

q Can ex parte leave be challenged
q Consequences of failing to file & serve notice and statement of facts

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

Misc Appli 8 of 2002

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
MICHAEL OYUGI)
NICHOLAS OKADA WANYAMA)
OPIYO SHIKEMBO)
MATAYOS OCHUNGI)
NAMUKHOMO OCHUNGI).....APPLICANTS

BETWEEN

BUDALANGI LAND DISPUTES TRIBUNALRESPONDENT

AND

FRED OKELLO AGENDA.....INTERESTED PARTY

RULING

In a motion dated 10th December, 2001, Michael Oyugi, Nicholas Okada Wanyama, Opiyo Shikhembo, Okotsi Shikhembo, Matayo Ochungi and Namukhomo Ochungi filed pursuant to the Provisions of Order LIII rule 3 of the Civil Procedure rules and sections 1 and 9 of the Law reform Act sought for an order of certiorari to issue to bring into this Court for quashing the decision of the Busia SRM's court dated 10th May, 2000 in Busia SRMC land case no.17 of 2000 adopting the award of Budalangi Land Disputes Tribunal as the judgment of the Court. When the motion came up for hearing Fred Okello Agenda, the interested party herein raised a preliminary objection to have the whole motion struck out. The preliminary objection had to be dealt with first before the merits of the motion could be heard.

The first preliminary point raised by the interested party was that leave was granted outside the statutory period of six (6) months. The interested party's advocate argued to the effect that the Tribunal's decision was adopted on the 10th day of May 2000 yet the application for leave was filed on the 10th day of October, 2001 which was a period of over 16 months. Mr Oroni who appeared for the applicants did not respond to this ground.

It should be noted that leave to institute judicial review proceedings is normally applied for ex parte in chambers. The applicant only needs to show the judge hearing the application for leave that he has a prima facie case. It must be remembered that even when the judge grants leave, there is nothing final about it. It is merely provisional. The adversary will have every opportunity of challenging the facts and the law afterwards at the substantive stage and the judge who tries or hears the substantive application must rule finally whether or not the ex parte applicant has satisfied the conditions required to obtain ex parte leave. Therefore the interested party is perfectly in order to raise an objection as to the competency of the leave. The Provisions of Order LIII rule 2 of the Civil Procedure rules provides:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree,

conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act”

It is abundantly clear that leave shall not be granted if the leave is not made within 6 months from the date the decision is made. In this case the decision sought to be quashed was made on the 10th day of May, 2000.

The application for leave was filed on the 4th day of October, 2001. The application for leave was obviously filed out of time without leave of Court. It was filed about 17 months after the Budalangi Land Disputes Tribunal’s decision was adopted as the judgment of the Busia Senior Resident Magistrate’s Court. I am convinced that the applicants obtained leave irregularly and without disclosing that fact to the issuing Court. I think the preliminary point was properly raised. This disposes of the whole matter. However, there is need to consider the other preliminary grounds raised against the motion.

The second preliminary point is that the applicants filed this motion outside the 21 days given at the stage of obtaining leave. The parties are in agreement that leave of 21 days was given to the applicants on 4th December, 2001 and the applicants filed this motion on 10th January, 2002. The interested party was of the view that the applicants filed the motion outside the leave period. Mr. Oroni pointed out that time stopped to run as from 21st day of December, 2001 to the 6th day of January, 2002. He did not quote the provisions of the law he was relying on but I presume he was relying on the provisions of Order XLIX rule 3A of the Civil Procedure Rules. Assuming that the above provisions of the law applied to this matter which I doubt then it can be said, he filed the motion within time.

The remaining grounds of objection are to the effect that the applicants did not file the statutory statement as required by law. It is also complained that the applicants did not serve the Deputy Registrar of this Court with the statutory notice. The applicants argued that they could not have obtained leave if they had not filed the statement nor served the notice to the Deputy Registrar of this Court.

I have perused the replying affidavit of Obwoye Onsongo sworn on 10th November, 2003 and the material placed before me. The motion is filed together with the application for leave dated 26th September, 2001 and a notice addressed to the Deputy registrar of this Court dated 26th September, 2001. The record does not show that the statutory statement was filed and served upon the interested party. It is a mandatory requirement and failure to comply with it renders the whole motion incompetent. The requirement is set out in rule 1(2) of Order LIII of the Civil Procedure rules. The statement is to contain the name and description of the applicant, the relief sought and the ground on which it is sought. There is no affidavit of service to show that the same was filed and served upon the applicants. Though there is a notice on record addressed to the Deputy Registrar, there is no evidence that the Deputy Registrar was served. In the absence of such evidence, then this motion is rendered incompetent unless the Court itself for good cause extends the time for lodging the notice or proceeds to excuse service of such a notice all together. Consequently, the preliminary objection is sustained

In the end, I am constrained to have the motion struck out for the reasons I have set out hereinabove. I will award costs to the interested party.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J. K. SERGON

JUDGE