



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANGA**

**MISC. APPL. (JUDICIAL REVIEW) NO. 2 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**REUBEN KANDUGU KAHIHANIA.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE MURANGA.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**EX PARTE JOHN KARUGO KURIA.....INTERESTED PARTY**

**JUDGMENT**

1. The Ex parte Applicant's application is for orders that Certiorari do issue to recall into the Court and to quash the decision of Kahuro LDT issued on 13/9/05 and such further orders the Court deems fit.
2. The Applicant claims that he was granted leave to file judicial review proceedings out of time pursuant to the orders issued in High Court Misc. Application No. 7/19 filed before this Court.
3. The Applicant's case was informed by the proceedings before the Land Dispute Tribunal at Kahuro and the elders award which was later adopted in Murang'a LDT 45/06 on the 16/6/16.
4. The Applicant was the Plaintiff before the tribunal, the impugned verdict was that the ex parte Applicant was directed to transfer the title to the 1<sup>st</sup> Respondent. The application is brought on the grounds that the tribunal exceeded its jurisdiction when it determined issues of title which rendered its decision *ultra vires*. That 10 elders passed the decision but 2 of the officials did not endorse their signature on the final award.
5. The application was not contested despite service on the Respondents. See the affidavit of service dated the 21/11/19 and filed in Court on even date.
6. The Applicant has attached the proceedings where the elders found that the Applicant had received some money from the Respondent's mother in 1971 for purchase of the suit land. The suit land was not transferred to the Respondent's mother. The Tribunal therefore ordered that the Applicant ought to transfer the land to the Respondent. The tribunal declined to order removal of the caution. The annexed copy of official search confirms that the title changed hands. The award was adopted in Murang'a LDT Case No 45/06 on the 16/6/06. That the Respondent did not serve the Applicant with the hearing notice and thus the application for adoption of the award was ex parte.
7. The Applicant filed submissions before this Court. It is submitted that the tribunal exceeded its jurisdiction in deciding ownership of the suit land which it did not have power to do so under the Land Dispute Tribunal Act. That there was also an apparent error on the record since one out of ten members did not sign the decision of the panel of elders.
8. The Respondents did not file any submissions.
9. Before I delve into the main stay of the application, let me examine the application from the prism of the procedural law.
10. Order 53 Rules 1 -3 provide as follows;

“No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be

accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days. [Order 53, rule 2.] Time for applying for certiorari certain cases. 2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

11. In this case the Applicant has alluded in his application that the Court granted leave on the 5/11/19 to commence the Judicial review proceedings out of time. I have seen an exparte chamber summons filed in the High Court Misc Application No 7 of 2019 however the record does not exhibit any such orders. The Applicant was bound to annex the extracted orders if any to the substantive motion. In the circumstances of this application and in the absence of the orders the Court is unable to hold that leave was granted to bring the motion out of time.

12. Even assuming that leave was granted by this Court (despite it not having been annexed to the substantive motion), I have looked at the proceedings on record and it is clear that the land dispute was submitted before the Land Dispute Tribunal on the 7/12/05. The dispute was between the Applicant as the complainant and the 1<sup>st</sup> Respondent as the Defendant. The subject matter was LOC8/Gatara/154. Upon deliberations on the 13/7/2005 the tribunal in its award held as follows;

“after listening to both parties and taking the evidence from both parties, it shows that Mr John Karigo Kuria and his mother has sold LOC8/Gatara/154 to the late Geoffrey Kihihania in 1971 which is about 34 years since then willingly for Kshs 3150 which was the current price in 1971. We therefore order that that the complainant (the Applicant) to transfer LOC 8/Gatara/154 to Geoffrey Kihihania’s son the defendant Reuben Kandugu Kihihania and family and therefore the caution cannot be removed.”

13. The above award was signed by eight (8) out of ten (10) members. Although no reason was given for abstention of the two, the constitution of the panel of elders is provided for under Section 4(1) of the Land Disputes Tribunals Act No.18 of 1990. The Land Disputes Tribunal is required to have a panel of three or five members pursuant to section 4(1) of the Land Disputes Tribunals Act No.18 of 1990. Section 4 (2) of the Land Disputes Tribunal Act which provides as follows: -

**“4 (2) Each Tribunal shall consist of-**

**a. a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 4; and**

**b. either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5.”**

14. In this case the composition in Land Dispute Tribunal comprised of 10 elders. The Applicant contends that the award was erroneous in that 2 of the elders did not execute the decision. That may be so, however, going by the quorum set out in section 4 above the elders who managed to execute the final award exceeded the minimum limit of elders required to sit. The Court is of the view that the composition of the panel was in order and cannot be faulted.

15. It is borne of the record that when the application for adoption of the award was heard before the Hon Magistrate, the Applicant was absent but served. He chose to absent himself from the proceedings. Although the Applicant did not annex the orders of the Court adopting the award the proceedings attest that the same was adopted as an order of the Court.

16. The Land Dispute Tribunals mandate as set out in section 3 of the said Act is as follows;

*(1) Subject to this Act, all cases of a civil nature involving a dispute as to—*

*(a) the division of, or the determination of boundaries to land, including land held in common;*

*(b) a claim to occupy or work land; or(c) trespass to land, shall be heard and determined by a Tribunal established under section 4.*

17. The Applicant has faulted the Tribunal for determining the dispute while it had no powers to do so. That is the law. The Tribunal acted ultra vires its powers. However, the Act provided for a mechanism to challenge the decision of the Land Dispute Tribunal namely an appeal to the Provincial Land Dispute Tribunal. There is no evidence that the Applicant appealed the decision of the elders. It was also open to him to file Judicial review challenging the decision of the panel of elders. It did not do so. After the adoption of the award by the Court the decision became an order of the Court and the only the remedy available to an aggrieved party is an appeal within the framework of Section 16A of the Environment and Land Court Act.

18. Section 16(A) of the Environment & Land Court Act contemplates the likeliness of appeals against decisions of tribunals and provides a clear framework for such appeals, provided that the Applicant satisfies the Court that he had a good reason for not filing the appeal within the

stipulated time.

19. I concur with the Court of appeal decision in **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others (2014) eKLR** which endorsed the High Court reasoning as follows;

“The 1st defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed, he was even advised by the SRM’s Court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again, he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the Court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate’s Court at Keroka and in particular the order adopting the award as a judgment of the Court dated 23<sup>rd</sup> May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the Court would have allowed the application unless it was satisfied that the respondent’s counsel was duly served with the application and or a hearing notice and had failed to turn up.

It is trite law that a valid judgment of a Court unless overturned by an appellate Court remains a judgment of Court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1<sup>st</sup> defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to Court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid Court judgment and decree.”

20. The Applicant seeks to impugn the decision of the Kahuro Land Control board which decision is not available for quashing because it was adopted as the orders of the honourable Court. The horse has already bolted. The award has changed character and as stated in the preceding para, the remedy available is an appeal against a judgement of the court, subject to leave of the Court. There is no evidence that the said judgement has been set aside, appealed and or vacated.

21. The application in my view has come too late in the day. It is unmerited. It is dismissed.

22. I make no orders as to costs.

23. It is so ordered.

**DATED, DELIVERED AND SIGNED VIA EMAIL THIS 7<sup>TH</sup> DAY OF MAY 2020.**

**J.G. KEMEI**

**JUDGE.**

**ORDERS**

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this judgement has been delivered to the parties by electronic mail/video conferencing. In this case the parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court

**J.G. KEMEI**

**JUDGE**