REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 48 OF 2011

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THEMATTER OF AN APPLICATION UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES 2010 OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL L.R NO. MOSOP/LEBOINET/109 AND KEIYO SOUTH LAND DISPUTES TRIABUNAL AWARD NO. 4 OF 2010

AND

IN THE MATTER OF ITEN SENIOR RESIDENT MAGISTRATE'S COURT AWARD NO.L 38 OF 2010

BETWEEN

REPUBLIC …… APPLICANT

-VERSUS-

THE CHAIRMAN KEIYO SOUTH LAND

DISPUTES TRIBUNAL …… 1ST RESPONDENT

DISTRICT SURVEYOR KEIYO/MARAKWET

DISTRICTS ……. 2ND RESPONDENTS

DISTRICT LAND REGISTRAR

KEIYO/MARAKWET DISTRICT ……..…... 3RD RESPONDENTS

ATTORNEY GENERAL …….....…. 4TH RESPONDENTS

AND

NATHAN KATTAM ……...….. 1ST INTERESTED PARTY

REUBEN KATTAM ……...…..... 2ND INTERESTED PARTY

SIMON KIPTUM ……..….. 3RD INTERESTED PARTY

SMUEL KIBET ……....….. 4TH INTERESTED PARTY

AND

ESTHER ROKOCHO ……...…...…… EX- PARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted on 30th June 2011, the Exparte Applicant moved this court through a Notice of Motion dated 15th July, 2011 seeking for an order of certiorari to remove into this court and quash the 1st Respondent's decision dated 10th December 2010 adopted as a Decree of Iten Senior Resident Magistrate's court award No. 4. According to the Exparte applicant, the award deemed a private road as a public road available for use by the interested parties and owners of parcel numbers Mosop/Leboinet/113 and Mosop/Lelboinet/186 though it existed on the Ex-parte applicants parcel of land No. Mosop/Lelboinet/109 measuring 7-8 hectares.

2. The application is supported by the affidavit sworn by the Exparte Applicant and is premised on grounds stated on its face. The grounds supporting the motion are duplicated in the depositions made by the Exparte applicant (herein the applicant) on 1st July 2011 and on 27th June 2011 in support of both the substantive motion and the application for leave to institute Judicial review proceedings.

3. It is the applicant's case that she is the registered owner of all that parcel of land known as Mosop/Lelboinet/109; that on 10th December, 2010, the 1st respondent made a decision to the effect that a road passing through her parcel of land was not a private road but a public road which the interested parties had a right to use; that the 1st respondent did not have jurisdiction to convert a private road on privately registered land into a public road; that the said decision was on 30th March, 2011 adopted as an order and decree of the Senior Resident Magistrate's Court at Iten in Iten SRMCC Award No. 38 of 2010.

4. The application is opposed. The 1st to 4th respondents who were represented by the Hon. Attorney General filed grounds of opposition to the motion dated 29th July 2015 while the interested parties represented by learned counsel *Mr. Keter* filed a preliminary objection dated 2nd August, 2012 and a replying affidavit sworn by the 4th interested party on 21st May 2012.

5. In their grounds of opposition, the respondents mainly contended that the applicant's Notice of Motion was defective and untenable in law since leave to institute it was wrongly granted out of time contrary to

the mandatory provisions of *Order 53 rule 2* of the *Civil Procedure Rules* ; that consequently leave granted was null and void; that the applicant has not demonstrated sufficient reasons why the court should interfere with the tribunal's award; that the motion is fatally defective as the Senior Resident Magistrate's court Iten was not enjoined as a party and the court cannot issue orders against a person who is not a party to the suit; and; that there was no decision to quash as the tribunal's award ceased to exist when it was adopted as an order of the court.

6. In their preliminary objection, the interested parties also attacked the competence of the motion on grounds that leave granted was invalid for the same reason advanced by the respondents. They in addition averred that the Notice of Motion was also incompetent as it was supported by a statement and verifying affidavit different from the ones relied on in the application for leave contrary to *Order 53 Rule 4* of the *Civil Procedure Rules.*

7. To counter the depositions made in the Replying affidavit, the applicant swore and filed a further supporting affidavit on 11th July, 2012. She denied that the road in dispute had ever been demarcated, gazetted or surveyed as a public road and claimed that the interested parties had simply claimed part of her private land as a public road and fixed improper beacons.

8. By consent of the parties, the motion was canvassed by way of written submissions. Those of the applicant were filed on 10th November 2015 while those of the respondents were filed on 16th November 2015. The interested parties filed theirs on 10th November 2015.

9. I have carefully considered the Notice of Motion, all the affidavits filed by the parties, the grounds of opposition, the preliminary objection and the submissions filed on behalf of all the parties together with the authorities cited. I wish to start by correcting the wrong impression created by the applicant in her submissions that the instant Judicial review proceedings are for orders of certiorari and prohibition. It is very clear from the Notice of Motion that the applicant only prayed for an order of certiorari in compliance with the terms of leave granted on 30th June 2011. There was no prayer for the remedy of prohibition.

10. That said, I now turn to consider the preliminary points of law raised by the respondents and the interested parties regarding the competence of the Notice of Motion.

Both the respondents and interested parties argue that the motion was defective and bad in law since it was filed pursuant to leave which was not valid given that the application seeking leave was filed after the expiry of the six months statutory limitation period after the impugned award was made. I have noted that the award was made on 10th December 2010 while the application was filed on 27th June 2011 and that the statutory limitation period of six months may have expired on 10th June 2011.

