



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 134 OF 2014

REPUBLICAPPLICANT

VERSUS

DISTRICT LAND ADJUDICATION &

**SETTLEMENT OFFICER – KIBWEZI SUB-COUNTY.....1ST
RESPONDENT/TRIBUNAL**

FESTUS MUTUS KIEMA.....INTERESTED PARTY

EXPARTE.....JOSEPH KIMANI MAINGA

JUDGEMENT

Introduction

1. The prayers the subject of this judgment are contained in the Notice of Motion dated 20th April, 2014 in which the *ex parte* applicant, **Joseph Kimani Mainga** seeks the following orders:

- a. **An order of Certiorari to bring into court for purposes of being quashed the the decision made by the 2nd Respondent on 15th/11/2013 and the subsequent decision by the 1st Respondent on 4/2/2014.**
- b. **Costs of these proceedings.**

Applicant's Case

2. According to the applicant, parcel of land No. 1083 Utithi Settlement Scheme (hereinafter referred to as “the suit property”) is registered in the name of **Ngeti Mavuti** (now deceased) and that there had been a dispute between the deceased and one **Festus Mutua Kiema**, the interested party herein over the suit property. It was disclosed that the said interested party, **Festus Mutua Kiema**, is a grandson of the deceased and the applicant is a son of the deceased.

3. According to the applicant, the Resident Magistrate Court Makindu arbitrated over the matter in absence of the deceased and long after she died and made adverse orders against her. Thereafter the applicant applied for letters of administration to contest this matter and wrote to the 1st Respondent asking him to defer the implementation of the said order until the succession matter was concluded but the request did not yield any favourable response as the 1st Respondent went ahead and subdivided the suit

land into three portions which decision aggrieved the applicant and which is the subject of these proceedings.

Interested Party's Case

4. According to the interested party, the ex parte Applicant has misled the court as there was (sic) order/decision made by the 2nd Respondent on the 15th November, 2013 and by the 1st Respondent on 4th February 2014 as alleged. To him the only decisions capable of being challenged by way of judicial review are:

i. The decision of the Resident Magistrate - **Hon P.M. Wambugu** made the 17th August, 2011 and

ii. The decision of the District Land Adjudication and Settlement officer – Makueni District dated 19th August, 2005

5. According to the interested party, what is referred to as decisions dated 15th November, 2013 and 4th February, 2014 are barely letters by the District Land Adjudication & Settlement officer inviting the parties to be present at the site during implementation of the court order.

6. It was further contended that the court which made the contentious decision on 17/8/2011 (i.e the Resident Magistrates court – Makindu) has not been made a party to these proceedings and further that the proceedings are time barred having been brought outside the six months limitation period prescribed for the questioning of administrative decisions.

7. To the Respondent the failure to join the Resident Magistrates Court is fatal to the application.

Determinations

8. I have considered the issues raised before me vide the affidavits and submissions.

9. It was contended that these proceedings are statute barred. These proceedings apparently arose from the adoption of the decision of Land Disputes Tribunal by the Principal Magistrate's Court Makindu. That adoption was done on the 17th August, 2011. These proceedings were however not commenced till 7th April, 2014, more than a year after the adoption of the said decision. Section 9(3) of the **Law Reform Act** provides:

In the case of an application for an order of certiorari to remove any judgement, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

10. The rationale for the timelines provided under the aforesaid provision is due to the recognition that judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial

markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.** In **Republic vs. The Minister For Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.

11. Therefore if what was being challenged was the decision adopting the decision of the Tribunal, these proceedings would no doubt be rendered incompetent and as was held in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482:**

“Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s. 9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court’s duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads “unless the High Court considers that there is good reason for extending the period within which the application shall be made” is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose...As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred.”

12. However the applicant seeks to challenge decisions purportedly made on 15th November, 2013 and 4th February, 2014. No such decisions have been shown to exist as the applicant has not exhibited any such decisions. Instead the applicant has exhibited a copy of the letter dated 6th November, 2013 from the 1st (sic) respondent notifying the parties of his intention to implement the court decision. That intimation is not a decision for the purposes of judicial review. That was the position adopted by the Court in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** in which the Court stated:

“The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application.”

13. The reason for exhibiting the decision sought to be quashed is *inter alia* to ascertain that there in fact exist a decision capable of being removed into the High Court and being quashed and also to ascertain that the said decision was made within the period provided under the law. Where no such decision is exhibited and the omission is not accounted for to the satisfaction of the Court, there would be no basis

upon which the Court can grant the orders sought.

14. On merits the role of the Court when adopting an award of the Tribunal ought to be appreciated. In **Zedekiah M Mwale vs. Bikeke Farm Directors & Another Kitale HCCA NO. 25 of 1998, Wanjiru Karanja, J** (as she then was) held, which holding I associate myself with, that a magistrate has no jurisdiction to alter, amend, set aside, review or in any other manner interfere with a Land Disputes Tribunal's award filed in court as section 7(2) only compels the magistrate to adopt it and it matters not how repugnant or unjust the magistrate may deem the award to be.

15. Similarly, in **Peter Ouma Mitai vs. John Nyarara Kisii HCCA No. 297 of 2005, Musinga, J** (as he then was) following the decision in **Zedekiah M Mwale vs. Bikeke Farm Directors & Another** (supra) expressed himself as follows:

“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate's court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal's award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a judicial review application, proceed to institute such proceedings before the High Court and not otherwise.”

16. Since the role of the Magistrate entrusted with the task of adopting an award was limited to such adoption, the issue of the competency of an award cannot arise at that stage of the proceedings.

17. For the foregoing reasons these proceedings are both incompetent and unmerited and are hereby dismissed but taking into account the relationship between the applicant and the interested party herein and pursuant to Article 159(2)(c) of the Constitution there will be no order as to costs.

Dated at Nairobi this 2nd day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Kariuki for Mr Ngala for the Respondent

Cc Muriuki