REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 93 of 2010

IN THE MATTER OF GATUNDU SOUTH LAND DISPUTES TRIBUNAL
AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF SENIOR RESIDENT MAGISTRATE'S COURT AT GATUNDU LAND DISPUTE TRIBUNAL CASE NO. 22 OF 2009

AND
IN THE MATTER OF LAND PARCEL NO KIGANJO/GACHIKA/799

REPUBLIC ....APPLICANT

VERSUS

THE CHAIRMAN GATUNDU SOUTH LAND DISPUTES TRIBUNAL........1ST RESPONDENT

THE LAND REIGSTRAR THIKA ....2ND RESPONDENT

THE SENIOR RESIDENT MAGISTRATE GATUNDU ....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ....4TH RESPONDENT

AND

JOSEPH GATHECA KINYANJUI ....INTERESTED PARTY

EX-PARTE

LAZARO NDUATI GITAU ....APPLICANT

JUDGEMENT

On 3rd December, 2010 Lazaro Nduati Gitau (the ex-parte applicant) moved to court and obtained leave to commence judicial review proceedings against the Chairman Gatundu South Land Disputes Tribunal (the 1st respondent), the Land Registrar Thika (the 2nd respondent), the Senior Resident Magistrate

Gatundu (the 3rd respondent) and the Honourable Attorney General (the 4th respondent). He named Joseph Gatheca Kinyanjui as an interested party.

By way of notice of motion dated 17th December, 2010 and filed in court on 21st December, 2010 the ex-parte applicant prayed for the following orders:-

1. THAT this Application be and is hereby certified urgent and be heard expeditiously owing to its extreme urgency.

2. THAT the Honourable Court be pleased to grant an order of certiorari to issue to move into this Honourable Court and be quashed the decision of the GATUNDU SOUTH LAND DISPUTES TRIBUNAL dated 1st July, 2009 awarding JOSEPH GATHECA KINYANJUI ownership of LAND REFERENCE NO. KIGANJO/ GACHIKA/799 measuring 2.36 Hectares and recommending the cancelation of Title Deed No. KIGANJO/GACHIKA/799 registered in the name of LAZARO NDUATI GITAU.

3. THAT the Honourable Court be pleased to grant an order of certiorari to issue to move into this Honourable court and be quashed the decision issued by the SRM GATUNDU in Senior Resident Magistrate Court Gatundu Land Dispute Case No. 22 of 2009, dismissing suo moto the exparte Applicant application to set aside the Tribunal award dated 1st July, 2009 which was adopted as judgment of the Court on 8th October, 2009.

4. THAT the Honourable Court be pleased to grant an order of certiorari to issue to move into this Honourable Court and be quashed the decision issued by SRM GATUNDU COURT LAND DISPUTE CASE NO. 22 OF 2009, authorizing the Executive Officer, Gatundu Law Courts to sign the necessary documents to effect transfer of all the parcel of Land known as KIGANJO/GACHIKA/799 Measuring 2.36 Hectares to the Plaintiff is SRM GATUNDU LAND DISPUTE CASE NO. 22 OF 2009

5. THAT the Honourable Court be pleased to grant an order of prohibition directed against the Land Registrar Thika to restrain him or anybody else from cancelling the Title No. KIGANJO/GACHIKA/799 currently registered in the name of the Exparte Applicant

6. THAT the Honourable Court be pleased to grant an order of prohibition restraining/prohibiting the Land Registrar Thika from registering JOSEPH GATHECA KINYANJUI or any other person as the owner of LR NO. KIGANJO/GACIKA/799.

7. THAT cost of this application be provided for

The application is supported by grounds on its face , a verifying affidavit sworn by the applicant on 29th November, 2010, a supporting affidavit sworn by the applicant on 29th November, 2010, a statement of facts dated 29th November, 2010, an amended statement of facts dated 18th February, 2011 and a supplementary affidavit sworn by the ex-parte applicant on 18th March, 2011.

The interested party opposed the application through a replying affidavit sworn on 8th February, 2011 and a notice of preliminary objection dated 7th February, 2011.

On the face of it this appears to be a straight forward case. The ex-parte applicant seeks to quash the ruling of the 1st respondent delivered on 1st July, 2009 and adopted by the 3rd respondent on 8th October, 2009. The ex-parte applicant's case is that the 1st respondent exceeded its jurisdiction by cancelling the title for his parcel of land number Kiganjo/Gachika/799 and awarding the same to the interested party.

The interested party has however objected to the ex-parte applicant's case on the ground that the ex-parte applicant ought not to have been granted leave to seek for orders of certiorari on the ground that the

application for orders of certiorari was time barred by virtue of the provisions of section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

Looking at the submissions made by the advocates for the parties herein, I can summarise the issues for the determination of this court into two broad catergories namely:-

(1) Whether the ex-parte applicant's application for orders of certiorari is statute barred; and

(2) Whether the 1st respondent exceeded its jurisdiction in this matter.

