



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

MISCELLANEOUS CIVIL APPLICATION 103 OF 2008

**IN THE MATTER OF AN APPLICATION BY ANDREW AGWANDA OWUOR FOR LEAVE
TO APPLY FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF (CERTIORARI)**

AND

IN THE MATTER OF THE LANDS DISPUTES TRIBUNAL

ACT NO. 18 OF 1990

AND

IN THE MATTER OF THE KISUMU LANDS DISPUTES TRIBUNAL

(Land Case No. 2 of 2006)

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT

AT KISUMU

(Land Case No. 6 of 2007)

BETWEEN

REPUBLIC APPLICANT

VERSUS

KISUMU LAND DISPUTE TRIBUNAL 1ST RESPONDENT

THE C.M'S COURT AT KISUMU 2ND RESPONDENT

AND

ELI AYIEKO OWUOR INTERESTED PARTY

AND

RULING:

This matter was initially filed in Nairobi before being transferred to this Court on the 18th June, 2008.

On 18th September 2008, the Applicant through Mr. Olel, applied for leave to institute judicial review proceedings by way of certiorari to quash the decision of the Kisumu Lands Disputes Tribunal dated 20th March 2007 and adopted as judgment of the Chief Magistrate's Court on the 17th April 2007. The grounds for the application were specified in the chamber summons dated 26th September 2007.

Leave was granted ex-parte and order was made by the Court to have the substantive application filed within one month.

There was no order to have the leave operate as a stay of the tribunal decisions.

The substantive application was filed under a Notice of Motion dated 15th October 2008.

The application is grounded on the basic fact that the Kisumu Land Disputes Tribunal (i.e. first Respondent) lacked jurisdiction when it dealt with the issue concerning ownership of L.R. No. Kisumu/Bar/501.

After due service of the application, the Respondents and the interested party entered appearance. The Respondent through the Learned Provincial Litigation Counsel did not file any replying affidavit. The Learned Counsel, M/s. Gathangu, indicated to the Court that the Respondents were not opposed to the application. The interested party through Learned Counsel, Mr. Moses Orengo, filed grounds of opposition dated 5th November 2008.

Having heard both counsels for the Applicant and interested party, this Court would readily agree with the Applicant that the first Respondent lacked the necessary jurisdiction to hear and determine the issue pertaining to ownership of registered land.

The final decision of the first Respondent was to the effect that:-

“In view of the foregoing points, the tribunal panel listening to this case has reached a decision that parcel No. KSM/BAR/501 be awarded to the claimant Eli Ayieko Owuor.

The Ministry of Lands to formalize the transfer accordingly.”

The tribunal thus purported to transfer land registered in the name of the Applicant Andrew Agwanda Owuor to the interested party Eli Ayieko Owuor. This was contrary to the requirement of S.3(1) of the Land Disputes Tribunal Act No. 18 of 1990.

This was not a claim to occupy or work on land otherwise transfer of the suit land would not have been included in the decision by the tribunal. The issue pertaining to the jurisdiction of a Land Disputes Tribunal was aptly stated by Alnashir Visram – J., in the cited case of Isaac Waweru Mwangi Vs. Ndungu Mwangi & Others NBI Civil Appeal No. 557 of 1999. This Court cannot agree more and upholds the contention that the first Respondent lacked the necessary jurisdiction to determine the matter before it.

The Interested party's opposition to the application essentially grounded on procedure in that the order made on 18th September 2008 granting leave was erroneous and contrary to Order LIII Rule 3 (1) of the Civil Procedure Rules which provides that a Notice of Motion has to be filed within 21 days from the date of grant of leave. Therefore, this Court lacks jurisdiction to hear the application, since it was filed past the 21 days. Mr. Orengo argued that the procedure adopted after the grant of leave was defective even

though no appeal was preferred. He said that the application was filed outside the 21 days yet there was no application for extension of time. Learned Counsel also took issue with the notice to the Registrar and contended that it was filed together with the application for leave contrary to Order LIII Rule 1 (3) of the Civil Procedure Rules.

In support of his contention, Learned Counsel referred the Court to the decisions in **Okumu Vs. Ooko (1991) KLR 123 and Bungoma H.C.Misc. Appl. No. 38 of 2003** i.e. In the matter of an application by Victory Christian Centre.

While it is a requirement under **Order LIII Rule 3 (1)** of the Civil Procedure Rules that an application be filed within a period of not more than 21 days this Court would follow the observation made in the case of **Trust Bank Ltd Vs. Jalo Company Ltd Ksm Civil Appeal No. 215 of 2000 (C/A)** in that:-

“The Principle which guides the Court in the administration of justice when adjudicating on any disputes is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by George, C.J. (Tanzania) in the case of Essanji and Another Vs. Solomon [1968] E. A. at page 224.

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.”

That accords with the policy of the law as can be gleaned from Order 9 (1) of the Civil Procedure Rules whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the Law is that as far as possible in the exercise of judicial discretion the Court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

Although the aforementioned case dealt with the ordinary Civil Procedure Rules rather than Order LIII which deals with judicial review, the principle stated therein applies to all types of cases.

The extension of time complained against was granted by the Court without any specific application by the Applicants. No prejudice was occasioned to the interested parts.

Regarding the notice to the Registrar, the same is dated 26th September 2007 and was filed in Court on 27th September 2007.

The Chamber Summons leave was filed in Court on the 28th September 2007. Therefore, there was compliance with the provisions of Order LIII Rule (1) (3) of the Civil Procedure Rules.

In the end result, this application is merited and is granted in terms of prayers (1) and (2) of the Notice of Motion.

Costs be provided to the Applicant.

Ordered accordingly.

J.R. KARANJA

JUDGE

[Read & Signed this 26th day of May 2009 in the presence of Mr. Olel for Applicant and Mr. Orenge for

party.]

JRK/mo.