



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NYERI

Miscellaneous Civil Application 159 of 2008

REPUBLIC..... APPLICANT

VERSUS

LAND DISPUTES TRIBUNAL, MATHIOYA.....1<sup>ST</sup> RESPONDENT  
SENIOR RESIDENT MAGISTRATE KANGEMA.....2<sup>ND</sup> RESPONDENT

INTERESTED PARTY

ISAAC KARIUKI KAMWITHA

EX-PARTY

BILHA NJERI KAMWITHA

JUDGMENT

The subject matter of this judgment is the Motion dated 28<sup>th</sup> July 2008 in which **BILHA NJERI KAMWITHA**, the *Exparte* Applicant herein seeks for the following orders:

- (a) *The honourable superior court be pleased to issue an order of certiorari to remove into this court the award of the land dispute tribunal Mathioya in its land dispute case number 15 of 2002 and the proceedings and judgment in Kangema land dispute case number 24 of 2002 and Quash them.*
- (b) *The cost of this application be provided for.*

The Motion is supported by the supporting and the verifying affidavit of the *Exparte* Applicant. When served with the Motion, **ISAAC KARIUKI KAMWITHA**, the Interested Party herein, filed grounds of opposition and a replying affidavit he swore to oppose the Motion. **THE CHAIRMAN, LAND DISPUTES TRIBUNAL, MATHIOYA** and **THE**

**SENIOR RESIDENT MAGISTRATE, KANGEMA**, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, through the Provincial Litigation Counsel, filed a Notice of Preliminary Objection dated 24<sup>th</sup> June 2010 to oppose the Motion.

**Mr. Wamahiu**, learned advocate held brief for Mr. Wahome, learned advocate for the *Exparte* Applicant argued three main points in support of the Motion. First, is that the Land Disputes Tribunal heard and determined a dispute relating to ownership and title to land. It is the Applicant's submission that the Tribunal did not have jurisdiction to do so. Secondly, that the Land Disputes Tribunal heard and determined a dispute in respect of the Estate of a deceased person, whereas it had no jurisdiction to entertain such a dispute. Thirdly that the Land Disputes Tribunal purported to hear and determine a dispute based on trust yet it had no jurisdiction to do so.

**Miss Munyi**, learned Provincial Litigation Counsel, was of the view that the Motion is incompetent in that the order for leave was erroneously given yet six months had lapsed from the date of the decision.

Mr. Kebuka Wachira, learned advocate for the Interested Party, was of the view that the Motion should be dismissed for the following reasons: First, it is said that the award was read to the parties on 16<sup>th</sup> August 2002. The application for leave was therefore filed out of time. It is also stated that the Provincial Appeal's Committee's decision was delivered on 30<sup>th</sup> January 2003 and adopted as the judgment of the Court on 18<sup>th</sup> June 2008. Again, it is argued that six months had lapsed by the time leave was sought. Secondly, it is said that no notice was served upon the Registrar of this court. Thirdly, that the statement

accompanying the Motion contains evidence contrary to provisions of *Order LIII rule 1(2)* of the Civil Procedure Rules.

I have considered the material placed before this Court and the oral submissions presented by learned counsels from both sides. The Interested Party herein filed a complaint before the Mathioya Land Disputes Tribunal claiming he is entitled to 1 acre to be excised from **L.R. NO. LOC 19/GACHARAGEINI/2124**. The aforesaid parcel of land is registered in the name of the *Exparte* Applicant herein. The Mathioya Land Disputes Tribunal ruled in favour of the Interested Party by its award delivered on 16<sup>th</sup> August 2002. The *Exparte* Applicant was unhappy with the decision hence she appealed to the Central Province Land Disputes Appeals Committee. It appears the Provincial Appeals Committee heard the appeal and by its judgment delivered on 30<sup>th</sup> January 2003, the Mathioya Land Disputes award of 16<sup>th</sup> August 2002 was set aside. The Appeals Committee further declared that the *Exparte* Applicant shall hold the parcel of land known as **LOC. 19/GACHARAGEINI/2124** measuring 2.2 acres as a trustee for the daughters of the late Jimnah Kamwitha. Again, the *Exparte* Applicant was dissatisfied with the decision of the Provincial Land Disputes Appeals Committee thus he preferred an appeal to this Court vide **NYERI H.C.C.A No. 5 of 2004**. The *Exparte* Applicant later withdrew the aforesaid appeal. On 10<sup>th</sup> July 2008 the *Exparte* Applicant was granted leave to apply for the orders of Certiorari and Prohibition directed

