REPUBLIC OF KENYA

High Court at Machakos

Civil Miscellaneous Application 212 of 2008

IN THE MATTER OF AN APPLICATION BY **JOSIAH MULI NDAMBO** FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL ATMAKUENI

BETWEEN

REPUBLIC …….APPLICANT

VERSUS

1. THE CHAIRMAN LAND DISPUTES TRIBUNAL AT MAKUENI

2. MAKINDU PRINCIPAL MAGISTRATE.....RESPONDENTS

AND

NZUVE NDAMBO NDUA……..…….INTERESTED PARTIES

EX PARTE

JOSIAH MULI NDAMBO

RULING

Vide an application dated 24th November, 2008, **Josiah Muli Ndambo** hereinafter "*the applicant*" seeks-

"***that the decision of the Land Disputes Tribunal Makueni dated 14th February, 2007 and read in court on 25th September 2008 be brought up and quashed by this honourable Court*".**

The applicant also prays for costs. The uncontested facts leading to the application are that **Nzuve Ndambo Ndua,** hereinafter the "*interested party*" filed a claim with the 1st respondent against the applicant with regard to land parcel Nzaui/Kikumini/398 hereinafter the "*suit premises*". In his statement of claim the interested party demanded from the applicant the suit premises which had allegedly bought from the family of one, **Lau**. The response by the applicant was that the suit premises belonged to him as he had inherited the same from his father. The applicant and interested party were nonetheless step brothers.

Having carefully listened to the parties the 1st respondent delivered its award on 18th January, 2008 acceding to the interested party's request. The applicant was not happy with the outcome aforesaid. He therefore sought to quash the same. On 3rd November, 2008, he came before **Lenaola**, *J ex-parte* and sought leave to apply for orders of *certiorari* and that the leave so granted should operate as stay of proceedings of the 2nd respondent. Apparently after making its award, the 1st respondent forwarded the award to the 2nd respondent for adoption as a judgment and decree of the court. **Lenaola, J** duly granted the leave.

Pursuant to the leave so granted, the applicant lodged the application, the subject of this ruling. The application was duly served on the respondents and interested party. However none of them chose to file any papers in opposition to the application. When the application next came before **Lenaola, J** on 21st September, 2009, parties agreed to file and exchange skeletal submissions. This was not to be as soon thereafter, **Lenaola, J** left the station on transfer.

On 16th July, 2012, the application came before me and the parties meaning the applicant and respondent agreed that I should take off from where **Lenaola,J** had left. They also renewed their wish to have the application canvassed by way of written submissions. True to their word, they subsequently filed and exchanged written submissions which I have carefully read and considered

The application is however bound to fail on the following grounds;-

1. The facts contained in the statement are misplaced and incurably defective thus making the substantive application equally defective and bad in law. The statement and the affidavit does not conform with the requirement of Order 53 Rule 1(2) which provides inter alia;-

"***an application for such leave aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by statement setting out the name and description of the applicant, the relief sought, and grounds on which it is sought and by affidavits verifying the facts relied on."***

This implies that all the evidential facts should be set out in an affidavit and not the statement. It is the verifying affidavit not the statement to be verified which is of evidential value in an application for judicial review. Reference to the statement by the applicant does not give him validity of the contents and does not authorize the court to recognize the facts in the affidavit as the same violate rules of procedure. However, in this case, the evidential facts are set out in the statuary statement which is a fatal error.

All the evidentiary facts should be set out in an affidavit, failure to which renders an application fatally incompetent. The Court of Appeal in the case of **Commissioner General Kenya Revenue Authority vs Silvano Onema Oaki t/a Marenga Filing Station, Civil Appeal No. 45 of 2000 [UR]**stated;-

"***We would observe that it is the verifying affidavit not the statement to be verified which is of evidential value in 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 Vo.1 at paragraph 53/1/7."***

"The application for leave "*by statement*". *The facts relied on should be stated in the affidavit (see R vs Wandsworth, JJ ex P. Read [1942] I KB 281)*"*the statement" should contain nothing more than the name and the description of the applicant the relief sought and the ground on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit*. Yet this is what has happened here. The bulk of the applicants complains are in the statement of facts. That is worthless piece of evidence that no discerning court would entertain in determining the application. Indeed such evidence is inadmissible

Secondly, the award the applicant seeks to quash was made on 18th January, 2008 and leave to file the substantive was sought on 29th October, 2008. This was almost 9 months after the decision sought to be

impugned and quashed was made. Order 53 rule 2 Civil Procedure Code clearly provides that the court cannot grant leave unless the application for leave is made not later than 6 months after the decision was made. The application clearly offends the provisions of that rule as it was filed after six months.

The section is couched in mandatory terms and non-compliance of the same makes the application fatal. Since leave was sought after expiry of six months, the applicant is guilty of laches and indolence. He does not therefore warrant the orders sought.

On those grounds this application stands dismissed with no orders as to costs.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **NOVEMBER, 2012.**

GEORGE DULU
JUDGE