



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

Misc. Appli.32 of 2007

REPUBLIC.....APPLICANT

VERSUS

- 1. MWEA LAND DISPUTE TRIBUNAL.....1ST RESPONDENT**
- 2. RESIDENT MAGISTRATE WANGURU.....2ND RESPONDENT**
- 3. GENESIO KUBUNYA NJAGI.....3RD RESPONDENT**

RULING

The Notice of Motion in Judicial Review jurisdiction was filed to quash the Judgment dated 25/1/2007 pursuant to leave of court dated 14/3/2007.

A preliminary objection has been raised by third Respondent (interested party) on the ground that the leave granted was a nullity as the application for leave was made after the lapse of the mandatory period of six months prescribed. This Respondent has quoted several authorities on this point. However the Ex parte applicant opposes the Preliminary Objection saying that where there are nullities the court is not bound to comply with the time limitation but is authorized by the constitution to quash irregularities whenever found. He relies on ***Misc. Application No. 1279 of 2004 at Nairobi*** in Goldenberg affair and also Misc.Civil Application No.163 of 2005 at Embu James Kimondo Ndegwa and 9 others vs County Council of Nyeri and others.

I have considered the authorities cited by both parties it is clear the decision to be quashed was made well out of the prescribed time. However that was a nullity and the court has power to quash nullities as held in the golden case saga. The decision of the Tribunal does not take effect until it is sent to a Magistrate court for it to be entered as Judgment of court. It is only after the decision is read to the parties by a Magistrate that the proceedings became concluded by entering the decision as Judgment of court which is capable of being executed.

Therefore it is my view that the time starts to run when Judgment is entered. The Judgment in this case was entered on 25/1/2007 and this application was made on 6/3/2007. The application was well within time.

The other objection was that the motion is wrongly instituted and there is misdescription of the parties in that Interested Party should be 3rd Respondent and the Ex parte Applicant is Muthike Mwaniki. These faults are not fatal as they are not of substance. What is of substance is the alleged non compliance

with 53 (1) (3). The Notice of Application is proved to have been served upon Deputy Registrar of High Court on 8/3/2007 while

the application was filed on 6/3/2007. The rule states “the applicant shall give notice of the application for leave not later than the preceding day to the registrar provided the court may extend this period or excuse failure to file notice of application for good cause shown

In this matter the no extension was sought or failure excused. Therefore following the decision in **Ndungu vs Muthoni Misc. Application No. 93 of 1990** where the application was dismissed for failure to serve the notice within the preceding day. The court (two Judges in appeal) the reason and importance of complying with this rule is explained by court on page 184 paragraphs B & C.

In the circumstances I find failure to serve Notice on Registrar on the preceding day is fatal. I therefore uphold the Preliminary Objection and dismiss the Notice of Motion with costs.

Dated this 2nd May, 2008.

J. N. KHAMINWA

JUDGE

2/5/2008

Khaminwa – Judge

Njue – Clerk

Mr. Mogusu HB for Mageto

Mr. Nthiga HB for Charles Kariuki

Read in open court._

J. N. KHAMINWA

JUDGE