I will start with the second issue. The jurisdiction of the 1st respondent is donated by Section 3(1) of the Land Disputes Tribunal Act Cap 303 A which states as follows:-

"3(1) Subject to this Act, all cases of a civil nature involving a dispute as to:-

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

shall be heard and determined by a Tribunal established under Section 4."

It is clear from the said section that a Land Dispute Tribunal does not have jurisdiction to entertain any claim relating to ownership of land. The 1st respondent herein went ahead and cancelled the ex-parte applicant's title and awarded ownership of the parcel of land in question to the interested party. In doing so, the 1st respondent acted outside its jurisdiction and its decision is a nullity.

Having answered the second issue, I will now address the 1st issue which in my view is a weighty matter. In addressing this issue I will also answer the question as to whether the ex-parte applicant was given a hearing by the 1st respondent.

In the amended statement of facts dated 18th February, 2011 the ex-parte applicant states that on 21st October, 2010 he was at Gatundu Law Courts waiting for his case in SRM C.C. No. 5 of 2009 to be called for hearing when he heard his name being called out in SRM Land Disputes Tribunal case No. 22 of 2009. The interested party has challenged this statement. In his replying affidavit the interested party avers that the ex-parte applicant was served with two summons to appear before the Tribunal on 27th May, 2009 and 10th June, 2009 but on both occasions he failed to appear.

The question would then be, was the ex-parte applicant aware of the proceedings before the Tribunal? In the affidavit sworn by the ex-parte applicant on 29th October, 2010 in support of the application for leave the ex-parte applicant avers in paragraph 2 as follows:-

"THAT on 23rd May, 2009, I was served with Notice of attendance from Chairman Land Dispute Tribunal Gatundu South requiring me to attend Land Dispute Tribunal case No. 5 of 2009 in respect of LR KIGANJO/ GACHIKA/799 to be held on 27th May, 2009 which I protested thereto as time given was too short. Annexed hereto and marked (LNG 11) is a copy of my letter of protest."

The letter referred to in the affidavit is dated 25th May, 2009 addressed to the Chairman Land Disputes Tribunal Gatundu South by the advocates for the ex-parte applicant. In that letter the ex-parte applicant raises three issues namely that the notice was too short, he had not been served with particulars of the claim and the Tribunal had no jurisdiction to determine matters of title.

From his own admission therefore, it is clear that the ex-parte applicant was aware of the

proceedings before the Tribunal but he opted not to attend. He was therefore availed an opportunity to present his side of the story but he did not do so. He cannot therefore turn around and say he was never heard. The ex-parte applicant can also not be allowed to claim that he only became aware of the decision of the Tribunal on 21st October, 2010 when he heard his name being called out Gatundu Law Courts.

In response to the preliminary objection raised by the interested party the ex-parte applicant has responded with two defences namely that he became aware of the decision of the Tribunal on 21st October, 2010 and by the time he obtained leave to commence judicial review proceedings on 3rd December, 2010 six months had not lapsed. As already stated however, the ex-parte applicant all along knew that the matter was before the Tribunal. 21st October, 2010 is therefore not an applicable date in this matter.

In my view the date when the decision of the Tribunal became effective is 8th October, 2009 when the Magistrate adopted the decision of the Tribunal as a judgement of the court. The six months provided by Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules therefore started running from that day and by the time the ex-parte applicant obtained leave on 3rd December, 2010 he was almost seven months late.

The advocate for the ex-parte applicant has persuaded me that this court should not waver in the face of an illegality and should exercise its inherent jurisdiction and seek any illegality wherever it may be and quash it. To him the time limit provided by the Law Reform Act and Order 53 of the Civil Procedure Rules should be overlooked. He cited the following cases in support of his argument

(1) REPUBLIC VS. EX-PARTE KAKA NZIOKA H.C.C.MISC. CIVIL APPLICATION NO. 1217 OF 2003;

(2) LILIAN MURANMJA VS. KAJIADO LANDS DISPUTE TRIBUNAL, NAIROBI H.C. JR. MISC CIVIL APPLCIATION NO. 689 OF 2001;

(3) ALFRED K KABUS VS. NANDI DISTRICT TRIBUNAL (KIPKAREN) ELDORET H.C. MISC APPLICATION NO 134 OF 2003;

(4) MACHEO LIMITED VS. JOSEPH WAFULA KHAOYA, KITALE HCCC NO.141 OF 2007; and

(5) ISHMAEL KAGUNYI THANDE VS. HFCK LTD, MILIMANI COMMERCIAL COURT NAIROBI HCCC NO. 896 OF 2000.

In all the above cited cases the learned judges were of the view that the court should not let an illegality pass even if the applicant came to court over six months after the decision being challenged had been made.

The position was clearly brought out by Nyamu, J (as he then was) in **ex-parte KAKA NZIOKA** case who when commenting on Order 53 Rule 2 had this to say:-

"In REPUBLIC VS. JUDICIAL COMMISSION into the GOLDENBERG AFFIAR Ex-parte HON MWALULU the court held that the rule applies only to the formal orders set therein and does not apply generally, and in addition, the exclusion does not apply where there is lack of jurisdiction and the court should be able to reach out and attack nullities arising out of lack of jurisdiction of the targeted decision making bodies."

