



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI Miscellaneous Civil Case 282 of 2008

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN, MARAGUA LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE'S COURT, KIGUMO.....2ND RESPONDENT

INTERESTED PARTY

NG'ANG'A MUCHOKI

EXPARTE

NDUNGU CHEGE

RULING

The substantive matter in this dispute is the Notice of Motion dated 14th August 2009, in which NDUNGU CHEGE, the *Exparte* applicant herein, is seeking for the following orders:

1. *That the Honourable Court be pleased to issue an order of certiorari to remove into this court for purposes of being quashed, the award of the Maragua Land Disputes Tribunal Case No. 89 of 2007 regarding an order of prohibition directed to the Senior Resident Magistrate from adopting such an award as judgment of the court in Kigumo Senior Resident Magistrate, LDT Case No. 31 of 2007 touching on any dispute regarding land parcel No. LOC. 6/MUHITHI/810.*
2. *That the costs of this application be provided for.*

When the aforesaid Motion came up for hearing, Mr. Wairoma, learned litigation counsel, was granted leave to argue the preliminary points of law set out in the notice of Preliminary Objection dated 19th February 2010.

It is the submission of Mr. Wairoma that the motion should be struck out on the following grounds:

First, that the motion was made six months after the decision sought to be quashed was made hence the order of certiorari is unavailable. Secondly, the decision sought to be halted by an order of prohibition had been adopted by the Senior Resident Magistrate's Court hence the order of prohibition cannot issue.

Mr. Mwaniki, learned advocate for the *exparte* applicant, was of the view that the Preliminary Objection lacks merit because the date when the decision was made is in dispute.

I have carefully considered the rival submissions made by both sides. The application for leave to institute judicial review proceedings in the nature of certiorari and prohibition is the summons dated 17th October 2007. The aforesaid summons is accompanied by a statutory statement of facts and is verified by the affidavit of the *exparte* applicant sworn on 17th October 2007. Annexed to the verifying affidavit is the decision of Maragua Land Disputes Tribunal vide Land Dispute Case No. 89 of 2007 dated 8th August 2007. It is not clear when the tribunal's decision was delivered. What is apparent is that the same was scheduled for mention before the Kigumo Senior Resident Magistrate's Court on 26th October 2007 ostensibly for the adoption of the award. The *exparte* applicant does not explain how he obtained the tribunal's judgment which he annexed to the verifying affidavit. A party seeking to take out judicial review orders of certiorari is enjoined to know the date decision he is seeking to quash was made. This duty is imposed upon the Applicant because an application to quash a decision by an order of certiorari can only be made within six months from the date the decision was made. In the matter before this court, Mr. Mwaniki, learned advocate for the *exparte* applicant, has argued that the date when the decision was made is in dispute. That is not

a submission which is expected to come from the *ex parte* and his legal advisors. I am prepared to assume that the decision was either made on 8th August 2007 or in the alternative it was made on 26th October 2007. The most probable date is on 8th August 2007 because by 17th October 2007 the *ex parte* Applicant had a copy of the judgment. In any case it was not conceivable for the Applicant to seek for an order of certiorari to quash a judgment which had not been pronounced. If the decision was made on 8th August 2007, then the Applicant was required under *Section 9 (2) and (3)* of the Law Reform Act and under *Order LIII rule 2* of the Civil Procedure Rules to make the application for leave before the lapse of six months from the date of judgment and or decision. The record shows that the application for leave was filed on 23rd October 2007 but was never prosecuted until 27th July 2009. such an application is normally argued *ex parte* before a judge in chambers pursuant to *Order LIII rule 1 (2)* of the Civil Procedure Rules. It is very clear that though the application for leave was filed within time, the order for leave was not sought and granted within six months from the date the decision was made. It was sought and granted about 21 months from the date of the decision and about 19 months from the date of filing the application for leave. I am convinced that the application for leave was made within the period set by *Section 9(2) and (3)* of the Law Reform Act, hence the motion is not time-barred. However, the delay to prosecute the application for leave must be deprecated since the Applicant was bound to obtain leave urgently.

The second issue raised is whether or not the order for prohibition should issue? In the motion, the applicant is seeking to prohibit the Senior Resident Magistrate's Court from adopting the award. It is the argument of Mr. Wairoma that by the time of seeking leave, the decision had already been adopted. Unfortunately, the *ex parte* Applicant did not respond to this issue. The record is, however, clear that the award was to be adopted on 26th October 2007 by the Senior Resident Magistrate's Court. It would appear from the certificate of urgency dated 4th November 2008 and filed in Court on the same date that the award had been adopted by 4th November 2008. In fact the process of execution appears to have been taking place. This turn of events appears to have jolted the *ex parte* to rush to court to prosecute the *ex parte* summons. In any case the *ex parte* applicant has not told this court what happened on 26th October 2007. I am entitled to presume that the tribunal's decision was adopted as the decision of the Senior Resident Magistrate's Court. Consequently, I have come to the conclusion that the order for prohibition cannot issue in the circumstances.

The final issue which came to my attention while perusing pleadings in this matter is that the *Ex parte* applicant departed from the orders of leave. At the leave stage, the Applicant sought for the following orders:

1. *That leave be granted to the applicant to apply for orders of certiorari and prohibition directed at the Chairman, Maragua Land Disputes Tribunal, the Senior Resident Magistrate, Kigumo or any other Land Disputes Tribunal prohibiting them from hearing or entertaining any dispute relating to land Parcel number LOC. 6/MUTHITHI/810.*
2. *That the leave granted do operate as stay of proceedings of the Kigumo Senior Resident Magistrate's L.D.T. Number 31 of 2007.*

Basically he sought for orders of certiorari and prohibition to be directed at the Chairman, Maragua Land Disputes Tribunal and the Kigumo Senior Resident Magistrate's Court to prohibit them from or entertaining any dispute relating to L.R. No. LOCATION 6/MUTHITHI/810. In the Motion now before this Court, the Applicant has sought for an order of certiorari to remove into this Court for quashing the award of Maragua Land Disputes Tribunal vide case No. 89 of 2007 and for an order of prohibition to prohibit the Kigumo Senior Resident Magistrate's Court from adopting the award vide L.D.T. Case No. 31 of 2007 touching on L.R. NO. 6/MUTHITHI/810. It is obvious the *ex parte* applicant did not seek for leave to apply for the aforesaid orders. That is not permitted under *Order LIII rules 3 and 4* of the Civil Procedure Rules. The entire Motion is therefore rendered fatally defective for two reasons. First, is that the prior leave was sought by the applicant for the aforesaid orders set out on the face of the Motion. Secondly, that the applicant completely departed from the orders sought in the Summons for leave contrary to the provisions of *Order LIII rules 3 and 4* of the Civil Procedure Rules.

In the final analysis I find the Preliminary Objection to be well founded. The same is upheld with a consequential order that the Motion is ordered dismissed and struck out with costs to the Respondents.

Dated and delivered at Nyeri this 31st day of March 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Wairoma for the Respondent. No appearance Kirubi for the Applicant. Interested party present in person.