



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL CASE NO. 42 OF 2011

IN THE MATTER OF MUTHAMBI DIVISION LAND DISPUTE TRIBUNAL

CASE NO. 22 OF 2010

AND

IN THE MATTER OF LAND PARCEL NO.MUTHAMBI/GATUA/463

LOYFORD NJAGI MWIANDI.....EXPARTE/APPLICANT

VERSUS

ANTONY MURITHI M'ITHARI.....RESPONDENT
MUTHAMBI DIVISION LAND DISPUTE TRIBUNAL.....INTERESTED PARTY

R U L I N G

The exparte applicant moved this court through an exparte Chamber Summons under Order 53 Rule 1, 2 and 3 of Civil Procedure Rules and Section 8 and 9 of The Land Reform Act, through an application dated 20th June, 2011.

The exparte applicant was seeking leave to apply for an Order of Judicial Review (certiorari) to bring the award in LDT NO.MUTHAMBI Division Land Dispute Tribunal Case No.22 of 2010 and quash the same.

The exparte applicant also requested the leave so granted to operate a stay of execution of the award in LDT No.22 of 2010 pending hearing and determination of the Notice of Motion. On 27th June, 2011 the Counsel for the exparte applicant M/S L. Kimathi Kiara & Co. Advocates appeared before my Sister Lady Justice Mary Kasango who granted the exparte applicant leave to file a substantive motion and leave granted was ordered to operate as a stay.

Under Order 53 Rule 3(1) it is provided:-

3. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

The exparte applicant after being granted leave did not proceed to file the substantive motion within 21days. On 30th September, the firm of M/S E.P.Omayo & Co. Advocates filed notice to act for the respondent and filed at the same time notice of Preliminary Objection to the entire proceedings in this case.

The preliminary objection raises the following point of law:-

“1. That the exparte applicant has contravened the provisions enshrined under Order 53 Rule (3) 1 of Civil Procedure Rules.”

When the matter came for hearing M/s Kimathi Kiara & Co. Advocates who had been served with the Preliminary Objection for hearing as per affidavit of service dated 08/12/11 did not attend. Consequently the application was ordered to proceed exparte.

Mr. Omayo Advocate argued that since leave was granted on 27th June, 2011 to file substantive motion for prerogative orders of certiorari and which leave was to operate as stay of

execution, the exparte applicant has not filed the main motion within the prescribed period for 21days as per Order 53 Rule 3 (1) of Civil Procedure Rules.

He submitted the failure to file the main motion should lead to striking out the pleadings and stay of execution granted to be vacated and/or discharged.

I have perused the court file and indeed it is true that leave was granted on 27th June, 2011. It is also correct that substantive motion which ought to have been filed within 21 days from 27th June, 2011 has not been filed. It is almost six months since leave was granted and no action has been taken.

Under Order 53 Rule 3(1) the application is supposed to be filed within 21 days. The Section is worded partly as follows:-

“The application shall be made within 21 days by Notice of Motion to the High Court”.

The word ***“shall”*** is used herein which means it is mandatory that the substantive motion must be filed within 21 days from the date of granting leave and the period cannot be extended beyond 21 days.

I agree with Counsel for the respondent that as the exparte applicant has to date not filed the substantive motion in compliance with Order 53 Rule 3(1) Civil Procedure Rules, the proceedings ought to be struck out. There is no pending matter before this court and the leave that was granted is spent or is no longer in force and as such the stay which was based on the leave is not long available to the applicant.

In the circumstances, the preliminary point of law is upheld and I do proceed to make the following orders.

1. *The exparte applicant has contravened the provisions enshrined under Order 53 Rule 3(1) and the proceedings in this Misc. Civil cause are ordered struck out.*
2. *That the stay of execution of the award in L.D.T No.22 of 2010 by virtue of leave granted is vacated or discharged forthwith.*
3. *That the respondent gets costs of this application.*

DATED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2011

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1.Mr. Gitonga hb for Omayo for the Respondent

J. A. MAKAU

JUDGE