



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**JUDICIAL REVIEW APPLICATION NO. 18 OF 2014**

**(FORMERLY JUDICIAL REVIEW NO. 23 OF 2010 EMBU)**

**IN THE MATTER OF THE APPLICATION BY JACKSON NJERU MURIUKI TO APPLY FOR  
ORDERS OF JUDICIAL REVIEW**

**AND**

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

**AND**

**IN THE MATTER OF GICHUGU LAND DISPUTES TRIBUNAL**

**AND**

**IN THE MATTER OF PROCEEDINGS IN GICHUGU SENIOR RESIDENT MAGISTRATE'S  
COURT L.D.T NO. 7 OF 2010**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE GICHUGU LAND DISPUTES TRIBUNAL.....1<sup>ST</sup> RESPONDENT**

**SAMUEL GAKONO NGARE.....2<sup>ND</sup> RESPONDENT**

**JANE WANGECHI KIURA.....3<sup>RD</sup> RESPONDENT**

**AND**

**JACKSON NJERU MURIUKI.....Ex-parte APPLICANT**

**JUDGMENT**

On 5<sup>th</sup> December 2014 this Court granted the applicant leave to apply for orders of certiorari to remove into this Court and quash the award of the Gichugu Land Disputes Tribunal with respect to its award regarding parcel No. BARAGWI/GUAMA/671. It was the applicant's case that the said Gichugu Land Disputes Tribunal (the Tribunal) had no jurisdiction to handle the dispute over that parcel of land.

That leave having been granted, the applicant proceeded to file the Notice of Motion on 19<sup>th</sup> December

2014 in which he sought the following substantive orders:-

1. ***An order of certiorari do issue to remove into the High Court and quash the award of Gichugu Land Disputes Tribunal read by the Gichugu Senior Resident Magistrate on 21<sup>st</sup> April 2010.***
2. ***Cost for the application be provided for.***

From the statement of facts and the verifying affidavit that accompanied the application for leave, it is clear that the basis of this application is that the Tribunal had no jurisdiction over the dispute before it by virtue of the provisions of ***Section 3 (1) of the Land Disputes Tribunal Act now repealed.*** A copy of the Tribunal's proceedings and award in their case No. 25 of 2009 were annexed. No copy of the order read by the Senior Resident Magistrate at Gichugu Court on 21<sup>st</sup> April 2010 was annexed.

The application was opposed by the 3<sup>rd</sup> respondent JANE WANGECHI KIURA who in her replying affidavit deponed, inter alia, that no notice was given to the Registrar as required and even the purported notice dated 21<sup>st</sup> May 2010 does not bear the Court stamp. That the order of the Senior Resident Magistrate's Court at Gichugu has not been demonstrated and in any case, the orders for leave granted by this Court were erroneous.

Submissions have been filed both by the applicant and the 3<sup>rd</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondent did not file any response to the application.

I have considered the application, the rival affidavits and annexures thereto and the submissions by counsels.

Although the Notice of Motion filed on 19<sup>th</sup> December 2014 also makes reference to the award read by the Gichugu Senior Resident Magistrate on 21<sup>st</sup> April 2010, no such order was availed as part of the documents herein. Indeed in my ruling delivered on 5<sup>th</sup> December 2014, I made the following observation:-

***“Although the Notice to the Registrar also mentions that it is intended to quash the order of the Senior Resident Magistrate's Court at Gichugu, there is infact no such order. In any case, the substantive Chamber Summons only refers to the order of the Gichugu Land Disputes Tribunal”***

It follows, therefore, that the only order or decision placed before this Court for purposes of quashing is the Tribunal's award delivered on 5<sup>th</sup> March 2009. Mr. Igati Mwai advocate for the 3<sup>rd</sup> respondent has submitted that the applicant having obtained leave to file the Notice of Motion, there was no compliance with the provisions of ***Order 53 Rule 4 (1) of the Civil Procedure Rules*** which provides as follows:-

***“Copies of the statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement “ emphasis added***

Mr. Igati Mwai advocate has submitted that there was no service of the Notice of Motion on either his office or his client the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent confirms this in his replying affidavit. To answer that question, I have looked at the un-dated affidavit of service of JANE W. KIRAGU advocate filed herein on 18<sup>th</sup> March 2015 in which she depones in paragraph 4 as follows:-

***“That sometimes on 2<sup>nd</sup> March 2015 within Kerugoya town while in the firm of Magee wa Magee & Co. advocates I served the firm of Igati Mwai & Co. advocates with an application dated 15<sup>th</sup> December 2014 indicating that the matter is coming up on 19<sup>th</sup> March 2015 by tendering them a copy of the same and requiring their signature”***

