



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Misc Application 47 of 2004

HARRISON NDUNGU KUNGU.....APPLICANT

VERSUS

THE NAKURU CHIEF MAGISTRATE'S COURT.....RESPONDENT

AND

KIMUNYA KAMANA.....INTERESTED PARTY

RULING

By a notice of motion dated the 15th of April 2004, the applicant, Harrison Ndung'u Kung'u has made an application for the judicial review orders of certiorari and prohibition to have the proceedings before the Chief Magistrate's Court Nakuru in **Nakuru CMC Land Dispute No. 7 of 2002, Kimunya Kamana –vs- Harrison Ndung'u Kung'u** and particularly the order relating to the reading and the adoption of the award purportedly made by Bahati Land Disputes Tribunal in its Land Dispute No. 47 of 2002 brought to this court for the purposes of having the said proceedings and adoption order issued quashed. The applicant further seeks an order of this court to prohibit the Chief Magistrate's Court Nakuru from issuing a decree or enforcing or executing such a decree pursuant to the orders emanating from Nakuru Chief Magistrate's Court, Land Case No. 7 of 2002. The grounds in support of the application are that the contested proceedings and the order issued by the Chief Magistrate's Court were ultra vires and made pursuant to illegal considerations. The applicant contends that the proceedings and orders issued were made in total disregard of the rules of natural justice. The applicant further states that there were grave errors of the law apparent on the record of the said Chief Magistrate's Court. The applicant contends that the said subordinate court ratified and adopted the illegal proceedings and award of a non-existent and/or illegal and unlawfully constituted tribunal. The application is supported by the annexed affidavit of the applicant and the statement and verifying affidavit in support of the application. The applicant has sworn a further affidavit dated the 28th of September 2004 in support of his application for the judicial review orders.

The application is opposed. The Interested party has filed a notice of preliminary objection and a replying affidavit in opposition to the application. In the said pleadings filed, the Interested party has deponed that the proceedings before the Land dispute tribunal were valid and properly conducted as provided by the law. The Interested party deponed that the applicant had filed a similar application before the High Court which application is awaiting determination by the court. He was of the view that the current application filed by the applicant was therefore incompetent. He further deponed that the applicant had not challenged the decision of the Land Disputes Tribunal and to purport to question the adoption of the said award was an exercise in futility. The Interested party deponed that the only avenue open to the applicant's was to file an appeal after the said award had been adopted and not to seek to frustrate its execution. In the notice of preliminary objection, the Interested party stated that the application filed

herein was bad in law, inept, fatally defective and filed in violation of the provisions of **Order LIII of the Civil Procedure Rules**. He further stated that the application was filed without any affidavit in support of it. In his view, the application was therefore filed in abuse of the due process of the court.

At the hearing of this application for judicial review, Miss Magana, Learned Counsel for the applicant submitted that the subordinate court purported to adopt an award of the Bahati Land Disputes Tribunal. She argued that the Bahati Land Dispute Tribunal had not been established in accordance with **Section 4 of the Land Disputes Tribunal Act**. She further submitted that **Section 7** of the said Act required the subordinate court to enter judgment once it has satisfied itself that there existed a competent award which it could adopt. It was contended on behalf of the applicant that the panel of elders who heard and determined the dispute were not gazetted; The proceedings were not therefore conducted in accordance with the provisions of **Land Disputes Tribunal Act**. The applicant was aggrieved that the said decision of the Tribunal had been arrived at in his absence and after the panel of elders had proceeded and determined the dispute “ex-parte”. The applicant argued that he was not served with the statement of claim as contemplated by **Section 3 of the Land Disputes Tribunal Act**. Learned Counsel for the applicant further submitted that the manner in which the award was arrived at was not contemplated by **Section 3(8)** of the said Act as no reasons for the findings were stated in the said award.

She further submitted that a Land Disputes Tribunal did not have jurisdiction to cancel titles issued under the law. By adopting the award, the applicant argued, the subordinate court was endorsing an illegality. As a registered owner of the suit land, it was submitted, the applicant was not subject to the jurisdiction of the Land Disputes Tribunal. He complains that he only became aware of the award by the Land Disputes Tribunal when he was served with the mention notice to appear before the subordinate court for the purposes of adopting the award made by the tribunal. It was submitted that the subordinate court could not have issued substantive orders when the case was listed for mention. The applicant urged the court to allow his application.

Mr Kahiga, the Learned Counsel for the Interested party opposed the application. He submitted that **Section 7(2) of the Land Disputes Tribunal Act** gave no option to the Chief Magistrate other than to adopt the award placed before him. He argued that the subordinate court did not have jurisdiction to consider any other issues raised before it including issues as relates to alleged breach of the rules of natural justice. He submitted that the issue now before court related to the proceedings of the 3rd of October 2003 before the Chief Magistrate’s Court and not the proceedings before the Land Disputes Tribunal. He argued that the rules of natural justice were followed when the matter was listed before the subordinate court for adoption. None of the parties was required to be heard.

