



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 229 OF 2003
REPUBLIC
VERSUS
GITHUNGURI LAND DISPUTES TRIBUNAL
SENIOR RESIDENT MAGISTRATE GITHUNGURI
(TRIBUNAL CASE No. 5 OF 2002)

RULING

This application was made by Notice of Motion, by virtue of the Law Reform Act (Cap. 26, Laws of Kenya), Order LIII Rules 1(1), 3(1) and (2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law. It is dated 19th May, 2003 but was filed on 20th May, 2003.

The application is for Orders -

- (a) that the Court do issue an Order of Certiorari to remove into the High Court and quash the award of the Githunguri Land Disputes Tribunal made on 4th April, 2002, in which it awarded ½ portion of L.R. No. GITHUNGURI/GITHUNGURI/T343 to the then claimant John Nderi Gituru;
- (b) that the Court do issue an Order of Certiorari to bring into the High Court and quash the Order of the Resident Magistrate, Githunguri issued on 20th April, 2002 in which the aforesaid award of the tribunal was confirmed;
- (c) that the costs of this application be provided for.

In support of this application is a Statutory Statement and an Affidavit sworn by George Waitthaka Gituru. The statement of supporting grounds is as follows:

- (i) the act of entertaining the claim by the tribunal and making an award was in contravention of Section 3(1) of the Land Disputes Tribunal Act;
- (ii) The proceedings of the Tribunal were not properly conducted and were improperly recorded and reported;
- (iii) The award was issued in contravention of the principles of natural justice as the Applicant was not given a hearing;

(iv) The said award has been read, confirmed and adopted as an order of Court by the second Respondent, the Senior Resident Magistrate at Githunguri;

(v) The act of confirming and adopting the Order by the Senior Resident Magistrate is illegal because the Land Tribunal Orders themselves were *ultra vires*.

The highlights of the sworn statement of the Plaintiff, George Waithaka

Gituru's are as follows:

(a) He is the registered owner of L.R. No. GITHUNGURI/GITHUNGURI/T.343 and the Respondent is his brother.

(b) He purchased the suit property in his own name, and it is his exclusive property.

(c) On 2nd April 2002, the Respondent applied to the Githunguri Division Land Disputes Tribunal (first Respondent) seeking a share of the suit property.

(d) The Tribunal proceeded to hear the Respondent's claim on 2nd April, 2002, notwithstanding that this Tribunal had no jurisdiction to do so.

(e) On 4th April, 2002 the Land Tribunal gave its award, in which it purported to sub-divide GITHUNGURI/GITHUNGURI/T.343 and to share out this property.

(f) The Applicant was not present at the hearing held by the Land Tribunal; but the Tribunal proceeded to hear and determine the matter.

(g) The Land Control Board has already consented to sub-division in accordance with the award of the Land Tribunal.

This application came up for hearing on 18th November, 2003. Mr. Wati representing an Interested Party had preliminary objections to raise. He submitted that an application for Judicial Review is a substantive motion, which is to be brought only after leave has been obtained, and he cited in this regard Order LIII of the Civil Procedure Rules. He also cited Sections 8 and 9 of the Law Reform Act (Cap. 26, Laws of Kenya), to support the proposition that when one applies for an Order of Certiorari, leave shall be granted, unless the application has been made not later than six months from the date of the Order to be quashed. He argued that the proceedings sought to be quashed had taken place on 4th April, 2002, and the Resident Magistrate's Order had been made on 20th April, 2002. He submitted that an application for Judicial Review Orders ought to have been made within six months of those decisions, and that the present application is too belated, as the application for leave was only brought on 20th April, 2003, well outside the period fixed by law. He questioned the decision of the Honourable Lady Justice Aluoch, who granted leave only on 12th May, 2003. He asserted that the essential provisions of the law had not been brought before Justice Aluoch, and so she had not taken them into account; but the effect was that the application was incompetent. He submitted that, while Order XLIX Rule 5 empowered the Court to enlarge time for filing proceedings, this did not apply to Certiorari; and the reason is that Order XLIX is just a rule, a subsidiary law, whereas Section 9 of the Law Reform Act (Cap. 26) is a Parliamentary enactment fixing a mandatory time limit to the filing of proceedings – with the effect that the six-month period cannot be enlarged unless leave is obtained within that limit of time. When, moreover, the Honourable Lady Justice Aluoch granted leave to file the application on 12th May 2003, she did not at the same time try to enlarge the time during which such an application could be filed, and the Applicant did not then address this question. The argument of counsel in any case was that, had the Court then granted extension of time, this would have been wrong in law and, in the circumstances, it would not have in the end, inured to the benefit of the Applicant. This, with respect, is a correct statement of the law. Counsel's prayer was that the Court should invoke its inherent powers, conferred by Section 3A of the Civil Procedure Act and Order VI Rule 13 to strike out the motion, for incompetence.

