REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC JR NO. 4 OF 2019

REPUBLIC.....APPLICANT

VERSUS

LAND DISPUTE TRIBUNAL, BAHATI.....1ST RESPONDENT

LAND REGISTRAR NAKURU.....2ND RESPONDENT

AND

PETER KARANI NDUKU.....INTERESTED PARTY

EX PARTE

JACOB KIPKURUI KONGA

AND

KAPROMOI A. CHEPSERGON

J U D G M E N T

1. The exparte applicant was granted leave to commence judicial review proceedings on 4th April 2019. The Applicant filed the substantive Notice of Motion dated 2nd May 2019, on 3rd May 2019. By the application the exparte applicant prayed interalia for the following orders:-

2. That:-

*(i) An order of certiorari do issue to quash the decision of the 1st Respondent cancelling the Applicants' title/ownership of land parcel **DUNDORI/MUGWATHI BLOCK 2/173** made on the 13th December 2006 in Land dispute No.45 of 2006, the order of the magistrate adopting it on 11th December 2008 in Nakuru Land Dispute No.16 of 2007 and the ruling made by L.D.A.C in Appeal no. 2 of 2009*

(ii) An order of probation do issue against the 2nd Respondent prohibiting him from cancelling the applicant's title and issuing a new title deed to the Interested party as was ordered by the 1st respondent on the 13th December 2006 and adopted by the Magistrate in Nakuru Land Dispute No.16 of 2007 on 11th December 2008 and the ruling of L.D.A.C in appeal No.2 of 2009.

*3. That stay of execution do issue against the decision of the 1st Respondent cancelling the Applicants' title to land parcel **Dundori/Mugwathi block2/173** made on the 13th December 2006, the order of the Magistrate adopting the decision issued on the 11th December 2008 in Nakuru Land dispute No.16 of 2007 and the ruling made by L.D.A.C in Appeal No.2 of 2009.*

4. That costs of this application be provided

2. The application was supported on the grounds set out in the body of the application and on the undated supporting affidavit sworn by Jacob Kipkurui Konga and the annextures attached thereto. The exparte applicant's application is predicated on the ground that the Bahati

Land Disputes Tribunal had no jurisdiction to deal with matters touching on title to land and specifically did not have power to cancel title to land and lacked, the jurisdiction to confer title to land on the interested party. The exparte applicant in the premises contended that the Tribunal in making an award granting land title **Dundori/Mungwathi Block 2/173** to the interested party acted ultravires and the decision was null and void.

3. The exparte applicant consequently contended that the adoption of the Bahati Land Dispute Tribunal decision by the Nakuru Magistrates Court as judgment and the implementation thereof was ineffectual and of no consequence. Further the exparte applicant argues that as the Tribunal lacked the jurisdiction to deal with the matter, the resultant appeal to the Provincial Land Disputes Appeals Committee Tribunal was of no consequence as there was no valid appeal. The Applicant thus contended the Tribunal acted in excess of its jurisdiction and their decision was a nullity and should be quashed.

4. The interested party filed a replying affidavit in opposition to the exparte applicant's application sworn on 26th July 2019. The interested party averred that he is the rightful owner of land parcel **Dundori/ Mugwathi Block 2/173** which he claimed to have occupied and possessed since 1984. He stated he purchased the property from one Andrew Kiplangat Kirui. The interested party further stated the ruling of the Tribunal was adopted as judgment of the Court in Nakuru Chief Magistrate's Court Land dispute No. 16 of 2007 on 11th December, 2008 and that the judgment was not challenged in these proceedings. The judgment was not appealed against by the applicant and therefore remains a valid judgment of the Court. The applicant appealed against the award of the Tribunal to the Provincial Land Disputes Appeals Committee and the applicant's appeal against the award was dismissed. The Applicant did not appeal against the dismissal of the appeal to the High Court as provided under the law. The interested party further contended the applicant did not make the instant application within the period provided under the law and that the same was inordinately out of time.

5. The parties canvassed the application by way of written submissions. The interested party filed his submissions on 27th February 2020 while the exparte applicant filed his submissions on 2nd June 2020. The interested party in its response and the written submissions has raised issues that challenge the competency of the exparte applicant's application before this court. The interested party has submitted that, the exparte applicant was granted leave on 4th April 2019 to file the substantive motion within 21 days from the said date. The exparte applicant did not file the motion until, 3rd May 2019 which was outside the time allowed by eight (8) days. The period allowed for filing of the application was not extended and no application for extension of the period was made by the exparte applicant. The interested party further contended the application was statute barred as it was not brought within the prescribed period under order 53 Rule 2 of the Civil Procedure Rules which provides as follows:-

> *" Leave shall not be granted to apply for an order of Certiorari to remove any judgment order, decree, conviction or other proceeding for the purposes 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 proceedings 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."*

6. My understanding of the above provision of Order 53 Rule 2 is that a judicial review proceeding that seeks to quash a judgment, order or decree has to be commenced not later than six months from the date of the proceeding giving rise to the judgment, decree or order. Thus even where leave to commence judicial review proceedings may have been given at the leave stage, the issue whether a judicial review proceedings was appropriately commenced can be properly taken up. In the present matter the award of the Bahati Land disputes Tribunal was adopted as judgment of the Court on 11th December 2008 by E Tanui Resident Magistrate in the presence of all the parties. Any judicial review proceedings to quash this judgment ought to have been commenced within six months of the judgment. The Magistrate's court that made this judgment was not made a party to these proceedings and consequently, the court even if the proceedings to quash the judgment was commenced within the prescribed period could not properly make an order quashing the judgment when the court was not a party to the proceedings.

