REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Miscellaneous Civil Application 203 of 2006

IN THE MATTER OF THE LAND DISPUTE TRIBUNAL ACT 1990

REPUBLIC (EX-PARTE)

ENOCK OBENGO…………………………………………………APPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE NYANDO…...................RESPONDENT

AND

1. JAMES OWINO NYAGOWA

2. VITALIS OKELLO MINODI……………...................….INTRESTED PARTIES

R U L I N G

The Notice of Motion dated 14th November 2006 is made under **Order LIII Rule 3 (1)** of the Civil Procedure Rules and seeks an order of certiorari removing into this court the ruling and order of the Senior Resident Magistrate dated 27th September 2006 in **Nyando SRM Misc. APPLICATION NO. 7 of 2006** arising out of Nyando District Land Dispute Tribunal case No. 36 of 2005 for purpose of being quashed and an order of Mandamus directed at the Senior Resident Magistrate Nyando compelling him/her to read and adopt the orders/awards of the Nyando District Land Dispute Tribunal as per the law.

The grounds for the motion are that:-

(a) The Respondent has acted *ultra-vires* the provisions of the land dispute tribunal Act.

(b) The action of the Respondent contravenes the rules of natural justice and fair play. The Respondent has no authority to make the orders she made.

(c) The Respondent's refusal to read and adopt the awards of Nyando District Land Dispute Tribunal No. 36 of 2005 was in bad faith.

Further grounds are contained in the statement of facts dated 14th November 2006 and these are supported by the facts contained in a supporting affidavit dated 15th November 2006 deponed by the Applicant **Enock Obengo Ojwang.**

The respondent **Senior Resident Magistrate Nyando** appears to have been served through the office of the Attorney General but did not file any response nor appear at the hearing of the application.

The interested parties **James Owino Nyagowa and Vitalis Okelo Minodi** opposed the application and filed a replying affidavit dated 22nd January 2007.

At the hearing of the application, Learned Counsel, Mr. Yogo, represented the applicant. The thrust of his arguments in support of the application was that the Respondent Senior Resident Magistrate erred in declining to read and adopt the award made by the land tribunal as provided by section 7 (2) of the Land Disputes Tribunal Act which is framed in mandatory terms.

Mr. Yogo argued that the respondent had no jurisdiction to refuse to record the decision of the tribunal nor to enquire into issues of the composition of the tribunal or the legality of the deliberations or the correctness or otherwise of the award. He urged this court to grant the orders sought.

The learned counsel for the interested parties, M/S Opondo, opposed the application and argued that the requirements of bringing such application are just as important as the merits of the application. She contended that the Notice of Motion contains an unsigned and undated verifying affidavit and that the Registrar was not served with the notice as required under Order LIII (1) (3) of the Civil Procedure Rule.

M/S Opondo stated that although the notice was filed there is no evidence that it was served and such omission is fatal. She further stated that it is the verifying affidavit which contains the evidence. Therefore, it is more important than the statement of facts.

M/S Opondo went on to state and contend that copies of the verifying affidavit and statement of facts filed at the time of seeking leave are the same documents required to accompany the subsequent Notice of Motion. She contended that the statement of facts dated 6th November 2006 and the unsigned verifying affidavit are not the documents accompanying the material Notice of Motion.

In a nutshell, learned counsel for the interested parties argued that the application is defective in as much as it is brought via a defective procedure and ought to be struck out.

From the foregoing arguments, the basic issue arising for determination is whether the application is defective and if not, whether the applicant is entitled to the orders sought.

Undoubtedly, if the procedure adopted in the bringing up of the application was defective, the defect would invariably be transferred to the application itself and render it incompetent.

Judicial Review is a special jurisdiction provided for under section 9 (1) (b) of the Law Report Act (cap 26 LOK) and order LIII of the Civil Procedure Rules.

Order LIII Rule 1 (1) provides that :-

"**No application for an order of mandamus, prohibition or certiorari shall be made unless leave thereto has been granted in accordance with this rule."**

Under Rule (2) "An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and by affidavits verifying the fact relied on. The Judge may in granting leave, impose such terms as to costs and as to giving security as he thinks fit".

Under Rule (3) "The applicant shall give notice of application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavit, provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown".

Herein, the chamber summons for leave and the notice to the registrar were filed on the 6th November 2006 contrary to the requirements of the aforementioned Order LIII rule (1) (3) of the Civil Procedure Rules. Further, the filing of the notice did not constitute service.

The applicant has not established that there was service of the notice upon the registrar.

To that extent, the application would be defective and incompetent.

The question following would be whether the defect is fatal as to render the application a nullity.

M/S Opondo, submitted that the omission to serve the notice is fatal. She relied on the High Court decision **Republic –VS- The Chairman Kanduyi Land Disputes Tribunal Ex-parte Victory Christian Centre & John A. Omuhala & Another Misc. Application No. 38 of 2003 at Bungoma.**

In that case, the failure to serve notice upon the registrar was considered to be fatally defective such that the application was struck out.