11. In my considered view, whether or not the statutory limitation period had expired by the time the leave was granted is now irrelevant and immaterial considering that none of the parties moved the court to have the said leave set aside by the time the Notice of Motion was filed. The leave was still in force by the time the motion was filed and todate it has not been set aside. This court cannot question the validity or otherwise of that leave when determining the substantive motion. The respondents and the interested parties should have moved the court to set aside the said leave at the appropriate time.

12. Regarding the claim that the Notice of Motion is incompetent as it was supported by a different set of statement of facts and verifying affidavit from those relied upon in the application for leave, though the statement and verifying affidavit filed together with the motion are substantially similar to those relied upon in the application for leave, I find that even if they were different, this would not have rendered the Notice of Motion incompetent. This is so because the statement and verifying affidavit filed together with the motion are superfluous since the law does not require that the Notice of Motion be supported by any statement of facts or affidavit. A reading of *Order 53 Rule (4)* of the *Civil Procedure Rules* clearly shows that the Notice of Motion need not be supported by anything else besides the statement of facts and the affidavit sworn in support of the application for leave. In view of the foregoing, I find no merit in the

claim that the Notice of Motion was defective or incompetent. My finding is that it is competent and properly before the court.

13. Turning to the merits of the application, the applicant contends that the 1st respondent did not have jurisdiction to arbitrate on the dispute lodged before it since it involved a private road which was on privately registered land.

The interested parties have claimed in their submissions that the 1st respondent had jurisdiction since the dispute which led to the impugned award concerned the boundaries of a road, the use and occupation of such a road.

14. The jurisdiction enjoyed by land dispute tribunals when they legally existed was donated by *Section 3(1)* of the repealed *Land Disputes Tribunal Act* (the repealed Act) which was in the following terms;

> ***Section 3(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.***

15. It is clear from the above provisions of the law that land dispute tribunals did not have jurisdiction to determine disputes related to ownership of registered land. In this case, it is clear from a reading of the proceedings before the 1st respondent on 10th December 2010 that the dispute lodged before the tribunal for its determination revolved around whether a road passing through the applicant's parcel of land was a private or public road.

16. The applicant who was the claimant and her witnesses claimed that it was a private road since it was part of her registered land but the interested parties thought otherwise. The 1st respondent in its award made a decision that the road in question was a public road. In my view, the 1st respondent in effect made a determination that the portion of land covered by the said road whose ownership the applicant was claiming and which the interested parties disputed was not part of her registered land but was public property. This was obviously a dispute concerning the ownership of a portion of registered land which fell outside the jurisdiction of land dispute tribunals – See; ***Amunavi V The Chairman Sabatia Division Land Disputes Tribunal & Another Civil Appeal No. 256 of 2005.*** The interested parties claim that it was a dispute regarding the use and occupation of a public road inter alia cannot be sustained in the light of the evidence recorded by the 1st respondent.

17. From the foregoing, I have no doubt in my mind that in hearing and making the impugned award, the 1st respondent acted ultra vires *Section 3 (1)* of the *Repealed Act* . It's decision was therefore null and void abinitio and was a nullity in law. It had no legal effect. I am thus satisfied that the applicant has demonstrated that she is deserving of the order of certiorari.

18. The respondent has submitted that the order sought cannot issue since the award no longer exists as it was adopted as an order and decree of the Senior Resident Magistrate's Court at Iten and that the lower court had not been enjoined in these proceedings as a party. I do not need to say much in response to these submissions. As I held in the case of the ***Republic V The Resident Magistrate's Court Limuru & three Others JR ELC MISC Application No. 59 of 2011 (2012) eKLR,*** the impugned award was part of the record of the 1st respondent and it would remain so unless and until it was quashed by orders of this court in the exercise of its supervisory jurisdiction.

19. It's adoption as a judgment of the lower court did not mean that it literally ceased to exist. It could

only cease to exist if removed to this court and quashed by an order of certiorari. And having found that the award was a nullity in law, it was not, legally speaking, capable of adoption as a judgment of the lower court. This is because it amounted to no decision at all. It was basically nothing. There was nothing for the Magistrate's Court at Iten to adopt. To buttress this point further, I wish to adopt the words of *Lord Denning in* ***Macfoy V United Africa Limited (1961) 3A11 ER 1169*** where he held that;

> ***"If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse".***

20. In view of the foregoing, though I appreciate that the adoption of awards of land disputes tribunals by the lower courts under *Section 7* of the *Repealed Act* was more of an administrative function as opposed to a judicial decision, I find that the judgment in Iten SRM's Court Civil Case No. 38 of 2010 was illegally entered and cannot be allowed to stand whether or not the magistrate's court was enjoined as a party to these proceedings.

21. It is my view that the non-joinder of that court was not fatal to the instant proceedings. It would have been different if the non-joiner was with respect to a private citizen who would have been adversely affected by the outcome of the proceedings or where the party not joined was expected to implement the court order. In this case, the order of certiorari if issued can only be effected by the High Court and not by the magistrate's court.

22. For all the foregoing reasons, I find merit in the Notice of Motion dated 15th July 2011 and it is hereby allowed. An order of certiorari shall consequently issue to remove into the High Court for quashing the decision the 1st respondent dated 10th December 2010 and the decree of the Senior Resident Magistrate's court adopted in the Senior Resident Magistrate's Court at Iten Civil Case No. 38 of 2010.

23. On costs, since costs follow the event and the applicant has been successful in her application, she is awarded costs of the motion to be borne by the interested parties.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of February 2017

In the presence of:-

Ms. Cherono holding brief for A. K Chepkonga for the Exparte Applicant

Mr. Miyienda holding brief for Mr. Keter for the interested parties

Mr. Lobolia Court Clerk

No appearance for the respondents.