



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
JUDICIAL REVIEW NO. 16 OF 2010

REPUBLIC.....
.....APPLICANT

AND

**THE ATTORNEY GENERAL (ON BEHALF OF LAND DISPUTES TRIBUNAL – UASIN
GISHU)1ST RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT AT
ELDORET2ND RESPONDENT**

ESTHER JELAGAT
KOSGEI3RD RESPONDENT

RULING ON PRELIMINARY OBJECTION

The Notice of Preliminary Objection dated 30th September 2010 is taken out on four grounds viz:-

- (i) That the motion by the ex parte applicant offends Order 53 Rule 2 of the Civil Procedure Rules.
- (ii) That the motion offends Section 8 of the Land Disputes Tribunal Act 18 of 1990.
- (iii) That the motion offends Order 53 Rule 3 of the Civil Procedure Rules.
- (iv) That the 3rd Respondent has been joined by being named as a respondent instead of an interested party as she has made no decision that can be the subject of judicial review.

For those reasons, it is the 3rd respondent's/objector's prayer that the motion be struck out with costs.

In arguing the objection on behalf of the 3rd respondent, learned Counsel, **MR. BARASA**, submitted that the ex-parte applicant filed the disputed motion on 31st March 2010 yet the decision of the Tribunal was made on 18th August 2009, a period exceeding six months contrary to the provisions of Order 53 Rule 2 of the Civil Procedure Rules and S. 8 and 9 of the Law Reform Act.

Mr. Barasa relied on the decision in the case of **REP. VS. CHAIRMAN AND MEMBERS OF KAPSABET DIVISION LAND DISPUTES TRIBUNAL EX-PARTE JEPKUTO BARGETUNY HIGH COURT JUDICIAL REVIEW CASE NO. 29 OF 2009 AT ELDORET** and contended that the ex-parte applicant was not permitted to file the motion after the expiry of six months and that his remedy lies with the Provincial Appeals Committee and not by way of Judicial Review.

It was also submitted by Mr. Barasa that the Objector is not a respondent in the matter but rather an interested party since there is no decision touching on her.

In opposing the objection, the ex-parte applicant through learned Counsel, **MR. NABASENGE**, argued that the objection raises issues of facts and that every matter should be determined on merits and not technicalities which are outlawed by Article 159 of the Constitution. Learned Counsel went on to state that the disputed motion was filed within time in accordance with Order 53 Rule 2 of the Civil Procedure Rules and that the decision of the Tribunal was a nullity such that the issue of the appeal is neither here nor there. Referring to Order 53 Rule 4 of the Civil Procedure Rules, Mr. Nabasenge submitted that the Court is granted the power to order the enjoining of a party as an interested party.

Mr. Nabasenge contended that the disputed motion is competent and in that regard, he referred to the case of **JOHN KANGONGO CHEPYATOR VS. DAVID KAMAU KIMEMU MISC. CIVIL APPLICATION NO. 103 OF 2007 AT ELDORET**. The learned Counsel urged this Court to dismiss the Objection and contended that the authorities cited by the Objector are irrelevant and have in any event, been overtaken by the Constitution.

On behalf of the first and second respondents, the learned Litigation Counsel, **MR. MUIRURI**, supported the Objection and contended that Article 159 of the Constitution does not outlaw technicalities. He further contended that the objection raises an issue of jurisdiction and not technicalities as it is based on S. 8 and 9 of the Law Reform Act.

On Order 53 Rule 4 of the Civil Procedure Rules, the learned Litigation Counsel stated that it deals with situations where a party not served has not been served. He urged the Court to uphold the objection.

The objection and the foregoing submissions for and against have been considered by this Court whose opinion is as stated hereinunder:-

In his application dated 26th May 2010, the ex-parte applicant seeks orders of certiorari and prohibition pursuant to the provisions of S. 8 of the Law

Reform Act and Order 53 Rule 3 of the Civil Procedure Rules.

The Orders are sought as a result of the decision made by the Uasin Gishu Land Disputes Tribunal on 18th August 2009 and adopted as a Judgment of the Court vide Chief Magistrate's Court at Eldoret Award Case No. 4 of 2009.

Leave to institute judicial review proceedings against the Tribunal's decision was applied for and granted on the 17th May 2010.

S. 9 of the Law Reform Act provides for such proceedings to be effected within six months after the act or omission to which the application for leave relates.

Under S. 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Act, leave to apply for an order of certiorari shall not be granted unless the application for leave is made not later than six months after the date of the disputed proceedings.

Herein, the decision being challenged was made on the 18th August 2009. Leave to institute these proceedings was granted on 17th May 2010, more than six months after the decision. This was a clear breach of the requirement of the Law Reform Act and Order 53 of the Civil Procedure Rules. Leave ought not have been granted in the first place for want of time.

An application for leave to apply for certiorari and prohibition is barred by Order 53 Rule (2) if it is brought outside the six months permitted. (**See, MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & ANOTHER CRIMINAL APPEAL NO. 316 OF 2000 (C/A)**). That being the law, the question of extending such period would not even arise (See, **RE. GITHUNGURI (1962) EA 520** and **THE DAR-ES-SALAAM NOOR TRANSPORT CO. LTD VS. THE TRANSPORT LICENSING AUTHORITY OF TANGANYIKA AND ANOTHER (1959) E.A. 403**).

From all the foregoing, it is apparent that grounds one and three of the preliminary objection are merited and sustainable.

Grounds two and four are not grounds suitable for a preliminary objection and are accordingly dismissed. Otherwise, the objection is sustained in terms of grounds one and three. To that extent, the notice of motion by the ex-parte applicant dated 26th May 2010 be and is hereby struck out with costs to the respondents.

J. R. KARANJA

JUDGE

[Read and signed this 24th day of February 2011]

[In the presence of Mr. Ngumbo for the 1st and 2nd Respondent]