



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Misc Appli 52 of 2002

CHALLY AKULA

SWAKAAPPLICANT

V E R S U S

MUMIAS LAND DISPUTES

TRIBUNALRESPONDENT

A N D

**PHILIP WABUTI WAKHULEINTERESTED
PARTY**

R U L I N G

This ruling is on the Preliminary Objection raised by the Respondent. The Grounds of Opposition dated 4/2/05 filed by the Attorney General and served on both the Respondent and the Interested Party in this judicial review application were treated as a Notice of Preliminary Objection. The Law Reform Act, Chapter 26 of the Laws of Kenya, and Order 53 of the Civil Procedure Act do not have provision for the filing of grounds of opposition in an application for judicial review seeking any of the orders of certiorari, mandamus, and prohibition. If the statement of the grounds of opposition had not been so treated, it would have been struck out. Mr. Mutinda, learned counsel for the Respondent, abandoned grounds 1, 2, 3 and 5 and based his preliminary objection on grounds numbers 4 and 6. Paragraphs 4 and 6 of the said grounds state –

4. *“The application is an abuse of court process as it seeks orders against persons who are not parties to the suit.*

6. *The application is an abuse of court process as these proceedings are not the right channel of seeking redress.”*

The Notice of Motion dated 8-4-2002 seeks in prayers (a) and (b) the following orders

(a) *“An order of CERTIORARI to issue directed at Mumias Division Land Disputes Tribunal sitting within Mumias-Butere District to remove into this court and to quash the decision contained in its award vide Tribunal case No.23 of 2001 in respect of land parcel No. E. WANGA/LUBINU/301 as read on 11-2-2002 by the District Magistrate, Kakamega vide Kakamega CM MISC. Civil Application No.20 of*

2002;

(b) *An order of PROHIBITION do issue directed at the Mumias Division Land Disputes Tribunal from ever purporting again to adjudicate over land parcel No. E.WANGA/LUBINU/301 or any claim on the part of PHILIP WABUTI WAKHULE or any one claiming through him.”*

In his submission on ground No.4, Mr. Mutinda submitted that the District Magistrate Court at Kakamega which endorsed the award of the Mumias Land Disputes Tribunal was not made a party to the suit and therefore it would be futile to grant the orders sought when the said court is not a party to the case.

With regard to ground 6, he contended that the award had become a judgment of the court and even if the award was nullified, the judgment of the court would still remain in force. Consequently, it would be futile to quash the award even assuming there was a basis for doing so which he said there was not.

On rebuttal, Mr. Anziya, learned counsel for the ex parte applicant, contended that the preliminary objection had no legal basis. He pointed out that the Respondents had not filed any pleading, which I understood to mean affidavit as this is the only pleading open to a Respondent to file under Order 53 of the Civil Procedure Rules. It was his contention that the process of judicial review is available to quash decisions of lower courts. He did not allude to the issue as to whether the lower court whose decisions are sought to be quashed require to be made parties to such judicial review proceedings and the consequences of failure to do so. In his view, the Motion was properly before the court.

I have duly considered the submissions of both counsel. The first ground raised by Mr. Mutinda begs the question whether after adoption of the award by Magistrate court, the award still subsisted.

No Magistrate court has jurisdiction to hear or determine matters set out in section 3(1) (a) (b) and (c) of the Land Disputes Tribunals Act (Act No.18 of 1990). A party who is aggrieved by the decision of the Tribunal is entitled to appeal against it to the Provincial Appeals Committee under Section 8 (1) of Act 18 of 1990. Once an appeal is filed, it is the decision of the Appeals Committee that rules the day. Where, as here, there was no appeal, and the award was adopted by the Magistrate court pursuant to section 7 (2) of Act 18 of 1990 as a judgment of the court, it is the judgment of the court that carries the day as this is what is in law enforceable as a decree (of the court). Section 7 (2) of Act 18 of 1990 states –

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

An award cannot be adopted and become a judgment of the court and at the same time rain in being in law so as to be open to challenge. The award ceased to exist as such upon its adoption as a judgment of the court. There is then nothing in being in terms of a decision that can be quashed by an order of certiorari.

