



REPUBLIC OF KENYA

High Court at Machakos

Civil Miscellaneous Application 53 of 2006

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND PROHIBITION

REPUBLICAPPLICANT

VERSUS

MACHAKOS LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

MACHAKOS CHIEF MAGISTRATE'S COURT.....2ND RESPONDENT

AND

KASOTI MBULI.....INTERESTED PARTY

EXPARTE

GEOFFREY MWANZIA MUATHE

RULING

Before me is a Notice of Motion dated 29th May, 2006 and filed in court on the even date. In the application, **Geoffrey Mwanzia Muathe**, hereinafter "*the applicant*" seeks 2 judicial review orders:-

- *Certiorari* to quash the proceedings and award of the Machakos Land disputes Tribunal, hereinafter "*the respondent*" dated 17th June, 2005 and which award is pending reading and entry of judgment by the Machakos Chief Magistrate's Court, hereinafter "*the 2nd defendant*".
- *Prohibition* to prohibit the 2nd respondent from reading the award by the 1st respondent dated 17th June, 2005 and from entering any judgment in terms thereof.

The substantive Notice of Motion was filed pursuant to the leave granted to the applicant by **Lesiit, J** on 18th May, 2006 as required by law.

From the pleadings, so far filed, the dispute involves land parcel Masii/Embui/292, "*the suit premises*" currently registered in the name of the applicant. The applicant apparently bought it from one, **Mbuli Musau** the husband of **Kasoli Mbuli**, the interested party herein.

The interested party instituted a claim against the applicant over the suit premises with the 1st

respondent. She complained that her husband had sold the suit premises to the applicant without her knowledge and or consent. The applicant bought the suit premises in the knowledge that the interested party's husband was disposing off the suit premises and leaving the interested party destitute. She wanted the suit premises to revert to her.

The 1st respondent having heard the dispute in the absence of the applicant who according to the record had refused to attend the proceedings despite several summons ruled thus:-

“the panel of elders (tribunal) sitting at Mwala D.O.s office has today 17/6/2005 ruled without any reasonable doubt that the claimant Kasoti Mbuli and her children should go back to their ancestral land in Masii and re-settle there since they are refugees in their own country staying in a rental house at Makutano market whereby they have nowhere to cultivate. The objector Geoffrey Mwanzia Muathe should seek his money from the seller Mbuli Musau who abandoned his family and fled to Kitui”.

The award was subsequently filed with the 2nd respondent for adoption as a judgment of the court. That process then triggered these proceedings.

The position of the applicant is that the 1st respondent lacked jurisdiction to entertain the proceedings and make the award complained of, the interested party lacked the necessary *locus standi* to maintain the claim as she had not obtained a Grant of Letters of Administration since her husband had passed on and lastly, her claim was in any event time barred.

On the other hand, the position of the interested party is that these proceedings are incompetent and bad in law as they were instituted long after the mandatory period within which they ought to have been instituted had lapsed. In any event the award was within the statutory jurisdiction as donated by section 3 of the then Land Disputes Tribunals Act, *now repealed*. In the premises the 2nd respondent cannot be prohibited from adopting the award since this was a requirement of law.

On 20th February, 2012, the application came before **Ngugi, J** for *interpartes* hearing. Parties agreed that the application be disposed of by way of written submissions. An order to that effect was duly made. Subsequently parties filed and exchanged their written submissions. However, by then **Ngugi, J** had left the station on transfer.

On 28th September, 2012, the matter came before me and the parties involved agreed that I should proceed with the same from where **Ngugi, J** left. Essentially, they were asking me to act on the pleadings, written submissions on record and then craft the ruling

To my mind the application is bound to fail or succeed on the single issue, whether these proceedings were commenced on time. The law is clear that judicial review proceedings seeking orders of *certiorari* must be commenced within 6 months of the making of the decision sought to be quashed. In the circumstances of this case, whereas the 1st respondent's award sought to be quashed was made on 17th June, 2005 as evidenced by the applicant's own prayer 1 in the Notice of Motion, these proceedings were commenced on 9th May, 2006 almost 11 months later. It is therefore apparent that the proceedings were brought outside the mandatory 6 months period provided for under Order 53 of the Civil Procedure rules. On that premises and order of *certiorari* cannot issue.

The applicant's argument which I find hollow is that although the 1st respondent's award was filed with the 2nd respondent, the same is yet to be read and adopted as a judgment of the court. That the *ex-parte* applicant learnt about the award in April, 2006 and rushed to this court in May, 2006 to quash and stop the adoption of the same. In the premises the applicant was within time since time starts running when the award is read and adopted as a judgment of the court. This argument is self defeating for 3 reasons:-

- One, the applicant himself has indicated that the award he wishes quashed is dated 17th June,

2005. Accordingly time for purposes *certiorari* started running then.

- Secondly, if he now claims that time for purposes of *certiorari* can only start running once the award has been read and adopted by the 2nd respondent, then there is no decision as of now capable of being quashed and or *prohibited*.
- Lastly, there is no legal requirement that an award of the tribunal can only be valid if it is read and adopted by court.

I have carefully read the ruling by **Lesiit, J** dated 18th May, 2006 in which she granted leave to the applicant to commence these proceedings. The learned judge appreciated that the proceedings had been commenced outside the statutory time under Order 53 of the Civil Procedure rules. However, she did not make definitive findings on the matter. That window allows me to consider the issue. That way I cannot be accused of sitting on appeal on my sister's decision.

In my view the requirement that proceedings leading to an order of *certiorari* be commenced within 6 months of the decision sought to be quashed is couched in mandatory terms. There is no room for discretion nor can time be extended. In the premises, the prayer for *certiorari* cannot issue.

How about *prohibition*? Much as there is no timeframe unlike *certiorari* in which a party should seek it, in the circumstances of this case, it cannot be available to the applicant. Firstly, because it cannot stand on its own. It is sought to prohibit the adoption of the award as a judgment of the court. It will be a legal absurdity for me to allow the prayer, when I have refused to quash the award. The two orders are co-joined at the hips so that if I refuse one, I must refuse all.

Under the Land Disputes Tribunal Act the 2nd respondent is statutorily required to adopt an award filed as a judgment of the court. It has no discretion whatsoever in the matter. How then should I prohibit something that a statute imposes on the 2nd respondent to undertake?

Lastly, orders of *prohibition* and *certiorari* can only issue where there is a complaint of a decision being reached in excess or want of jurisdiction, there is breach of rules of natural justice or an error of law on the face of the record. Nowhere, in the application, has the applicant alluded to those concerns in so far as his prayer for *prohibition* is concerned.

In the result, I hold the view that the application is incompetent, devoid of merit and bad in law. It is dismissed with costs to the interested party.

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