Mr. Yogo, contended that the failure to serve the notice was not fatal. He relied on the Court of Appeal decision in the case of **Republic –VS- Isaac Theuri Githae the Principal Magistrate, Nyahururu Civil Appeal No. 11 of 2002 at Nakuru** in which failure to serve notice was not considered to be fatal.

In dealing with the material Order LIII Rule (1) (3), the Court of Appeal reiterated:-

"**Whatever the object of the provision we are unable to hold that it is mandatory. In our view a failure to comply with that sub-rule is only an irregularity which is curable. The rule is merely directory. That would explain why the rule has a provision empowering the court either to extend the time within which to comply with the sub-rule or to excuse the failure to comply with it".**

Applying the foregoing principle, this court would hold that the failure by the applicant to serve the notice upon the registrar is not fatal as it is only an irregularity which is curable.

However, in the same case of Isaac Theuri Githae (supra), the court of Appeal noted that the power of the court under the said Order LIII Rule (1) (3) is discretionary but a court will be inclined to strike out a suit if the failure to comply with the provision is or would be prejudicial either to the respondent or any party likely to be affected by an order in the application.

The Respondent herein has chosen not to participate in the proceedings thereby losing the opportunity to indicate the prejudice, if any, that may be suffered.

The interested parties have not shown the prejudice that they may suffer. Consequently, this court is not inclined to strike out the application for failure to comply with the requirements of Order LIII Rule (1) (3).

What about Order LIII Rule 4 which deals with statements and affidavits?

Learned counsel, M/S Opondo, contended that the statement of facts dated 6th November 2006 and the accompanying unsigned verifying affidavit are not the documents accompanying the material notice of motion dated 14th November 2006 and that the notice of motion is instead accompanied by a statement dated 14th November 2006 and a document entitled supporting affidavit dated 15th November 2006.

The import of these contentions is that the application is incurably defective in so far as it contravenes the requirements of Order LIII Rule 4 (1) of the Civil Procedure Rules.

Learned counsel, Mr. Yogo, was of the view that the documents in the notice and the chamber summons are not different and that they are copies and not pleadings therefore requiring no signature. He said that

only pleadings should be signed.

The evidential value in an application for judicial review is contained in a verifying affidavit rather than the statement of facts **(see Commissioner General of Kenya Revenue Authority –VS- Sulvano Onema Owaki t/a Marenga Filing Station Civil Appeal No. 45 of 2000 at Kisumu)**.

The chamber summons for leave dated 6th November 2006 is accompanied by a verifying affidavit undated and unsigned.

The Notice of Motion dated 14th November 2006 and a supporting (not verifying) affidavit signed and dated 15th November 2006.

Clearly, the statements and affidavits contained in the chamber summons are completely different from those contained in the Notice of Motion contrary to the requirements of Order LIII 4 (1) which provides that:-

"**copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement".**

The difference is essentially in the dates specified in the statements and affidavit. Significantly, the verifying affidavit in the chamber summons is not only undated but also unsigned.

A verifying affidavit not dated nor authenticated is invalid and incapable of verifying the accompanying statement of facts. It would therefore appear that the leave to file this application was improperly granted.

The attempt to cure the glaring defect by having the application accompanied by what is called a supporting affidavit which is dated and signed was in vain and was made without leave of the court.

It is the view of this court that allowing the applicant to proceed on the basis of a defective verifying affidavit and/or an affidavit which is at variance with that contained in the chamber summons for leave would be highly prejudicial to the Respondent and the Interested Parties. It is further the view of this court that the defect may in the circumstances not be curable by amendment.

Consequently, the failure by the applicant to comply with the mandatory requirements of Order LIII Rule 4 renders the application incomplete and suitable for striking out.

Otherwise, on the merits, this court would not have hesitated to associate itself with the remarks of Kimaru J in the case of **Harrison Ndungu –VS- The Nakuru Chief Magistrate's Court and Another Misc. Application No. 47 of 2004 at the High Court Nakuru,** to the effect that:-

"**As provided by section 7(2), (Land Disputes Tribunal Act) the magistrate is bound to adopt the award presented to him by the chairman of the Tribunal. The subordinate court cannot make inquiries to established whether or not the said award was arrived at after the provisions of the Land Disputes Tribunal Act were complied with. The court will also not question the composition of the Tribunal neither will it make inquiries to establish whether or not rules of natural justice were followed when the said award was arrived at. The subordinate's court's role as it were is procedural and clerical in nature. The said court is legally bound to adopt an award of the tribunal and enter judgment in accordance with the said award without making any inquiry as to the legality or otherwise of the said award".**

But for the defects mentioned herein above this application is struck out and dismissed with costs to the Interested Parties.

[Read and Signed at Kisumu this 10th day of June 2009].

J.R. Karanja

J U D G E

JRK/va