Ms. Gateru, who was holding brief for Mr. Mburu, for the Applicant, re-stated that the Applicant's request for leave to apply for Judicial Review Orders was heard by the Honourable Lady Justice Aluoch on 12th May, 2003, and that leave was granted with the condition that the application was to be filed within eight days. Ms. Gateru stated that within the application, there was the prayer that the Court do enlarge the time allowed for the filing of the application for Judicial Review Orders. She said that the fact of the application coming out of time was not concealed to the Court, and that it was only after leave had been granted that the present application was filed. She submitted that as leave had been granted, and the application was filed within the eight days required by the Court, the Applicant should in the circumstances be given an opportunity to be heard.

I specifically put this question to counsel:

“What do you say to the assertion that the correct legal provisions were not canvassed before the learned Judge?”

Counsel's answer was:

“I am unable to comment, as I was not the one handling the matter.”

Counsel for the Interested Party remarked:

“The matter was heard *ex parte*. This is why we can question it only now, at the *inter partes* stage.”

It became necessary at this stage to make an Order, in setting a direction for the disposal of the fundamental legal issues that were arising.

The Order made was as follows:

“In view of the preliminary legal issues that have been raised by counsel for the Interested Party, this matter be mentioned at 9.30 a.m. on Thursday, 27th November, 2003. In the meantime, leave is granted to counsel to file any legal documents that may help in the taking of short submissions on 27th November, 2003. On the mention date, new directions will be taken for the hearing of the application.”

On 27th November, 2003, Mr. Wati for the Interested Party made legal submissions and relied on two cases: Re An Application by GIDEON WAWERU GATHUNGURI (1962) E.A. 520 and MAHAJA V. KHUTWALO (1983) KLR 553. The Gathunguri case came up before a two-Judge Bench (Rudd, Ag. C.J. and Wicks, J.) and the question was whether leave to apply for Certiorari can be made after the expiry of a period of six months following the taking of the decision being impugned. This involved the interpretation of Section 9 of the Law Reform Act (Cap.26).

The facts of the Gathunguri case, in summary are:

In 1962 the Applicant applied for and obtained leave to file an application for an Order of Certiorari to quash his conviction and sentence by the Kiambu African Court of Appeal on February 21, 1959. When the application for an Order of Certiorari came up for hearing, the Crown Counsel raised a preliminary point; and it was held -

(i) the application for leave was time-barred under Section 9 of the statute; and that leave should not be granted unless the application for leave was made not later than six months after the date of the conviction and sentence;

(ii) the application for leave should not have been granted since it was made more than six months from the conviction and sentence;

(iii) since the remedy was discretionary and it was clear that in fact the order for leave to proceed should not have been made, the court would not exercise its discretion and make the order sought.

The following words of Rudd, Ag. CJ are worthy of note:

“It follows...that rules of court... cannot defeat the clear provisions of sub-s.(3) which imposes an absolute period of limitation in the case of an application for an Order of Certiorari to remove any judgement, order, decree, conviction or other proceeding for the purpose of being quashed so that leave shall not be granted unless the application for leave is made not later than six months after the date of such judgement, order, decree, conviction or other proceedings.”

