



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 405 OF 2007

REPUBLICAPPLICANT

VERSUS

- 1. IN THE MATTER OF THE LAND DISPUTES TRIBUNAL MUKURWEINI**
- 2. THE SENIOR RESIDENT MAGISTRATE'S COURT AT NYERI**
- 3. SIMON KABACHIA KARUGURI.....RESPONDENTS**

EXPARTE:

PETER NYAMU KARAGURI

MUHARI KARAGURI

JUDGEMENT

1. By a Motion on Notice dated 30th April 2007, the ex parte applicants herein, **Peter Nyamu Karaguri** and **Muhari Karaguri**, seek the following orders:
 - a. **An order of certiorari to remove unto the High Court and quash an award made by the Land Disputes Tribunal Mukurwe-ini at Mukurwe-ini on the 5th October, 2004 in the Land Disputes Tribunal Case No. 7 of 1999 under the provisions of Land Disputes Tribunal Act 1999 Act No. 18 of 1990 Section 3.**
 - b. **An order of certiorari to remove unto the High Court and quash the award adopted and judgment entered by the Senior Resident Magistrate in Nyeri Civil Case No. 20 of 2001 at Nyeri Chief Magistrate's court arising from the above award of the Land Disputes Tribunal Case No. 7 of 1999, under the provisions of Land Disputes Tribunal Act 18 of 1990.**
 - c. **Costs of this application be provided for.**
2. The Motion was based on the Statutory Statement filed with the application for leave on 24th April, 2007. The facts according to the said Statement were as follows:
 - i. **The original suit-land Gikondi/Gikondi/609 measuring about 11 acres was registered under and owned by Muhuri Karuguri and Peter Nyamu Karuguri.**
 - ii. **The ex-parte applicants reside on the suit land where they have constructed houses and dwellings. The suit land was subdivided and gave rise to Gikondi/Gikondi/ 1787 and 1788 respectively and the same is owned and registered in favour of the ex-parte applicants herein whereas Simon Kabachia Karaguri brother to the ex-parte applicants is the registered**

- owner **Gikondi/Gikondi/589** which land was given to him by the late father of the ex-parte applicants herein.
- iii. **The Mukurwe-ini Land Disputes Tribunal heard the ex-parte applicants and the 3rd respondent and made orders to subdivide the suit-land into three (3) portions one amongst whom was the ex-parte applicant herein.**
 - iv. **The ruling and orders of the Land Disputes Tribunal aforesaid was effectively meant to bestore title to the applicant and two others which was unlawful and illegal and against the provisions and powers of the Land Disputes Tribunal.**
 - v. **The said ruling, find and purported adoption of the same by the court were bad in law and hence defective ab initio.**
3. The Motion was supported by a verifying affidavit sworn by Peter Nyamu Karaguri on 23rd April, 2007. The said affidavit was a scanty 5 paragraph affidavit which apart from verifying the correctness of the statement and annexing copies of the documents as a bundle did not contain much.

Respondent's Case

4. In Response to the application the 3rd Respondent, **Simon Kabachia Karuguri** filed a replying affidavit sworn on 23rd May, 2007.
5. According to him, there are other persons i.e. **Amina Juma Karanja** and **Muthoni Mwangi** who are directly affected by this application who were parties to the dispute before Mukurwe-ini Land Disputes Tribunal No. 7 of 1999 and Nyeri CM Award No. 20 of 2001.
6. According to him, the application is incompetent and bad in law in that leave to file this application was granted long after expiring of six (6) months i.e. that Mukurwe-ini Land Disputes Tribunal award was delivered on the 11th December 2000; that the ruling in Nyeri CM award No. 20 of 2001 was delivered on 5th October 2004; and that the application for leave was filed in April 2007 and the order to file this application was granted on 25th April 2007.
6. He took the issue with the fact that the application for leave was not annexed in this application nor was it served upon him as well as the other interested parties.
7. According to him, the Chief Magistrate court at Nyeri by directing **Amina Juma Karanja** and **Muthoni Mwangi** to get their parcels from LR Gikondi/Gikondi/1787 and Gikondi/Gikondi/1788 respectively was meant to maintain the sanctity of the law as the applicants had subdivided LR Gikondi/Gikondi/609 after judgment of the court was delivered and it was meant to defeat the cause of justice and the reason why the court found the subdivision fraudulent.
8. He deposed that the orders being sought to be quashed had been effectuated and all that remained was processing of the title deeds. He contended that although he did not get any share out of the dispute **Amina Juma Karanja** and **Muthoni Mwangi** are entitled to the land.
9. To him, the applicants are vexatious litigants as presently there are other suits pending in the High Court at Nyeri.

Ex Parte Applicants' Submissions

10. On behalf of the applicants it was submitted that the Land disputes Tribunal exceeded its jurisdiction by dividing Land Reference No. Gikondi/Gikondi/609 when it had no powers and/or jurisdiction to subdivide land under section 3 of the Land Disputes Act. It was further submitted that the Tribunal exceeded its jurisdiction and mandate by adjudicating on title suit contrary to the law.
11. It was further contended that the Tribunal exceeded its mandate by illegally awarding 3.6 acres of the land to **Amina Juma Karanja** who was not a party to the matter before it and therefore a stranger to the said proceedings at the Tribunal. The Senior Resident Magistrate was on the other hand accused of exceeding her jurisdiction in entering judgement based on an award which was null and void *ab initio*. It was therefore submitted that the Land Dispute Tribunal award is

contrary to law and is inconsistent with and in contravention of the *Land Dispute Disputes Act 18 of 1990*.