against the Respondents. Having set out in brief the history leading to the filing of the current Motion, let me now turn my attention to preliminary objection raised by learned counsels appearing for the Respondents and the Interested Party. It is their submission that the order for leave to institute judicial review order of *Certiorari* was erroneously given because at the time of granting leave six months had lapsed since the decision sought to be quashed was made. Under *Section 9(3)* of the Law Reform Act and *Order LIII rule 2* of the Civil procedure rules, it is clearly stated that no leave to apply for judicial review order of *Certiorari* shall be given if more than six months have lapsed since the decision sought to be quashed was passed and or delivered. The *Exparte* Applicant has applied for an order of *Certiorari* to have the Mathioya Land Disputes Tribunal's decision as adopted as the decision of the Resident Magistrate's Court, Kangema to be quashed by an order of *Certiorari*. The *Exparte* Applicant has not explicitly applied for the decision of the Central Province Appeals Committee's decision to be quashed. It is not in dispute that the Mathioya Land Disputes Tribunal delivered its decision on 16<sup>th</sup> August 2002. The record shows that the decision was adopted as the order of Kangema Resident Magistrate's Court on 28<sup>th</sup> May 2008. The Central Province Land Disputes Appeals Committee delivered its award on 30<sup>th</sup> January 2003. If the *Exparte* Applicant intended to have the aforesaid decisions quashed by an order of *Certiorari*, she was required to seek for leave to take out such an order within six months from the date the decision was delivered. For

example she was required to apply for leave to apply for an order of *Certiorari* to quash the Mathioya Land Dispute's Tribunal six months with effect from 16<sup>th</sup> August 2002 i.e. on or before 17<sup>th</sup> February 2003. If she wanted to challenge the decision of the Provincial Land Disputes Appeals Committee, she was required to do so within six months from 30<sup>th</sup> January 2003 i.e. on or before 2<sup>nd</sup> July 2003. The *Exparte* Applicant applied for leave to apply for judicial review order of *Certiorari* to quash the decision of the Land Disputes Tribunal, Mathioya on 10<sup>th</sup> July 2008. It is obvious she went to court to seek for leave outside the six months fixed by law. The order for leave remains a provisional order and the court is not impeded from setting aside the same where it turns out that the same was erroneously given. It is clear that the *Exparte* Applicant did not disclose in her application at the leave stage and even at this substantive stage on the face of the Summons and the Motion the date when the decisions sought to be quashed were delivered. I think she conveniently did that to mislead the court into believing that the decision she was seeking to be quashed was made on 28<sup>th</sup> May 2008. With respect, I agree with the submissions of Mr. Kebuka Wachira and Miss Munyi that the order of leave was erroneously given. I hereby set aside the order of leave given on 10<sup>th</sup> July 2008. This renders the whole Motion incompetent. Since I have no competent Motion before me, then I do not need to consider the merits of the same. I hereby order the Motion struck out.

The other preliminary point raised by the Interested Party is to the effect that the order of Prohibition does not lie because whatever the *Exparte* Applicant wanted to prohibit has taken place. I have perused the Motion dated 28<sup>th</sup> July 2008 and it is apparent that the Applicant did not seek for an order of prohibition despite having been given leave to do so. The above submissions therefore cannot stand. The end result is that the Motion dated 28<sup>th</sup> July 2008 is incompetent. It is ordered struck out with costs to the Respondents and the Interested Party.

*Dated and delivered at Nyeri this 23<sup>rd</sup> day of July 2010.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Wairoma for 1<sup>st</sup> and 2<sup>nd</sup> Respondent, Mukuha holding brief Mugo for 3<sup>rd</sup> Respondent. Mr. Wahome for the Applicants.