REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

MISC. APPL. NO 4 OF 2019

IN THE MATTER OF: AN APPLICATION TO APPLY FOR ORDERS

OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE LAND DISPUTES TRIBUNAL ACT CAP 303A (REPEALED)

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, THE LAW REFORM ACT CAP 26,

ORDER 53 OF THE CIVIL PROCEDURE RULES 2010 AND ALL ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF: DECISION/AWARD OF THE NYANDARUA DISTRICT LAND DISPUTES

TRIBUNAL DISPUTE NO.16 MADE ON 23 OCTOBER 2000 AND ILLEGALITY AND PROPRIETY

OF PROCEEDINGS AND CONSEQUENTIAL JUDGMENT AGAINST THE APPLICANTS IN NYAHURURU CMCC21 OF 2000

BETWEEN

PAUL NDUNGU NYOKABI & 31 OTHERS.....APPLICANTS

VERSUS

JOHN NZIOKI NZUKI.....1st RESPONDENT

DAVID GITONGA GITHINJI.....2nd RESPONDENT

THE LAND REGISTRAR NYANDARUA.....3rd RESPONDENT

CHIEF MAGISTRATES COURT NYAHURURU

LAW COURTS.....4th RESPONDENT

THE ATTORNEY GENERAL.....5th RESPONDENT

RULING

1. The Applicant vide his Chamber summons dated the 17th June 2019, herein substantially seeks to file Judicial Review writs out of time and thereafter, the grant of leave do operate as stay of execution pursuant to the proceedings of Nyahururu CMCC No. 21 of 2000. The application was supported by the affidavit of the Applicant dated on an even date.

2. The matter proceeded for hearing orally on the 16th July 2019 in the absence of representation from the office of the Hon Attorney General

for the 3rd -5th Respondents where counsel for the Applicants submitted that their application dated the 17th June 2019 sought for leave to file out of time orders of Certiorari, Prohibition and Mandamus and in the meantime a stay of eviction and execution proceedings.

3. That the application was based on the grounds on the face of it and the affidavits of Paul Ndung'u sworn on the 17th June 2019 and the 26th June 2019 respectively.

4. That the basis of their application was because the Land Dispute Tribunal had no jurisdiction to deal with the matter in the first place. That Section 3 of the repealed Land Disputes Tribunal Act provided for the jurisdiction of the Tribunal. Counsel relied on the decided case of **Republic vs. Land Disputes Tribunal Kitui District & Another; Ngotho Ndelu (interested party) Ex Parte Mukai Katama [2019] eKLR** where the court had held that "Where a decision is a nullity time does not run."

5. The Applicant also referred to the decision of **Republic vs. Kenya Revenue Authority Ex-parte Stanley Mombo Amuti [2018] eKLR** which authority was to the effect that there needs to be flexibility in the application of the law. That since the tribunal had no power to hear the issue of ownership of land, leave ought to be granted to enable them file their substantial Judicial Review.

6. That on the issue of the application for leave to file an application for prohibition, Counsel submitted that the Applicants were in danger of being evicted from the suit property for reasons that on the 3rd June, 2019, the Applicant's application for stay in the lower Court was dismissed and as such the 1st and 2nd Respondents could can now proceed to execute the award of the tribunal which was a nullity.

7. Counsel submitted, on the issue of their application for leave to file the writ of Mandamus that they sought that the Nyandarua Land Registrar cancels all subdivisions resulting from Nyandarua/Oljoro Orok Salient/1635, so that the status reverts back to the status before the award of the tribunal. They sought for their application to be allowed as prayed.

8. In response and in opposition of the application, counsel for the 1st and 2nd Respondents herein submitted that they had filed their statements of grounds of opposition on 22nd June 2019 as well as a replying affidavit sworn by David Gitonga Githinji the 2nd Respondent on equal date. That they would also rely on their list of authorities filed on the 24th June2019.

9. It was their submission that the Applicants seek for leave to file Judicial Review proceeds out time, that is, for extension of time to file the application for Judicial Review proceedings. That the requirements under Section 9 (3) of the Law Reform Act Cap 26 Laws of Kenya were that the application for leave to file Judicial Review proceedings in respect of an order of Certiorari must be filed within 6 months from the date of judgment, decree or proceeding.

