



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
MISCELLANEOUS APPLICATION 68 OF 2008

REPUBLIC APPLICANT

VERSUS

MERU CENTRAL DISTRICT LAND

DISPUTES TRIBUNAL RESPONDENT

ALICE MWARI M'ARIMI 1ST INTERESTED PARTY

JOYCE KAJUJU MUCHANGI 2ND INTERESTED PARTY

NAOMI MBAYA 3RD INTERESTED PARTY

JANE MURITHI 4TH INTERESTED PARTY

DORIS PETER 5TH INTERESTED PARTY

EX PARTE: M'ARIMI IKWINGA

RULING

The *ex parte* applicant by Chamber Summons dated 11th August 2008 (filed on 12th August 2008) sought leave of the court to apply for an order of *certiorari* to remove to this court the decision/award of Meru Central District Land Dispute Tribunal in LDT Case No. 58 of 2007 read to the parties on 18th February 2008 and quash the same.

The affidavit in support of that chamber summons referred and annexed the typed proceedings of chief magistrate's court Meru L.D.T. No. 5 of 2008. Those proceedings reflect Alice Mwari M'Arimi as the claimant and M'Arimi Ikwinga, the *ex parte* applicant herein, as the object. The proceedings show that on 18th February 2008 the following was recorded:-

"Court

Tribunal award read out to the parties present. R/A within 30 days explained.”

The Chamber Summons seeking leave to bring the judicial proceedings dated 11th August 2008 was considered on 14th August 2008 and the leave granted as prayed. The *ex parte* applicant filed the substantive Notice of Motion dated 20th August 2008 in this very file where leave to file the judicial review was granted. The Notice of Motion was supported by a verifying affidavit of the *ex parte* applicant.

Annexed to that affidavit were copies of the proceedings and the award of the Meru Central District Land Dispute Tribunal Case No. 58 of 2007. The award of that tribunal was dated 20th November 2007. The interested parties filed preliminary objections to the *ex parte*'s application. Objection number 1 and 2 deal with the same issue. Counsel vocalized those objection thus; section 9(2) of The Law Reform Act as read with Order LIII Rule 2 provide that leave sought for orders of *certiorari* should be within 6 months of the date when the decision was made. Counsel argued that the date referred in Cap 26 and O. LIII was the date of the decision. He argued that the Land Dispute Tribunal decision having been given on 20th November 2007, it made the *ex parte* applicant's application made on 13th August 2008 to have been out of the 6 months period. The respondents relied on the case of **Mobrama Gold Corporation Ltd Vrs. Minister for Water, Energy and Minerals and others** (1995 – 1998) IEA, 199. The Court of Appeal Tanzania at Dar-es-salaam held:-

“The application for leave made on 15th September 1995 was both misconceived and hopelessly out of time. It ought to have been rejected for being incompetent.”

In response, counsel for the *ex parte* applicant argued that the Land Dispute Tribunal Act by virtue of sections 6 and 7 thereof the Tribunal is only mandated to hear the parties. That the said Act did not make provision for reading of its award. That award, counsel submitted, once filed before the magistrates court, the magistrate would then summon the parties for the reading of the award. His argument was that that would be the point at which the parties got to know whether or not they succeeded in their claim before the Tribunal. Consequently, it would follow that the date applicable in calculating the 6 months within which leave to file judicial review should be filed was the date of the reading of the award by the magistrate. In the case of **Republic Vrs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex parte Kariuki** (2005) 2 KLR Hon. Mr. Justice Khamoni held:-

“Where a decision of the Land Disputes Tribunal has been adopted by a magistrate's court in accordance with the provision of the Land Disputes Tribunal Act, that adoption makes the decision of the Tribunal or decision of the Appeal's Committee, be a decision of the magistrate's court. Consequently, the decision of the Tribunal or Appeals Committee, in law, ceases to exist as an independent decision challengeable separately in an appeal or judicial review.”

Section 3(1) of The Land Dispute Tribunal Act provides the Limitation of the Land Dispute Tribunal's jurisdiction. Section 6(1) (b) also provides:-

“The decision of the Tribunal shall be that of the majority of the members hearing the dispute.”

Section 7(c) provides:-

(1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall be enforceable in the manner provided for under the Civil Procedure Act.”

I have quoted extensively from the Land Disputes Tribunal because of the argument of the *ex parte*

applicant. The *ex parte* applicant argument is that the 6 months within which leave to bring judicial review run is from the date when the award is read by the magistrate.

What is clear from the provisions hereof is that the Act does not provide for the reading of the award by the magistrate. The Act provides that the decision over dispute is arrived at by the Tribunal. It then follows that the Tribunal having arrived at its decision as per section 6(2) (b) that date of decision by the Tribunal is the operative date for purpose of calculating the period within which leave to file judicial review should be filed.

In that regard, I am not persuaded by the decision in **Republic Vrs. Chairman Land Dispute Tribunal Kirinyaga District & Others** (supra). The High Court in a judicial review is asked to reconsider the tribunal's decision to determine if there were legal errors sufficient to require the quashing/reversal of such a decision. In my view, the decision which the *ex parte* applicant seeks the court to review is the decision of the Meru Central District Land Disputes Tribunal. Even going by the proceedings annexed to the *ex parte* chamber summons of the Meru Chief Magistrate's Court, it is clear that the said magistrate merely read the Tribunal's award.

