REPUBLIC OF KENYA

High Court at Bungoma

Miscellaneous Application 322 of 2005

ABSOLOM KISUTIA MASIBO …….APPLICANT

VERSUS

WYCLIFFE WANYAMA SIMIYU …….....….. INTERESTED PARTY

RULING

The ruling is on the application dated 11th October 2005 and filed in court on 14th November 2005.

The application is brought under Order LIII R. I (2) (4) of CPR and Sec. 8 (2) of the Law Reform Act seeking

1. The applicant ABSOLOM KISUTIA MASIBO be granted leave to apply for an order of certiorari & prohibition to remove and quash the proceedings and award of Kanduyi LDT in case no. 4 of 2004, read and adopted as judgment of the court on 13.7.2005 vide Bungoma SPMCC LDT. Case No. 6 of 2005.

2. That upon grant of such leave, the same do operate as a stay of execution proceedings in respect of Bungoma SPMC LDT case No. 6 of 2005.

3. That cost of the application be in the cause.

The application is supported by the affidavit of the applicant. Subsequently the interested party and the exparte applicants filed their written submissions and annexed relevant case law to respective submissions.

The applicant submitted that leave can be granted as a matter of course in the event of nullities and time is not of essence. He also argued that a second limb is to have leave granted where the application is brought within 6 months.

The interested party on their part submitted on the question when time begins to run and quoted order 53 rule 2 to support this.

The question I shall endeavor to answer is whether the application was made within time or whether the leave can be granted without time being of essence. The 2nd question is whether the leave as sought should operate as stay.

The applicant referred this court to the case of R. vs. ICPSK exparte Mundia Njeru (2010) e KLR which I find to be distinguishable to the instant case because it was dealing with the substantive motion and not application for granting leave.

The 2nd case law of R. vs. Shadrack W. Makhapila & another CW. Misc. No. 75 of 2006. High court at Bungoma is of similar circumstance to the present case but the decision is persuasive on me.

The order sought to be reviewed was an award of the Kanduyi LDT. From the proceedings on last page, there is no indication of when the elders read this award. They have signed but did not date it, at least from the proceedings in the court file. The interested party has submitted the award was read on 28.9.05 which again is not possible as the award was presented to court for adoption as early as 15.2.2005 from the proceedings on record in SPMCC. No. 6 of 2009.

The award was thereafter adopted as order of the court on 13.7.2005 when both parties appeared before the honourable magistrate. The present application was filed on 14.11.2005. This is within the 6 months period as envisaged by Order 53 rule 2.

On the 2nd limb as to whether leave should operate as stay. Part of the elder's award in prayer (3) they started as follows:

"Because of point 7 and 12 on page 5 & 6 of the Panel's findings, the panel of elders request for re-survey of the land in dispute, over after the payment of Kshs. 1500/=(Government surveyor). Extra over will be given to seller."

Although this application has taken a long time before being prosecuted, for whatever it is worth, if stay is not granted, the interested party may execute the award in prayer (3) quoted above.

Leave to file an application for judicial review does not touch on the merits of the case but endeavors to maintain status quo until the substantive motion is determined.

The upshot of this is that I allow the application, grant leave to the exparte applicant to commence judicial review proceedings. The leave do operate as stay, each party to bear its own costs. The applicant to file the substantive motion within 21 days.

RULING DELIVEREDE on the ……18th …….. day of ……DECEMBER……. 2012 in the presence of ……. For the applicant

……. For the interested party

A. OMOLLO
JUDGE.