10. That in the instant case, the Applicants did not file their application in response to the impugned award and decree within the 6 months, the impugned award having been made on the 23rd October 2000 and the decree passed on the 13th December 2000. That the Applicants are coming to court 19 years after.

11. That the question that thus arises was whether the court had jurisdiction to extend time for the application for leave. The Land Reform Act had no provision for extension of time and there was no law that entitled the court to enlarge time for filing of an application for Certiorari outside the 6 months limitation period.

12. Counsel relied on the decided cases **of Rosaline Tubei & 8 Others vs. Patrick K Cheruiyot & 3 Others [2014] eKLR** and the case of **Republic vs. Chairman Amagoro Land Disputes Tribunal & Another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** to submit that the court could not grant leave to a party seeking to file an application for Judicial Review out of time because it had no jurisdiction.

13. That the Applicants had not submitted any decision to show that the provisions of Section 3(3) of the Law of Reform Act was unconstitutional. Further, they had not demonstrated that they had filed any proceedings to challenge the constitutionality of Section 9(3) of the Law Reform Act and this court had no jurisdiction to extend time to file Judicial Review proceedings to challenge the impugned award, judgment and or decree.

14. That the application dated 17th June 2019 was misconceived, bad in law, incompetent and an abuse of the court process, and the same should be dismissed. That even if the court had jurisdiction to hear and determine this application, one of the factors to be considered was whether the Applicants had come to court without unreasonable delay.

15. That the Applicants had come to court after 19 years and were guilty of inordinate delay and therefore did not deserve to be granted leave for the extension of time they sought. They did not even disclose that they had filed a suit challenging the impugned award, the consequential judgment and decree where the suit had been heard and dismissed and there had been no appeal filed to the Court of Appeal.

16. That it had been after the dismissal of their suit by the Court of Appeal that they now wanted to challenge the award through Judicial Review proceedings. The Applicants having chosen to seek remedies through suits instead of through Judicial Review, had themselves to blame. That it was clear that they were now on a fishing expedition.

17. Counsel also submitted that vide their replying affidavit, they had annexed a copy of the abstract of title for the suit land No. 1635 which was clear that the 1st and 2nd Respondents had not obtained title through the Land Tribunal Award. Further, that the tribunal did not make an award touching on the title of the land but only held that the Applicants were trespassers on the land, power which they had under the repealed Tribunal Act.

18. It was therefore Counsel's submission that the Applicants had not established a prima facie case that the Tribunal had acted without jurisdiction. The Applicants' case was that they had purchased the suit land from one George Kamau Gateru who was never registered as

proprietor of the land in question and therefore had no title to pass. Their suits and appeal had been dismissed, facts which the Applicants failed to disclose to the court. The application dated 17th June 2016 therefore had no merit and should be dismissed with costs to the 1st and 2nd Respondents.

19. In rejoinder, Counsel for the Applicant submitted that they had not filed the Judicial Review on time because the decision of the land Disputes Tribunal had been stayed on the 11th April 2001 wherein it was lifted on the 3rd June 2019 within which time this application was filed. That secondly, the Applicants had no legal representation and therefore were never advised. That the mistake of Counsel should not be visited on the Applicants. That recent decisions of the court have departed from the finding that the court cannot extended time to file Judicial Review.

20. That they were not challenging the constitutionality of Section 9 of the Land Reform Act but the jurisdiction of the Land Disputes Tribunal in dealing with issues of the title to registered land. That the Application was not incompetent as the Applicants' rights had been violated and the remedy of Judicial Review was distinct from what was sought earlier by differing parties. They reiterated that their application be allowed.

Analyses and Determination

21. Before dealing with the merits of this application it is clear that the institution of this application at leave stage was improper. In Judicial Review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. **See Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779**. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523 where it was held:**

> *"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".*

22. **In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** Ringera, J (as he then was) expressed himself as follows:

> *"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of Certiorari, Mandamus or Prohibition are issued in the name of the Republic and applications therefor are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for Mandamus is:*
>
> **"REPUBLIC.....APPLICANT**
>
> **V**
>
> **THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT**
>
> **EX PARTE**
>
> **JOTHAM MULATI WELAMONDI"**

23. In the case of **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

> *"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or nonjoinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular" We think not, as we find that it substantially complies with the guidelines set out by this Court".*

24. In the case of **Masagu Ole Koitelel Naumo v Principal Magistrate Kajiado Law Courts & another [2014] eKLR** the court held that:

> *Whereas the failure by a party to properly institute proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalized in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.*

I have no reason to depart from this finding.

