



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Misc Application 592 of 2003

**IN THE MATTER OF: APPLICATION BY JAMES KALUKO KYALO FOR LEAVE TO
APPLY FOR ORDER OF PROHIBITION, CERTIORARI AND**

MANDAMUS.

AND

IN THE MATTER OF: LAND DISPUTES TRIBUNALS ACT 1990

AND

**IN THE MATTER OF: THE DISTRICT MAGISTRATE'S COURT AT
KALOLENI LAND AWARD CASE NO 4 OF
2003.**

JAMES KALUKO KYALO -VS- JULIUS MWANGANGI MULU

AND

**IN THE MATTER OF: THE LAND DISPUTES TRIBUNAL JIMBA
RURUMA LOCATION LAND AWARD CASE NO. 16/11/95**

EX-PARTE: JAMES KALUKO KYALO

REPUBLIC.....APPLICANT

VERSUS

1. THE DISTRICT MAGISTRATE'S COURT AT KALOLENI

2. THE LAND DISPUTES TRIBUNAL JIMBA RURUMA LOCATION.....RESPONDENTS

JULIUS MWANGANGI MULUINTERESTED PARTY

RULING

By a motion dated 17th October 2003 filed pursuant to leave given on 29.9.2003, James Kaluko Kyalo, the exparte applicant herein, sought for judicial review orders in the nature of certiorari, prohibition and mandamus. However when the motion came up for hearing, the exparte only asked for prayers 1 and 4 that is to say:

(i) *For an order of certiorari to bring into this court for quashing the proceedings and the award of the Land Disputes Tribunal dated 15th October 1997 between James Kaluko Kyalo and Julius Mwangangi Mulu in Land case No. 16.11.95 and the proceedings and order of the District Magistrate Kaloleni in Land Case No. 4 of 2003 between Julius Mwangangi Mulu and James Kaluko Kyalo dated 25th February 2003.*

(ii) *Costs.*

The motion is verified by the affidavit of James Kaluko Kyalo sworn on 16th October 2003. When served, Julius Mwangangi Mulu, the interested party herein filed an affidavit to oppose the motion.

The exparte applicant raised two main issues in which he beseeched this court to base its decision to quash the decision of the land disputes' tribunal and the subsequent District Magistrate's Order: First, it is claimed the dispute had been heard and finalized by Kaloleni Land Disputes Tribunal on 12th March 1995 vide Land case No. 16 of 1995. It is said that after the pronouncement of the aforesaid, the panel of elders reconstituted itself and reheard the dispute on 15th October 1997. It is the submission of the exparte applicant that by then the Land Dispute's tribunal was *functus officio*. Secondly, the land disputes tribunal was accused of breaking the rules of natural justice by rehearing the dispute without giving the exparte applicant a chance to state his part of the story. The aforesaid decision is claimed to have been adopted by the learned District Magistrate sitting at Kaloleni on 25.02.2003.

On his part, the interested party opposed the motion on various fronts. It is said that the decision of 12th March 1996 was a forgery and is intended to mislead this court. It is the submission of the interested party that the correct decision is that of 15th October 1997. It is also said that there are pending cases before this court and Kaloleni Resident Magistrate's court over the same land. It is said that the decision of 15.10.97 was filed for reading vide Kaloleni Resident Magistrate Land Case No. 53 of 1997 but the reading has been stayed pending the outcome of Mombasa H.C. Misc. Application No. 5 of 2000.

I have considered the submissions of learned counsels. I have also perused the material placed before this court. Though it is disputed, I am convinced that a panel of elders sat and determined the dispute between the applicant and the interested party on 12.3.96. It is claimed that the same tribunal reconstituted itself into a panel of elders on 15.10.97 and reheard the matter. I have perused the proceedings giving rise to the decision of 15.10.97 and it is clear that both the exparte applicant and the interested party and their witnesses were heard before the tribunal tendered its decision. Consequently

the allegation that the Land Disputes Tribunal breached the rules of natural justice cannot stand. What remains to be decided is whether or not the tribunal had become functus officio when determining the decision of 15.10.1997. In order for one to establish whether or not the principles of resjudicata applied, one must look at the pleadings filed before the Land Disputes Tribunal. In this matter this court has only been shown the proceedings taken before the Land Disputes Tribunal. The proceedings seem to show that the tribunal dealt with a boundary dispute between the exparte applicant and the interested party in two separate occasions. It was incumbent upon the applicant to bring on board the pleadings filed before the tribunal. This will have enabled this court to determine whether or not the provisions of section 7 of the Civil Procedure Act were breached so that I can decide whether or not that the tribunal acted *ultra vires* the law.

One last objection raised by Mr. Mutungi, learned litigation counsel appearing for the Land Disputes Tribunal, Jimba Ruruma Location is to the effect that the motion is time-barred hence incompetent pursuant to Section 9(3) of the Law Reform Act. The exparte applicant appears not to have responded to Mr. Mutungi's objection. I have carefully perused the motion plus the verifying affidavit. The decision sought to be quashed is said to have been made by the Land Disputes tribunal on 15th October 1997 and its reading was stayed on 25th February 2003. Leave to commence judicial review proceedings in the nature of certiorari was given on 29.9.2003. It is obvious from the above facts that the motion was filed outside the six months set by a statute. Leave is normally granted exparte and the same is available for challenge at the hearing of the substantive application without the court feeling inhibited as though it is hearing an appeal on its own cause. It is plain from the provisions of S.9(3) of the Law Reform Act that leave shall not be granted unless the application is made inside 6 months after the date of judgment or proceedings. In the circumstances, this court has inherent jurisdiction to set aside exparte leave if leave is wrongly granted. In the end I set aside the exparte leave of 29.9.2003 thus leaving the motion without a foundation to stand on.

For the above reasons I find that the motion is not well founded. The same is hereby dismissed with costs to the respondents and the interested party.

Dated and delivered at Mombasa this 24th day of August 2007.

J.K. SERGON

J U D G E

In open court in the absence of parties with notice.