The interested party on his part submitted that the six months rule is cast in stone and the court cannot even enlarge the time were it requested to do so by the applicant. The following cases were cited by the interested party in support of its position:-

(1) AKO V SPECIAL DISTRICT COMMISSIONER KISUMU & ANOTHER (1989) KLR 163;

(2) NYAGA VS. REPUBLIC (1990) KLR 291;

(3) DANIEL KIPRONO NAIMOJA VS. DISTRICT LAND ADJUDICATION OFFICER TRANSMARA (2005) eKLR, and

(4) OYOO & 5 OTHERS VS. SYONGO & 2 OTHERS (2005) 1 KLR 423

The thinking in all these decisions cited by the interested party was clearly brought out in the case of **NYAGA** by Bosire J (as he then was) when he stated at Page 292 that:-

"Section 9(3) of the Law Reform Act above has a total prohibition to the granting of leave after the expiration of a 6 months duration after the order or decree or judgment under attack. The provision is conclusive. Had it been the intention of the legislature to confer on the court the power to enlarge the time specified for bringing an application for leave it would have said so or made provision under Section 9(1) of the Law Reform Act for the making of rules in that regard."

At this stage it is important to bring out the provision of Section 9(3) of the Law Reform Act which states as follows:-

"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 the judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law.........."

Order 53 Rule 2 is just but a replica of Section 9(3) of the Law Reform Act. The side bar to that rule states: **"Time for applying for certiorari in certain cases".** That means the 6 months rule is only applicable to **"judgment, order, decree, conviction or other proceeding."**

Looking at the decisions of the High Court, it is clear that the High Court has two different opinions on Section 9(3) of the Law Reform Act. In my view however the strict interpretation of this section is the way to go. The 6 months limitation rule is buttressed in statute and that clearly explains the intention of the legislature. It has been argued that the court should not sit back and allow illegalities and nullities to remain in situ. To me, this amounts to saying that an applicant can live with an illegal decision for say ten years and then one day wake up and rush to court to seek an order to quash that decision. It is good public policy to move to court immediately an illegal decision is made. After all the decision also affects the tribunal or inferior court making it and third parties. The applicant should not wait until the decision has been acted upon by other parties before rushing to court to quash it.

In fact the Court of Appeal has clearly stated that there is no room for enlargement of time in as far as Section 9(3) of the Law Reform Act is concerned. This was the holding in the **AKO** case cited by the interested party.

Commenting on the issue of granting leave in the case of **AGA KHAN EDUCATION SERVICE KENYA VS. REPUBLIC ex-parte seif** (2004) the Court of Appeal stated that:

"We would, however, caution practitioners that even though leave granted ex-parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contented that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside."

The last line clearly shows that where an applicant comes to court after six months from the date of the decision he seeks to be quashed, such an application has no prospects of success and leave to commence judicial review proceedings should not be granted.

I think I have said enough to clearly bring out my views on section 9(3) of the Law Reform Act. The ex-parte applicant before me opted to live with an illegal decision, he cannot now move the court to have that decision quashed. For that reason, his prayers numbers 2, 3 and 4 of the notice of motion therefore fail.

Commenting on the scope of the remedies of certiorari and prohibition in the eight edition of their book ADMINISTRATIVE LAW, Sir William Wade and Christopher Forsyth observed that:-

"Although prohibition was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective, and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had some power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by prohibition.

Certiorari and prohibition frequently go hand in hand, as where certiorari is sought to quash the decision and prohibition to restrain its execution. But either remedy may be sought by itself. Where only prohibition is applied for to prevent the enforcement of an ultra vires decision, as happened in the last-cited case, the effect is the same as if certiorari had been granted to quash it; for the court necessarily declares its invalidity before prohibiting its enforcement."

In prayers 5 and 6 of his application the ex-parte applicant prays for orders of prohibition to be issued against the Land Registrar Thika restraining the Land Registrar from cancelling the ex-parte applicant's title and registering the title in the name of the interested party or anybody else. As Wade and Forsyth have stated, it is possible to issue an order of prohibition to stop the implementation of a wrongful decision. I have clearly demonstrated in this judgement that the decision of the 1st respondent was made in excess of powers granted to it by statute. Although for the reasons already stated, I have refused to quash the said decision, I find that I still have jurisdiction to stop its implementation. The court cannot stand aside and allow the implementation of illegal decisions. The orders of prohibition which the applicant seeks have no time limit. He came to court 13 months after the decision he is challenging had been adopted by the 3rd respondent. Considering that the decision was in respect of ownership of land which is a very dear asset in this country, one cannot say there was an inordinate delay on his part. As such I allow the prayers for orders of prohibition so that the 2nd respondent is stopped from cancelling the ex-parte applicant's title to L.R. No. KIGANJO/GACHIKA/799 and from registering the interested party as the owner of the said parcel of land. The ex-parte applicant having only partly succeeded I make no orders as to costs.

Dated and signed at Nairobi this 26Th Day of January, 2012
W. K. KORIR
JUDGE