7. The Applicant has contended the 1st Respondent, Bahati Land Disputes Tribunal lacked the jurisdiction to entertain the dispute as it related to title to land which under section 3 (1) of the Land Disputes Tribunals Act, Cap 303 A Laws of Kenya it had no mandate to handle . Following the decision/award of the Tribunal the applicant appropriately made an appeal to the Provincial Land Dispute Appeals Committee under section 8(1) of the Act. The applicant's appeal was dismissed by the Provincial Land Dispute Appeals Committee on 17th November 2009.

8. Under Section 8(8) of the Land Disputes Tribunals Act, the decision of the Appeals Committee was deemed to be final on any issue of fact and no appeal was allowed thereof to any Court. However a party aggrieved by the decision of the Appeals Committee could under Section 8(9) appeal to the High Court on point of Law within sixty (60) days of the decision of the Appeals Committee. Section 9 (9) of the Act was in the following terms:-

> *9 (9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of :*
>
> *Provided that no appeal shall be admitted to hearing by the high Court unless a judge of that Court certified that an issue of law (other than customary law) is involved.*

9. The issue of jurisdiction that the exparte applicant has raised in these proceedings was clearly a point of law which the applicant could have appropriately raised in an appeal against the decision of the Appeals Committee before the High Court. He did not file any appeal as provided under the Land Disputes Tribunals Act. In my view the applicant had the option of commencing judicial review proceedings once the Tribunal made its decision and/or after the magistrates court adopted the decision of the Tribunal to quash the Tribunal's decision and the decision of the Magistrate's Court adopting the Tribunal's decision as its judgment. It is clear that the Applicant was aware of the procedure under the Land disputes Tribunals Act as he appropriately filed an appeal against the award of the Tribunal which he duly prosecuted before the Appeals Committee. Having chosen the procedure laid out under the Act, the applicant was precluded from

abandoning the process to opt for an alternative procedure as he did when he initiated the present proceedings. The applicant was duty bound to exhaust the procedure under the Act and it was not open to him to kick start an alternative process. Pursuit of justice cannot be on the basis of trial and error.

10. The courts have repeatedly stated that where a statute establishes a procedure to be followed in resolving disputes such procedures must be followed and exhausted rather than seek to pursue an alternative remedy. In the case of ***Karume -vs- The Speaker National Assembly (1992) eKLR*** the court of Appeal re-affirmed the exhaustion principle when they stated as follows:-

> *" In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.*

11. It is evident that the Tribunal heard and determined the dispute in 2006 and that the Magistrates Court adopted the award as judgment in 2008 while the Appeals Committee dismissed the applicants Appeal in 2009. Upto the time the appeal was dismissed the Land Disputes Tribunals Act, had not been repealed and was in force. Hence the procedure that ought to have been followed in resolving the dispute was the one laid out under the Act which the applicant had undoubtedly chosen. The applicant as is evident adhered to the procedures set out under the Act, when he filed the appeal to the Provincial Dispute Appeals Committee. If he was not satisfied with the decision of the Appeals Committee, he ought to have filed an appeal against the committee's decision if a point of Law was involved in the High Court. He did not and although the decision in the appeal was given on 17th November 2009 the applicant only initiated these proceedings on 27th March 2019 when he filed the application for leave. It was not explained why it took the applicant over 9 years from the date the appeal to the Provincial Appeals Committee was dismissed to seek to bring these proceedings. The delay was inordinate and could only have been an afterthought. I view these proceedings as a fishing expedition on the part of the applicant in the hope that he could somehow make a catch. The Courts do not work in that manner as their solemn duty is to interpret and apply the law the quest of doing justice to the parties who come before them.

12. I have said enough to demonstrate that the instant application was defective for having been brought out of time, was unmeritorious as the applicant failed to exhaust the applicable procedure under the Land Disputes Tribunals Act, and that the failure to enjoin the Magistrates Court that adopted the decision of the Tribunal and which the Applicant seeks to have quashed was a fatal omission. The Notice of motion dated 2nd May 2019 is devoid of merit and the same is dismissed with costs to the interested party.

13. Orders accordingly

Judgment dated signed and delivered virtually at Nakuru this 30th day of July 2020.

J M MUTUNGI

JUDGE