The magistrate did not adopt that award as a judgment of the court. Even if that award would have been adopted, in my view, the judicial review can only target the Tribunal's decision and not the magistrate's adoption of that decision. I do not see the Tribunal's award as a relay race baton which is passed on to the magistrate's court and it ceased to be the property of the Tribunal as argued by the *ex parte* applicant.

Rather, the award remains the decision of the Tribunal but for enforceability, it is registered as a judgment in the magistrate's court. I therefore rule that for the purpose of calculating the 6 months within which leave to file judicial review should have been sought began to run from 20th November 2007 when Meru Central District Tribunal delivered its award to both the *ex parte* applicant and the respondents.

The *ex parte* applicant should therefore have sought the leave to file Judicial Review Proceedings by 21st May 2008. Instead, the leave was sought by a Chamber Summons filed on 12th August 2008. I am of the view that the first limb of the Respondent's preliminary objection is well taken and does succeed.

The other limb of the preliminary objection faulted the substantive notice of motion on the basis that it should not have been filed in the same file in which leave was granted to file judicial review. The interested parties relied on the case of **Republic Vrs. Funyula Land Dispute Tribunal & 3 others** (2004) IKLR, 585. It was held in that case as follows:-

“Under O. 53 Rule 3(1), the substantive motion can only be filed after leave has been obtained. The law does not envisage a situation where the motion is filed under the file through which leave was issued. The chamber summons is considered as spent when leave has been granted. The applicant should thus originate the proceedings by filing the Notice of Motion in a separate miscellaneous application. The failure to adhere to this practice renders the whole motion fatally defective for being improperly before the court.”

The interested parties argued that the *ex parte* applicant's motion having been filed in the same file where leave was granted rendered the motion liable to be struck out. The *ex parte* applicant in opposition argued that the process of obtaining the leave, service on the Registrar and the substantive motion were all one process and that it was good practice to bring them under one file. I for one do not consider it a fatality to file a motion under the same file where the leave was obtained.

Order LIII Rule 3(1) provides that once a leave is obtained the *ex parte* applicant should file the substantive motion within 21 days. The Rule does not provide for such a motion to be filed in a separate file. In my view, to file the motion in the file where leave was obtained ensures continuity in the matter and also is a check against duplicate file being opened. More often than not, the miscellaneous file under which leave is obtained, if the substantive motion is not filed under it, remains open in court registry and continues to be reflected as a back log.

I am in agreement with the submissions of the *ex parte* application that the filing of the motion in same file as the file where leave is obtained is a better practice. But it should be noted to either file the substantive motion in the file where leave was obtained or not does not go to the root of the matter. It is, in my view, of no consequence. That objection fails and is rejected.

The third limb of objection is to the effect that the affidavit in support of the motion was in contravention to Order LIII Rule 4(2). That Rule enables the court on hearing the motion to allow the amendment of an applicant's statement of facts and to rely on further affidavits. The interested parties argued that the *ex parte* applicant having failed to obtain court's leave to rely on further affidavit other than the one annexed to the summons seeking leave, that he could not rely on the affidavit filed together with the motion. The *ex parte* applicant argued that the affidavit filed together with the motion was filed in compliance to Order LIII Rule 7(1). That Rule states:-

“In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar or accounts for his failure to do so to the satisfaction of the court.”

The Rule provides that such verifying affidavit should be filed before the hearing of the motion. The *ex parte* applicant's verifying affidavit dated 20th August 2008 was filed before the motion was heard. It therefore cannot be faulted what so ever. That objection is rejected.

The last limb of objection was to the effect that the *ex parte* applicant should have joined the Attorney General in these proceedings because the same are against a statutory body, that is Meru Central District Land Dispute. This objection received support from the state counsel representing the Land Dispute Tribunal. The learned state counsel submitted that all action against the Government under section 13 of the Government proceedings Act are brought under the Attorney General.

The argument of the *ex parte* applicant in opposition to that argument finds favour with me. That is, that judicial review proceeding are proceedings of their own nature of special jurisdiction. They are neither civil nor criminal proceedings. Being so, no other statute or any other law applies to the proceedings.

In **Ndete V. Chairman Land Disputes Tribunal & Ano. (2002) KLR 392** Ringera J. (as he then was) stated that under the Civil Procedure Rules, Order LIII is a special jurisdiction as the rules therein are not made under the Civil Procedure Act but under the provisions of section 9 of the Law Reform Act and in that regard Order VI Rule 12 of the Civil Procedure Rules that had been cited in the course of arguing the application was not applicable in arguing the proceedings brought under Order LIII which is promulgated in pursuance of the provisions of Section 9 of the Law Reform Act. Ringera J. again reaffirmed this position in **Welamondi Vrs. The Chairman Electoral Commission of Kenya (200) 1 KLR 486** by holding that in exercising powers under Order LIII, the court is neither exercising civil or criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *sui generis*.

That being so, the interested parties reliance of the Government Proceedings Act must and is rejected. That last objection is dismissed. In the end, the only objection that succeed is the one to the effect that the *ex parte* applicant's motion must fail because the leave obtained was granted after 6 month's period from the date of the Land Dispute Tribunal decision.

Accordingly, the ruling of this court is as follows:-

- (1) That the motion dated 20th August 2008 is dismissed with costs thereof being awarded to the respondents.**
- (2) The interested parties are awarded costs of the suit and a third of costs of the preliminary objection dated 6th October 2008.**

Dated and delivered at Meru this 16th day of July 2009.

MARY KASANGO

JUDGE