In the Mahaja case, the Court of Appeal held that where an ex parte application for leave to apply for an Order of Certiorari is made coupled with an application for extended time, notice of at least the part dealing with extended time ought to be given, so that the matter can be heard inter partes.

Counsel for the Interested Party submitted that whereas the Applicant, by his Chamber Summons application filed on 15th April 2003, did indeed seek enlargement of time for the filing of an application for Judicial Review, this particular element was not prosecuted and hence there was no service on the Respondent and Interested Parties for them to attend and make appropriate submissions. He submitted that an application for enlargement of time must be served; and in this respect, apart from the fact that the application for leave itself was not served as well, counsel made the submission that the application before the Court had been made in circumstances of substantial irregularity. He therefore submitted that the application by Notice of Motion should be struck out.

Exercising her right of reply, Ms. Gateru for the Applicant entrusted this matter in the hands of the Court.

There are two critical elements to this application which should determine the outcome; but one of them is preliminary to the other and, therefore, more crucial in the decision-making. The first of these is the substantive legal argument to justify issue of an Order of Certiorari. The second, and more crucial one, is the procedural question of compliance with the terms under which an Order of Certiorari will remove the decision of a public body into Court for the purpose of being quashed. This, precisely, is the reason why I found it necessary on the first occasion of hearing this matter, on 18th November, 2003, to adjourn proceedings and request the parties to prepare to address the Court on issues of law. I assume that counsel for both sides sensed the delicate concerns that led to the decision, as may be inferred from the fact that whereas counsel for the Interested Party returned with case law in support of his position and ready with submissions on 27th November, 2003, counsel for the Applicant chose to leave the matter to the Court's sense of justice.

From the review of facts and of the Affidavit evidence in this matter, I must state without hesitation that I would have found in favour of the Applicant, and duly granted the prayers. This is because the position is entirely uncontested, that the property L.R. No. GITHUNGURI/GITHUNGURI/T.343 belongs to the Applicant and he is the holder of the title deed therefor. In the absence of potentially lawful competing claims, such as may be acquired by prescription or adverse possession, which have not at all been argued in this case, the Applicant's landed property cannot suddenly be transformed into the property of the Defendant if there has been no sale transaction (which also has not been alleged or argued in this case).

I would moreover have agreed that the applicant's land, GITHUNGURI/GITHUNGURI/T.343, which is held under the Registered Land Act (Cap. 300), cannot be dished out by an elders' Land Disputes Tribunal whose remit is confined to

- (i) determination of boundaries to land held in common;
- (ii) usufructuary claims on land;
- (iii) claims of trespass to land.

And consequently I would have found that no Magistrate's Court can take a lawful decision conferring legal validity upon a purported Order of the Githunguri Land Disputes Tribunal taking away the Applicant's land rights and transferring them to the Interested Party or the Respondent.

It is not possible, however, as a matter of law, to give effect to such ends of justice unless the correct procedures have been complied with.

It is clear from the provisions of the Law Reform Act (Cap. 26) and from the case law, in particular Re An Application by GIDEON WAWERU GATHUNGURI (1962) E.A. 520 and MAHAJA V. KHUTWALO (1983) KLR 553, that all actions in quest of the discretionary Order of Certiorari, must be commenced either within the six-month limit following the taking of the decision impugned, or outside this limit when the Court's leave has been secured during that time limit. It is beyond doubt that the present application has not complied with these procedural limits; and, therefore, the prayers sought cannot be granted.

I would, in the circumstances, dismiss this application with costs to the Interested Party.

DATED and DELIVERED at Nairobi this 16th day of December, 2003.

J.B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mutea

For the Applicant: Ms. Gateru, Instructed by M/s John Mburu & Co. Advocates

For the Respondent and the Interested Party: Mr. Wati, Instructed by D.B. Wati & Co. Advocates