Determination

25. The Applicants herein seek to file the substantive motion for Judicial Review out of time and the grant of leave do operate as stay of execution pursuant to the proceedings of Nyahururu CMCC No. 21 of 2000 for reasons that the Land Dispute Tribunal had no jurisdiction to

deal with the matter in the first place. That their application for leave to file an application for prohibition was because the Applicants were in danger of being evicted from the suit property and lastly that they sought for leave to file the writ of Mandamus to compel the Nyandarua Land Registrar to cancel all subdivisions resulting from Nyandarua/Oljoro Orok Salient/1635, so that the status reverts back to the status before the award of the tribunal.

26. This application was opposed by the 1st and 2nd Respondents for reasons that first the impugned award and decree having been made on the 23rd October 2000 the same passed on the 13th December 2000. That the Applicants were coming to court 19 years after in contravention of the provisions of Section 9 (3) of the Law Reform Act Cap 26 Laws of Kenya which was clear that an order of Certiorari must be filed within 6 months from the date of judgment, decree or proceeding. Secondly, that this court had no jurisdiction to extend time for the application for leave, the Land Reform Act having no provision for extension of time and there being no law that entitled the court to enlarge time for filing of an application for Certiorari outside the 6 months limitation period.

27. I shall base the matters for determination on:

i. Whether the court lacks jurisdiction to enlarge time for filing of Judicial Review writ of Certiorari.

ii. Whether the Applicants are deserving of the orders sought.

28. In the present application, the impugned award and decree were made on the 23rd October 2000 and the decree passed on the 13th December 2000, the Applicants have now filed the application to enlarge time to file the writ of Certiorari on the 17th June 2019 which is about 19 years later. The provision of Order 53 Rule 2 of the Civil Procedure Rules do not allow leave to file for orders of certiorari to be granted if not applied for before the expiry of six months from the date of the order or decision complained of. This court has no jurisdiction to extend the statutory period as confirmed in the decisions from the superior courts in ***Republic -v- Chairman Amagoro Land Disputes Tribunal & Another, Exparte Applicant, Paul Mafwabi Wanyama [2014] eKLR, James Githinji Kiara –vs- William Wachira Mwaniki [2005] eKLR, Kimanzi Mboo –vs- David Mulwa CA No. 233 of 1996 and Wilson Osolo –vs- John Onjiambo &Another [1991] eKLR.***

29. The authorities relied upon by the Applicant herein on the issue of enlargement of time for filing of Judicial Review writ of Certiorari were in matters heard by courts of equal status and are therefore of persuasive nature and not binding to this court.

30. The court of Appeal in the case of **Owners of the Motor Vessel "Lilian "S" v. Caltex Oil (Kenya) Ltd [1989] KLR1** held as follows:

> **"…***Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

31. Following the above finding herein, I find that this court has no power to extend time to apply for orders of certiorari after 6 months from the time of the action complained of.

32. The Applicants' application stems from the proceedings and award of the Nyandarua District Lands Tribunal Dispute No. 16 made on the 23rd October 2000 and adopted in the Principle Magistrates Court at Nyahururu vide PMC land Dispute No. 21 of 2000 on the 13th December 2000.

33. In the decided case of case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR,** the Court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case No. 139 of 2009 where Makhandia, J held as follows;

> "*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 1st 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."*

34. The Land Dispute Tribunal Act (repealed) at Section 8 had clear provisions on appeals to the Appeals Committee and subsequently to the High Court within stipulated timelines and on points of law only. In this case the appellant elected not to do so and it is impermissible that he should relitigate the issue finally determined through the kind of suit he intended to before the High Court.

35. The award of the Nyandarua District Lands Tribunal Dispute having been adopted by the Principal Magistrate's Court at Nyahururu PMC Land Dispute No.21 of 2000 ceased to exist on its own, and thus, could not be the subject of a declaration but could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in an appropriate proceedings.

36. Having found as above, the court finds that the application dated 17th June 2019 must fail and it is hereby dismissed with costs to the 2nd and 3rd Respondents.

Dated and delivered at Nyahururu this 5th day of November 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE