangi, JA**:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where

a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

20. Accordingly, I have to down my tools and order which I hereby do that the Notice of Motion dated 8th April 2013 is both incompetent for lack of factual averments in the verifying affidavit and for having been filed outside the limitation period. The same is hereby struck out with costs to the interested party.

Dated at Nairobi this 20th day of December 2013

G V ODUNGA

JUDGE

Delivered in the presence of Miss Njenga for Mr Mr. Mwaromo