But can an aggrieved party move this court for an order of certiorari to quash, not the award which does not exist as such, but the judgment of the Magistrate court? Regard must be had to the fact that a party who does not appeal against an award which he/she is aggrieved by runs the risk of the award being adopted by and becoming a judgment of the Magistrate court. This is the risk the ex-parte applicant took. Once the award was adopted as a judgment of the court and an enforceable decree ensued therefrom it was not open to the aggrieved party to challenge the judgment on the basis that the award which he had failed to challenge on appeal was faulty. Rule 20 of THE LAND DISPUTES TRIBUNALS (FORMS AND PROCEDURE) RULES 1993 states:-

20. “At the conclusion of every dispute the Tribunal shall make a determination to be served on the person affected by the decision and such determination shall be filed in the magistrate court, and the court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and be enforceable in the manner provided for under the Civil Procedure Act.”

The Land Disputes Tribunal is enjoined after making a determination on a land dispute to file its decision as an award in the Resident Magistrate Court. Once the decision is filed, the Magistrate court is enjoined to enter judgment in accordance with the decision of the Tribunal. The fact that such judgment is entered in accordance with the decision of the tribunal means, in my view, that the decision of the Tribunal and the judgment of the Magistrate court cannot exist alongside each other in a way they can each be challenged. While the former ceases to exist in a form capable of being challenged, the latter is not open to challenge at all unless it can be shown that the judgment was not entered in accordance with the decision of the Tribunal. In so far as Judicial review is concerned, the Magistrate Court had jurisdiction to enter judgment as it did pursuant to section 7 (2) (supra) and Rule 20 (supra) and once it did so, such judgment was not open to challenge on the ground that the decision of the Tribunal (which had not been appealed from) was wrong.

The fact that the applicant did not appeal ought to be taken as signifying that he was either not aggrieved by the decision of the Tribunal or that he waived his right to do so. In these circumstances, the Applicant cannot turn round and seek to challenge the judgment of the Magistrate Court on the basis that the decision of the Tribunal was faulty. He lost his chance to do so when he declined to appeal. To allow the Applicant to challenge the judgment is to undermine the provisions of Act 18 of 1990 relating to appeal. This Court has no jurisdiction to hear appeals from the decisions of the Land Disputes Tribunal. Appeals from such decisions are the preserve of the Provincial Appeals Committee under section 8 (1) of Act 18 of 1990. It cannot be correctly argued that the judgment of the Resident Magistrate Court entered pursuant to Section 7 (2) and Rule 20 (supra) would be open to judicial review. I do not understand either of the parties to say that the power to enter that judgment was exceeded. In these circumstances, the first limb of the Preliminary Objection on ground No.4 succeeds.

With regard to the second point on ground No.6, it goes without saying that the party or body whose decision is sought to be declared null and void by an order of certiorari ought to be joined as a party to the proceedings. The Magistrate Court was not joined as a party but even if it was, it would have made no difference to the fact that there was no decision in respect of which an order of certiorari could issue.

I do, with respect, subscribe to the view expressed by the Honourable Mr. Justice Khamoni in *ex parte John K. Munga and Land Disputes Tribunal Kiambu and 2 others NBI H.C.MISC. CIVIL APPLICATION NO.195 OF 2000* in which he said

“...once a decision of a Land Disputes Tribunal has become a judgment of the court under section 7 (2) of the Land Disputes Tribunal Act, the decision of the Land Disputes Tribunal ceases to exist in a form that it can be properly and lawfully brought to the High Court and be quashed. I further think that even if it were quashed, the judgment of the court would lawfully remain.”

In the light of the above, I am satisfied that the Notice of Motion is misplaced for the simple reason that there is not in being a decision that can be quashed by an order of certiorari. I think it is appropriate to say here that litigation must have an end. If I were to allow the motion to proceed to hearing the precedent I would be setting would be to render the provisions relating to appeal from the decision of the Land Disputes Tribunal to the Appeals Committee meaningless and thereby keeping the litigation endlessly alive. I decline to do so. I strike out the Notice of Motion dated 8/4/02 and award the costs thereof to the Respondents.

Dated, signed and delivered at Kakamega this 18th day of May 2006

G. B. M. KARIUKI

J U D G E