IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO.10 OF 2011

IN THE MATTER OF THE LAND DISPUTE TRIBUNAL ACT NO.18 OF 1990

AND

IN THE MATTER OF THE DECISION OF OLOLULUNGA LAND DISPUTE TRIBUNAL IN CASE NO.10 OF 2006 DELIVERED ON 4TH SEPTEMBER, 2006

AND

N THE MATTER OF THE SUBSEQUENT ADOPTION OF THE SAID DECISION ON 26TH FEBRUARY, 2009 BY THE NAROK PRINCIPAL MAGISTRATE'S COURT IN MISC. LAND CASE NO.13 OF 2006

AND

IN THE MATTER OF OLPUSARE GROUP RANCH PARCELS

BETWEEN

PETER MUNERIA OLE MUIYA……...…….1ST APPLICANT

STEPHEN OLE SEUR……...……2ND APPLICANT

DANIEL LETUYA SEUR…….....……...…3RD APPLICANT

VERSUS

THE CHAIRMAN
OLOLILINGA LAND DISPUTE TRIBUNAL……..1ST RESPONDENT

THE PRINCIPAL MAGISTRATE COURT, NAROK …….2ND RESPONDENT

DISTRICT SURVERYOR, NAROK NORTH/SOUTH DISTRICT.....3RD RESPONDENT

AND

LETEIPA OLE KIPKOECH……..…….....1ST INTERESTED PARTY

PARIKEN OLE NGEETI……....……...2ND INTERESTED PARTY

MORINTAT OLE MUIYA…….....3RD INTERESTED PARTY

OREU OLE KIPKOECH Alias WILLIAM OLE SEUR…….....4TH INTERESTED PARTY

JOHN OLOONKISHU SEUR…….……....……..5TH INTERESTED PARTY

RULING

The applicants brought this motion against the respondents and the interested parties for orders of *certiorari* and prohibition. The order of *certiorari* is sought to quash the decision of the respondent (the Ololulunga Land Dispute Tribunal) (the Tribunal) made on 4th September, 2006 in the Tribunal claim No.10 of 2006 and also to quash the decree of the 2nd respondent, the Principal Magistrate, Narok issued on 26th February, 2009 in Principal Magistrate's Court Misc. Application No.13 of 2006.

The order of prohibition is sought to prohibit the respondents from executing, enforcing or implementing the Tribunal's award. The decision of the Tribunal has been challenged on the grounds that:

i) It is ultra vires its powers as provided in **Section 3** of the **Land Disputes Tribunal Act**;

ii) he adoption of the decision by the 2nd respondent was a nullity;

iii) the decision did not conform with the rules of natural justice.

In respond, the interested parties have filed a notice of preliminary objection which was argued as part of their replying affidavit. The combined effect of both the preliminary objection is that:

i) the application offends **Order 53 rules 1** and **2** of the **Civil Procedure Rules;**

ii) the applicants were given a hearing and fully participated in the proceedings before the Tribunal;

iii) the Tribunal had jurisdiction to entertain the dispute and the 2nd respondent acted within its mandate;

iv) prohibition cannot issue as the acts sought to be stopped by it have been performed.

I have duly considered these arguments, the written submissions by the applicants and the interested parties together with the authorities cited.

The respondents, as is normally the case, did not participate despite being served with the pleadings and hearing notice. In their respective submissions, learned counsel for the parties have framed issues for determination. Those relevant to this matter before me can be condensed into two, namely;

i) whether the tribunal had jurisdiction to entertain the dispute and to make the decision it made;

ii) whether the orders of *certiorari* and prohibition are available to the applicants.

It is only if the second (ii) question is answered in the affirmative that there will be necessity to consider the first question. There is no doubt that the impugned decision of the Tribunal was made on the 4th September 2006. Leave to bring this application was sought and obtained on the 31st March 2011, some 4 ½ years after the decision.

I understand the essence of the preliminary objection to be that by dint of **rule 2** of **Order 5**3 aforesaid *certiorari* is not available to quash a judgment, order, decree, conviction or other proceedings 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 any Act.

For his part, learned counsel for the interested parties has submitted that **rule 2,** limiting the period to seek *certiorari* to six months does not apply where the act sought to be quashed is a nullity or is ultra vires. He referred to court to the cases of **In the Matter of Republic** and ***the ICPSK***, *ex parte* **Mundia Njeru Gateria,** H.C. Misc. Application No.322 of 2008 and **Republic** V. **Borabu Land Dispute Tribunal** and **The Senior Principal Magistrate, Kisii** *exparte* **Kipkebe Limited**, H.C. Misc. Civil Application No.132 of 2006 to support that proposition.

It must be remembered that the provision of **rule 2** of **Order 53** is directly derived from **Section 9(3)** of the **Law Reform Act** in more or less the same language. The requirement of six months period is therefore a statutory limitation. The courts have had opportunity to consider the effect of not bringing an application for *certiorari* within six months.

In **Wilson Osolo** V. **John Ojiambo Ochola & the Attorney General**, Civil Appeal No.6 of 1995, the Court of Appeal explained that:

"It can easily be seen that Order 53 rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules that procedure cannot be availed for the extension of time limited by statute, in this case, the Law Reform Act……

It therefore is apparent that the extension of time granted by Platt, J was a nullity. Any steps taken thereafter are therefore of no consequence."

What is also important to note is that the provisions of **Section 9(3)** of the **Law Reform Act** and **Rule 2** of **Order 53** is that apart from being in mandatory language, they emphasise that the period must not be later than six months but can only be shorter.

By asking the court to quash the decision of the Tribunal made well after six months, the applicant is in effect saying that time beyond six months can be enlarged. That route is unattainable. If the decision to be quashed is a nullity, the process to quash it must not itself be a nullity. The court cannot entertain what it is prohibited from entertaining.

On the prayer of prohibition, such a relief is not efficacious if what is sought to be prohibited has taken place. Because an order of prohibition like the other prerogative orders is only available against public bodies and is issued to forbid a tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of laws of the land or for departing from the rules of natural justice, it cannot be issued *ipso fac*to against the magistrate.

In the result, I find no necessity to consider the issue of the Tribunal's jurisdiction. This application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 24th day of February, 2012

W. OUKO
JUDGE