



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Misc. 190 of 2001

MWEU MUSYOKI..... APPLICANT/PLAINTIFF

VERSUS

1. SIMON MAVUTI

2. MACHAKOS DISTRICT LAND DISPUTES TRIBUNAL

3. REPUBLICRESPONDENTS/DEFENDANTS

RULING

1. The Application dated 9.3.2004 is premised on Order XLIX Rule 5 of the Civil Procedure Rules. In it, the Applicant prays as follows:-

i. *“That there be enlargement of time and the applicant be allowed to file an application for leave to apply for an order of certiorari to quash the proceedings and the decision of the Land Disputes Tribunal at Machakos dated 28.8.1997 out of time.*

ii. *That the court be pleased to allow the applicant to make the said application for leave notwithstanding that six (6) months have lapsed since 28.8.1997 when the Land Disputes Tribunal at Machakos made the said decision.*

iii. *That the costs of this application be provided for.”*

2. The grounds in support are that:-

a. *“The applicant intends to file a judicial review application to quash the decision of the Machakos District Land Disputes Tribunal dated 28.8.1997 if the Court grants an enlargement of time.*

b. *It is necessary to join the Machakos District Land Disputes Tribunal and the Republic as parties in this application to enable the Court to effectively and completely adjudicate upon and settle all questions involved in this application”.*

3. I have seen the Supporting Affidavit sworn by Mweu Musyoki on 9.3.2004 and in I, he depones that he is the registered owner of title No.Mitaboni/Kiani/1136 and that on 7.3.1992 by a written agreement of even date, he sold a portion of that land to the 1st Respondent, Simon Mavuti for a consideration of Kshs. 24,000/=. That the Respondent only paid Kshs. 14,100/= and failed to pay the balance in July 1992 as had been agreed. He then sold the land to another person and the dispute ended up before the Machakos District Land Dispute Tribunal and Tribunal ordered the 1st Respondent to pay the balance of the purchase price and the Applicant to transfer the portion that he had sold to the 1st Respondent.

4. The Applicant now wishes to challenge the decision of the tribunal but that since the order was made on 28.8.1007, six months had since elapsed and he now requires leave to institute proceedings to quash the decision of the Tribunal by an order of certiorari. That the delay in doing so within time was because he was a “*layman and ... did not*

know the aforesaid provisions of the law.” Further, that if the order is not granted, he will suffer irreparable harm as his land will be lost forever.

5. The Attorney General filed a Notice of Preliminary Objection on 21.7.2004 stating that the Application violated the express provisions of Order LIII Rule 2 and the Law Reform Act regarding the mandatory six months period to institute judicial review proceedings. The objection was never prosecuted but I will return to the issue later.

6. Simon Mavuti, the 1st Respondent filed a Replying Affidavit on 12.1.2007 and stated that the Application lacked competence as no leave can be granted in the manner the Applicant seeks and in any event, the disputed portion of land had long been registered in his name and any further legal proceedings would be in vain.

7. I asked Mr. Ndungi for the Applicant to address me on the issue of jurisdiction and he referred me to the decision in Republic vs Minister of Lands & Settlement ex-parte, Museng’ya Maithya, H.C. Misc Appl. 81/2003 where leave was granted under Order XLIX Rule 5 of the Civil Procedure Rules for a party to institute judicial review proceedings in certiorari outside of the statutory six months period from the date of the decision. The judge in that case stated as follows:-

“Order 53 CPR falls under the Civil Procedure Rules and I believe the court is given wide discretion as to whether or not to enlarge time in such proceedings.”

8. Reference in that case is also made to Halsbury’s Laws of England Vol. II 4th edition at page 1546 and the learned judge added as follows:-

“Our Order 53 CPR provisions relating to grant of orders of certiorari are similar to those obtaining in English.”

9. For my part, it is clear to me that Order LIII of the Civil Procedure Rules is a separate and special procedure whose parent law is the Land Reform Act, Cap 26 Laws of Kenya. Section 8 and section 9 of that Act provide as follows:-

8. *“(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogatives writs of mandamus, prohibition or certiorari.*

(2) In any case in which the High Court in English is, by virtue of the provisions of sections 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order, and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

(5) Any person aggrieved by an order made in the exercise of the civil jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.

9. *(1) any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court-*

(a) prescribing the procedure and the fees payable on documents filed or issued incases where an order of mandamus, prohibition or certiorari is sought;

(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

2. *Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.”*

3. *In the case of an application for an order of certiorari to remove any judgment, order, decree conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of the judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceedings is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”*

10. The Rules referred to are those now referred to as Order LIII of the Civil Procedure Rules and although lumped up with those Rules created under Cap 21(the Civil Procedure Act) they are special and separate and have no connection with those Rules including Order XLIX which has been invoked here. There is to my mind no law in Kenya which grants this court the power to extend the period to institute the judicial review orders of certiorari once six months have lapsed. I say so, the decision in exparte Maithya, notwithstanding as I am not bound by it.

11. Having so held and there being no jurisdiction to entertain the Application for enlargement of time, the same is stuck off with no order as to costs.

12. Orders accordingly.

Dated and delivered at **Machakos** this **28th** day of **May 2009**.

Isaac Lenaola

Judge

In the presence of; Mr. Kimeu h/b for Mr.Ndungu for Applicant

Isaac Lenaola

Judge