Learned Counsel argued that if the applicant was aggrieved by the decision of the Land Disputes Tribunal, he ought to have filed an appeal to the Provincial Appeals Tribunal or to the High Court. He further submitted that under **Section 7(2)** of the said Act the Chief Magistrate did not have powers to set aside the award; Likewise the High Court did not have jurisdiction to set aside such an award. Mr Kahiga argued that, although the applicant had raised various complaints concerning the way the Bahati Land Disputes Tribunal arrived at the said decision, this court was not the proper forum where the said issues could be ventilated. He further submitted that the applicant had filed a similar application which is pending hearing and determination before the High Court. The Interested party thus urged this court to disallow the application with costs.

I have read the pleadings filed by the parties to this application and carefully considered the arguments made by their respective counsels in this case. The issue for determination by this court is whether the applicant has established a case to enable this court grant him the prerogative writs of judicial review that he has sought. Having anxiously considered the arguments put forth by the applicant, I have arrived at the conclusion that his major complaints relates to the award of the Bahati Land Disputes Tribunal made on the 28th of September 2001. The applicant has raised serious allegations on the conduct of the said tribunal especially the manner in which it heard and determined the dispute between himself and the Interested party. The said allegations appear to have merit. However, the proceedings before this court do not relate to the decision of the Bahati Land Disputes Tribunal; but rather concern the conduct of the Chief Magistrate’s Court when it adopted the award of the said Bahati Land Dispute Tribunal on the

3rd of October 2003. What is the role of the subordinate court once an award made by a Land Disputes Tribunal is present to it for adoption? **Section 7 of the Land Disputes Tribunal Act** provides that;

“(i) The chairman of the tribunal shall cause the decision of the tribunal to be filed in the Magistrate’s Court together with any depositions or documents which have been taken or proved before the tribunal.

(ii) 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.”

As provided by **Section 7(2)**, the magistrate is bound to adopt the award presented to him by the chairman of the tribunal. The subordinate court cannot make inquiries to establish whether or not the said award was arrived at after the provisions of the **Land Disputes Tribunal Act** were complied with. The court will also not question the composition of the Tribunal neither will it make inquiries to establish whether or not rules of natural justice were followed when the said award was arrived at. The subordinate’s court’s role as it were is procedural and clerical in nature. The said court is legally bound to adopt an award of the tribunal and enter judgment in accordance with the said award without making any inquiry as to the legality or otherwise of the said award. When so acting, the subordinate court is not conducting proceedings in a legal sense where parties to the award are required to be heard. Rules of natural justice cannot therefore be said to be breached when a magistrate is adopting an award made by the Land Disputes Tribunal.

If a party is aggrieved, he is required to put in motion the appeal procedure as provided by **Section 8 of the Land Disputes Tribunal Act**. An aggrieved party can only have recourse by filing an application for judicial review challenging the proceedings and the award of the Land Disputes Tribunal. However in making such application, such an aggrieved party has to ensure that he files such an application for judicial review within six months of the award being made as provided by **Section 9(2) & (3) of the Law Reform Act** and **Order LIII Rule 2 of the Civil Procedure Rules**.

In the instant case, had the applicant filed an application to review the decision of Land Disputes Tribunal within six months of the 28th of September 2001, his complaints would have received a sympathetic hearing from this court. As matters stand now, this court lacks jurisdiction to consider whether the decision arrived at by the Bahati Land Disputes Tribunal was legally arrived at or not. This is due to the fact that the avenue for the applicant to make an appropriate application for judicial review was closed when six months expired from the date the said decision was made. Much as this court may sympathise with the legitimate complaints raised by the applicant, this court lacks jurisdiction to consider the same as the said complaints have been raised in the wrong forum. In my considered view, the applicant was trying to impeach the decision of the Bahati Land Tribunal by challenging it at the stage when the Interested party sought to have it adopted by the subordinate court. Unfortunately for the applicant, by that time, he was attempting to close the doors of the stable after the horse had already bolted.

My sympathies for the applicant notwithstanding, the law is the law. It has to be applied as it is. I therefore find no merit with the application for the prerogative writs for the judicial review orders of *certiorari* filed by the applicant seeking to remove to this court and quash the award of the Bahati Land Disputes Tribunal, adopted by the Chief Magistrate and entered as judgment of the said subordinate court. The application for judicial review is therefore dismissed with costs to the interested party.

DATED at NAKURU this 21st day of September 2005.

L. KIMARU

JUDGE