REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 326 OF 2007

NDURYA KATANA …….. PLAINTIFF

- Versus -

SAID BADI ZEMBE …… DEFENDANT

R U L I N G

This application is made by a Notice of Motion dated 18th December, 2007, and brought under Sections 3A and 63(e) of the Civil Procedure Act. It seeks orders –

1. THAT this Honourable Court be pleased to order stay of execution of any decree emanating from the award of the Kaloleni Land Dispute Tribunal which was adopted by the Kaloleni Court as its own judgment on the 29th June, 1998, pending the final determination of this suit.

2. THAT the costs of this application be in the cause.

The application is supported by the annexed affidavit of NDURYA KATANA, the Applicant himself, sworn on 20th December, 2007, and is basically premised on the grounds that the plaintiff herein was never summoned at all during the hearing of the Kaloleni Land Dispute Tribunal; that all the said proceedings were heard ex parte in the absence of the plaintiff/applicant; that the rules of natural justice were never followed at all; and that the award which emanated from the said proceedings and which was adopted by the Kaloleni Resident Magistrate was therefore illegal, flawed and unprocedural. The plaintiff also filed a supplementary affidavit sworn on 20th February, 2008.

The application is opposed vide the Defendant/Respondent's replying affidavit sworn and filed in court on 12th February, 2008. In that affidavit, he deposes that the applicant was constantly present at the hearing and on several occasions applied for the matter to be adjourned. On some occasions he tried to force the tribunal to conduct its business according to his rules and conditions and not as provided for under the law. Upon being overruled by the Tribunal, the plaintiff opted not to give evidence and the matter proceeded in the manner demonstrated in the proceedings a copy of which was exhibited in his affidavit.

Mr. Mutugi for the Applicant submitted that the Applicant was never served with any hearing notice to

attend the Tribunal proceedings, and that the hearings proceeded ex parte. The applicant was only served to attend the delivery of the ruling while the rules require attendance and hearing of both sides. The applicant's appeal to the Provincial Land Disputes Appeals Tribunal, Coast, was dismissed on the ground that the appeal was time barred, which was a technicality. The matter has therefore never been heard on merit. Mr. Mutugi thereupon urged the court to invoke its powers to enable the plaintiff to be heard on merits.

Opposing the application, Mr. Mutubia for the Respondent referred to a copy of the proceedings before the Tribunal and submitted that the Applicant took part in those proceedings as well as in the reading of the award. Thereafter he filed two memoranda of appeal, and those appeals are on merit. The Applicant does not allege in the appeals that he did not take part, and therefore the application has no merit.

After considering the application and the submissions of counsel, I find that the only issue for determination is whether the Applicant herein was ever summoned to attend the Tribunal hearings, and whether all the proceedings of the said tribunal were heard ex parte in the absence of the plaintiff/applicant. From the copy of the proceedings of the Tribunal whose authenticity has not been discredited, the first session of the Tribunal was held on 8th March, 1998, when the panel of elders visited the land in dispute. They found "all parties present", but the defendant applied for an adjournment to 22nd March. On the appointed day, the panel of elders visited the suit premises, but the defendant and his son, one Nelson M. Ndurya, a Police Officer, demanded that the District Officer must be present. Otherwise they did not recognize the members of the panel despite being shown the letters of appointment signed by the District Officer himself. The matter was then stood over for hearing on 6th May, 1998.

On the 6th May, 1998, all the parties were present. However, the defendants wanted their witnesses to sit in and hear the evidence of the other witnesses before they themselves testified. When the Tribunal insisted that the witnesses should keep away until they had testified, the defendant objected. Upon learning that the tribunal's proceedings and decision are filed in the magistrate's court for endorsement and judgment, the defendant and his team declined to participate in the proceedings and left.

From this account, it seems that the Applicant took part in the proceedings, and that even though the tribunal did not take down the defence evidence on 6th May, 1998, it was not due to the defendant not having been notified of the hearing. Rather, it was due to the defendant declining to testify after attending. He can't therefore pretend that he had not been summoned. Upon the defendant's deliberate refusal to testify, the Tribunal was entitled to proceed as it did and the defendant had only himself to blame.

On 29th June, 1998, when judgment was entered in terms of the panel of elders' award, the applicant was present in court in person. Thereafter he filed appeal No. 45 of 1998 in the High Court which was later dismissed for want of jurisdiction. He thereafter filed appeal No. 301 of 2004 in the Provincial Land Disputes Appeals Tribunal – Coast. It is not clear from the file copy when the appeal was filed, but the memorandum of appeal was dated 8th June, 2004. It may be assumed, for the benefit of the applicant, that the appeal was filed on the same date. It was subsequently dismissed as having been filed out of time. The Applicant's reason for not having filed the appeal before the Appeals Tribunal any earlier was that he was referred to the High Court by the Provincial Commissioner, one Mr. S.K. Limo, since the Provincial Appeals Tribunal had not been established by then.

However, in paragraph 8 of his Replying Affidavit, the Respondent deposes that he also visited the same office where he was informed by one Mr. Ismail that the Provincial Land Disputes Tribunal had been constituted earlier. He exhibited copies of documents of some cases which demonstrate that the Tribunal was operational as early as June, 1998. These are exhibited as "SZB III". Confronted with this information, the Applicant responded by a supplementary affidavit sworn on 20th February, 2008, in which he averred in paragraph 7 –

"THAT there is no way of proving that 'SZB III' are genuine cases unless the said Mr. Ismail comes to

court to testify. I reiterate that I was informed by the P.C. that I should file my appeal to the High Court since the Provincial Appeals Tribunal had not been re-constituted."

This statement is a double edged sword. If there is no way of proving that "SZB III" is made up of genuine cases, unless Mr. Ismail comes to court to testify, is there any way of proving the conversation with the PC unless the PC himself comes to court to testify? On a balance of probability, which is easier to believe, the conversation between the Respondent and Ismail, which is supported by documentary evidence, or the conversation with the PC which is not supported by anything?

In my view, and in the context of the exhibited proceedings before the Tribunal, the Applicant appeared before the Tribunal on three occasions and this could not have been by accident. He could not have been there without having been summoned. On 6th May, 1998, he attended but declined to testify. His appeal to the Appeals Tribunal was about 6 years out of time. It was therefore properly dismissed. For these reasons, I find that this application has no merit and it is accordingly dismissed with costs to the Defendant/Respondent.

It is so ordered.

Dated and delivered at Mombasa this 6th day of June, 2008.

L. NJAGI

JUDGE