



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

MISC. APPLICATION NO. 60 OF 2017 (J.R NO. 6 OF 2011)

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN NDANAI LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE KERICHO.....2ND RESPONDENT

WILLIAM KIPRUTO MAINA.....3RD RESPONDENT/APPLICANT

EX-PARTE

JOSEPH MARITIM.....SUBJECT/RESPONDENT

RULING

1. I am called upon to determine a motion on notice dated 14th August, 2019 and filed on 15th August, 2019. It is expressed to be brought under Sections 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act (cap 21), Order 10 Rule 11, Order 22 Rule 22(2) and Order 51 Rules 1 and 4 of Civil Procedure Rules, 2010, and all enabling provisions of law. The applicant – **WILLIAM KIPRUTO MAINA** – was the third respondent in Judicial Review No. 6 of 2011, which he seeks to be heard afresh. More appropriately, he was, or should have been, an interested party.

2. In the judicial review matter aforesaid, the exparte applicant, called subject/respondent in the matter, was **JOSEPH MARITIM**. The respondents – **THE CHAIRMAN NDANAI LAND DISPUTES TRIBUNAL** (1st respondent) and **THE CHIEF MAGISTRATE, KERICHO** (2nd respondent) – were impleaded for making a decision without jurisdiction. The court found merit in the allegations of the Exparte Applicant and quashed the decision.

3. The applicant in this application was named as 3rd respondent in the judicial review proceedings, which he now alleges to have gone on without his participation. This application is essentially meant to set aside the proceedings and conduct a fresh hearing. He alleges that he was never served with the proceedings. He further says he was condemned unheard.

4. The application came with five (5) prayers but two – prayers 1 and 2 – are now moot, as they were meant for an earlier stage. The prayers for consideration now are therefore three (3) – prayers 3, 4 and 5 – and they are as follows:

Prayer 3: The proceedings herein and all consequential orders emanating therefrom be and are hereby set aside, varied and/or reviewed.

Prayer 4: The 3rd respondent be granted leave to defend the suit herein and to file a replying affidavit out of time.

Prayer 5: Costs of this application be provided for.

5. The supporting affidavit that came with the application reiterated and extrapolated the grounds advanced, in particular emphasizing the alleged fact of non-service, with the applicant further complaining that his properties – two fresian cows, one ashire cow, one motor cycle reg. no. KMDZ, a black bull, white cross cow, and an ashire heifer – had been attached.

6. The respondent, who was Exparte Applicant in Judicial Review proceedings, responded vide a replying affidavit dated 30th August, 2019

and filed on 2nd September, 2019. He denied allegations of non-service, averred that service was effected, and deposed that the applicant even appeared in court on 27th November, 2011, 10th October, 2011 and 28th March, 2012. The respondent faulted the applicant for not pointing out the law which would counter the issue of lack of jurisdiction. According to the respondent, the applicant has not raised any legal issues which this court can address.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 3rd December, 2019. According to the applicant, the respondent has no claim against him. The attachment of properties was termed illegal. The respondents replying affidavit was said to be in bad faith and the court was urged to grant the orders sought as the applicant "*is likely to suffer loss and damage which cannot be compensated in monetary terms*".

8. The respondent's submissions were filed on 17th February, 2019. It was submitted that the applicant was served and he even attended court several times. He however ignored the proceedings later and the matter proceeded without his input leading to the outcome he is now dissatisfied with. Stay of proceedings or execution was said to be a matter of court's discretion and the applicant was faulted for not demonstrating well that he is entitled to favourable exercise of that discretion.

9. Both sides cited or availed decided authorities to support their submissions. The applicant availed two – **WACHIRA KARANI VS BILDAD WACHIRA: HCC NO 101 OF 2011, NYERI**, and **WELDCON LIMITED VS CHINA NATIONAL AERO TECHNOLOGY INTERNATIONAL ENGINEERING CORPORATIONS & ANOTHER: HCC NO. 5 OF 2017, NAIROBI**. On his part, the respondent cited **BUTT VS RENT RESTRICTION TRIBUNAL (1982) KLR 417** and **HUNKER TRADING COMPANY LIMITED VS ELF OIL KENYA LIMITED: HCC APPL. NO. 6 OF 2010, NAIROBI**, amongst others.

10. The respondent submitted "*that the application should be struck out with costs because it is an abuse of the process of court, and it is frivolous and vexatious.*"

11. I have had a look into the entire proceedings generally. I have also considered the application, the response made, and the rival submissions. The crucial issue for determination is this: Was the applicant served or not? The applicant himself says he was not. The respondent says he was. He even mentioned several court appearances by the applicant in order to drive his point home. I have looked at the court records. It is clear that the applicant attended court several times. More specifically, he was in court on 27th July, 2011, 6th October, 2011, and 28th March, 2012. Question is: How could the applicant appear in court if he was not served? How did he get to know of the case? There are also several affidavits of service vouching for service on the applicant. I am persuaded that the applicant was served. He is telling a lie when he says he was not served. He could not have appeared in court without being served.

12. The court record even shows that on 27th July, 2011, the applicant asked the court to give him two weeks to file a replying affidavit. Then on 6th October, 2011, the applicant was again in court but he had not yet filed a replying affidavit. The court record shows him asking for a week to file it. He could not have been asking for time to reply without knowing what he would be replying to.

13. The truth of the matter therefore is that the applicant is being less than honest to this court when he says he was not served. And as his application is wholly dependent on the issue of service, it is difficult to see how it can succeed.

14. But there are other considerations too. The judicial review proceedings were about the decision made by 1st and 2nd respondents. These two respondents did not oppose the proceedings. The applicant was not the decision maker. If the decision makers were conceding that their decision was without jurisdiction, can the applicant himself prove otherwise? And the answer to this question is No. The applicant cannot confer a jurisdiction that was not there in the first place. The main concern in the judicial review proceedings was lack of jurisdiction.

15. I have had a look at the draft replying affidavit meant to be a response to the judicial review proceedings. It does not address the issue of jurisdiction. I am constrained to observe that it wouldn't change things. The response dwells on merits. Judicial review proceedings are never about merits; they are about the legality and fairness of the decision making process. The response therefore would not take the applicant far. That is why it is easy to see that the application under consideration has no merits at all.

16. The upshot, in light of the foregoing is that the application herein is one for dismissal and I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 27th day of May, 2020.

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A. K. KANIARU

JUDGE