Annexed to that affidavit of service is the Notice of Motion dated 15<sup>th</sup> December 2014. There is no averment therein that copies of the statements accompanying the application for leave were also served together with the said Notice of Motion. It is in that regard, therefore, that Mr. Igati Mwai has urged me to strike out this application for being incompetent in not complying with **Order 53 Rule 4 Civil Procedure Rules**. Counsel cited my own decision in the case of **REPUBLIC VS THE PRINCIPAL MAGISTRATE KERUGOYA & OTHERS EX-PARTE NANCY WATHIBA KIMOO ELC JUDICIAL REVIEW CASE NO. 20 OF 2013 at KERUGOYA COURT** in a case in which, incidentally, also involved the firm of Magee wa Magee advocate acting for the applicant. In that case, I held that failure to comply with the provisions of **Order 53 Rule 4 of the Civil Procedure Rules** was not a mere technicality curable by the provisions of **Article 159 (2) (d) of the Constitution**. In doing so, I relied on the Court of Appeal decision in **SIGALAGALA POLYTECHNIC VS NELSON OGWERO C.A CIVIL APPEAL NO. 13 A OF 2013 (KISUMU)** where the Court of Appeal in a majority decision (Maraga J.A dissenting) held that failure to comply with the provisions of **Order 53 Rule 4 (1) of the Civil Procedure** renders an application incompetent and therefore liable for striking out. In the circumstances, and guided by the decision in the case of **SIGALAGALA POLYTECHNIC** (supra) which is binding on me, this application must be struck out.

If the application is to be considered on its merits, what is before me is the award of Gichugu Land Disputes Tribunal and not the order of the Gichugu Court dated 21<sup>st</sup> April 2010. From the record herein, that award was delivered on 5<sup>th</sup> November 2009. The relevant part of that award reads as follows:-

***“Award read on 5<sup>th</sup> November 2009 in presence of the complainant and the defendant”***

It follows therefore that the only award that is before me for quashing is the Tribunal’s award dated 5<sup>th</sup> November 2009. Although the Notice of Motion filed herein on 19<sup>th</sup> December 2014 also states that the said award was read by the Gichugu Senior Resident Magistrate on 21<sup>st</sup> April 2010, the Resident Magistrate is not a party in these proceedings and, as I have already stated above, no record of what transpired at the Gichugu Court on 21<sup>st</sup> April 2010 has been annexed. This Court can therefore only concern itself with the Tribunal’s award dated 5<sup>th</sup> November 2009.

Under **Order 53 Rule 2 of the Civil Procedure Rules** it is provided as follows:-

***“Leave SHALL not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings 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 other proceedings.....”***

emphasis added.

Although leave was granted by the Court on 5<sup>th</sup> December 2014 to apply for orders of certiorari to remove into this Court and quash the award of the Tribunal, it is clear that the said leave was erroneously granted as a matter of course and in contravention of the law. It is clear from the authority of **AGAKHAN EDUCATIONAL SERVICE VS REPUBLIC & OTHERS C.A CIVIL APPEAL NO. 252 OF 2003** that the Court retains the jurisdiction to set aside any ex-parte orders of leave particularly in clear cases such as this one where the application, having been filed well beyond the time allowed by the law is incompetent. It is also settled from the Court of Appeal’s case of **AKO VS SPECIAL DISTRICT COMMISSIONER KISUMU & ANOTHER 1989 K.L.R 163** that there is an absolute prohibition against bringing an application for certiorari after the six months period stipulated in the law. It is obvious from the record herein that the decision sought to be quashed was rendered on 5<sup>th</sup> November 2009. The leave granted on 5<sup>th</sup> December 2014 could only have been granted as a matter of course which is not permitted. It was also hopelessly out of time. Therefore, even if the applicant’s Notice of Motion were to be considered on its merits, it can only be dismissed as it was filed well beyond the six (6) months period provided for both under the **Law Reform Act (Section 9 (3) and the Civil Procedure Rules (Order 53 Rule 2)**.

Ultimately therefore and having found that the applicant's Notice of Motion filed herein on 19<sup>th</sup> December 2014 is incompetent, I order it struck out with costs to the 3<sup>rd</sup> respondent.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**

**Judgment delivered this 26<sup>th</sup> day of February 2016 in open Court**

Ms Kiragu for Applicant present

Mr. Ngangah for 2<sup>nd</sup> Respondent present

Mr. Mwai for 3<sup>rd</sup> Respondent present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**