12. According to the applicants under Article 159 of the Constitution of Kenya, this Court is vested with power to do justice without undue regard to procedural technicalities as raised in the replying affidavit filed herein hence the matter is properly before the Court.

3rd, 4th and 5th Respondents' Submissions

13. On behalf of the 3rd, 4th and 5th Respondents, it was submitted that the award herein was made on 11th December 2000 and was adopted by the Court on 5th October, 2004 yet leave to institute these proceedings was given on 25th April 2007 which was a period of 30 months after the issuance of the decree without leave being sought to extend time for applying for the same. That the application was made outside the 6 months period provided, it was submitted, was not disclosed to the Court at the ex parte stage. It was the proceedings are incurably defective. In the Respondents' view this legal requirement under Order 53 is not a procedural technicality but one of substance and cannot be cured under Article 159 of the Constitution.

14. It was further submitted that the Court ought not to act in vain since in this case the subject matter of these proceedings is Land Reference No. Gikondi/Gikondi/609 which no longer exists the same having been closed on subdivision and new titles issued.

15. It was further submitted that this Court having dismissed an application seeking the revocation of the Title issued to the interested party which was derived from the aforesaid title, that was an acknowledgement that the process cannot be reversed hence it would serve no useful purpose to quash the award of the Tribunal as the decree emanating therefrom has already been effectuated and nothing remains.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions.

17. As indicated at the beginning of this judgement, the verifying affidavit was a 5 paragraph affidavit which was very economical on the facts and to it was annexed a bundle of documents whose relevance was unexplained in the body of the verifying affidavit. It is now trite that it is the verifying affidavit which contains the facts rather than the statement. This was held by the Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000** where the Court restated the law that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. Accordingly, the ex parte applicant ought to ensure that the verifying affidavit contains all the factual information that he intends to rely upon.

18. The second issue is that the award herein was made on 11th December 2000 and was adopted by the Court on 5th October, 2004 yet these proceedings were not instituted until 24th April, 2007 which was definitely way after the 6 months period had lapsed. Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. 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.

19. 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.
20. These proceedings were instituted out of time 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.”

15. It has always been my view it is high time the provisions of Section 9 of the *Law Reform Act* were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period.
16. In my view Article 159 of the Constitution is meant to ensure that justice is done to the parties in cases where the Court is properly seised of the matter without locking out the parties for failure to comply with matters of procedure. Where however the matter is not properly before the Court in that a party has failed to bring himself within the circumstances which clothe the Court with powers to grant him the remedies sought it would be stretching the provisions of Article 159 of the Constitution too far if the Court were to ignore all statutory provisions in order to accommodate a party who without any justifiable reason failed to adhere to the provisions of the law. It must be remembered that legal provisions including provisions relating to limitation are meant to achieve justice to all the parties before the Court. A party ought to know that after a certain period of time he will go on with his affairs without fear that the actions or omissions which were buried many years back would be resurrected and come back to haunt him. As was held by **Madan, JA** (as he then was) in **Chase International Investment Corporation and Another vs. Laxman Keshra and Others [1978] KLR 143; [1976-80] 1 KLR 891**, when the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred. It is therefore my view that Article 159 of the Constitution cannot be called in aid of the applicants herein.
17. Apart from the foregoing where a decision of the Tribunal has been adopted by the Court the law is that the former is subsumed into the latter and the former ceases to exist with the result that the only decision that can be quashed is the Magistrate’s adoptive decision. **Khamoni, J** in **R vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex parte Kariuki [2005] 2**

KLR 10 held:

“The Court judgement having been entered by a Court, in law, not only was it improper but was also irregular for this notice of motion to have been filed praying for an order of *certiorari* to quash the decision of the Land disputes Tribunal since under section 7(2) of the Land Disputes Tribunals Act the Court enters judgement in accordance with the decision of the tribunal and upon judgement being entered a decree issues and is enforceable in the manner provided for under the Civil Procedure Act. Once such a decision is adopted by a Court, it becomes a judgement of the court thereby ceasing to exist as a decision, which can be separately quashed as contemplated in this notice of motion. What has to be dealt with now is a judgement of a court and not a decision of a tribunal just as a party would have appealed against the decision of the Provincial Land Disputes Appeals Committee and not against the decision of the Land Disputes Tribunal had the appellant’s appeal in the Provincial Land Disputes Appeals Committee been heard and determined without the existence of an intervening court judgement adopting the tribunal’s decision.”

18. In this case there was no need to apply for the quashing of the decision of the Tribunal separately. However, nothing turns upon that point since the applicants also applied for the quashing of the decision of the Court.
19. I am however unable to agree with the applicants that the Court had no jurisdiction to enter the judgement based on the award of the Tribunal. Whereas the decision could be quashed on the ground that it was based on a decision which was a nullity, the Court had no option but to enter judgement based on the award. 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.
20. 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. In 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.”

21. In result, I find that the Notice of Motion dated 30th April 2007 is both misconceived and incompetent.
22. Accordingly, the same is dismissed with costs to the 3rd, 4th and 5th Respondents.

Dated at Nairobi this 15th day of May 2014

G V ODUNGA

JUDGE

Delivered in the absence of the parties

