



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

MISCELLANEOUS CIVIL APPLICATION NO. 390 OF 2005 [J.R.]

IN THE MATTER OF AN APPLICATION BY

ERICK BARASA WANYONYI FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

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

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN

KANDUYI L AND DISPUTES TRIBUNAL..... RESPONDENT

EXPARTE

ERICK BARASA WANYONYIEX PARTE APPLICANT

AND

NICASIO SIMIYU MUSE.....INTERESTED PARTY

JUDGMENT

1. The exparte applicant vide a notice of motion dated 20th June 2008 seeks the following orders;

(a). **THAT** the Honorable court be pleased to issue an order of certiorari and prohibition to remove into this court and quash the decision of the Kanduyi Land Disputes Tribunal adopted by the Bungoma SPM's court on 2nd August 2005 vide LDT no. 41 of 2005 as leave to file this application was granted on 9th June 2008 vide HIGH COURT MISC. CIVIL APPLICATION NO. 390 OF 2005 AT BUNGOMA.

(b). Costs of this application, costs in Bungoma LDT case no. 41 of 2005 and costs in High Court Misc. Civ App. No. 390 of 2005 be provided for.

2. The motion is opposed by both the respondent and the interested party. The respondent in his grounds

of opposition filed in summary raises three points i.e the motion is defective for failing to join Bungoma Senior Principal Magistrate's court in this proceeding. Secondly there is no decision apparent to quash as the tribunal award ceased to exist once it was adopted as an order of the court and finally that the suit is statutorily time-barred. The interested party on his part filed a replying affidavit and opposed the motion in three main ways. First that he sold three (3) acres of land to the exparte applicant and not 5 ½ acres as contained in the title deed. Secondly, the application was not brought within the time provided in law. Lastly the tribunal had jurisdiction to hear and determine the dispute as it concerned a claim to work and/or occupy land and/or determine the boundaries as given by dint of section 3(1) of the Land Disputes Tribunal Act.

3. The advocates on record for the parties filed written submissions to argue this motion which I have considered. The exparte applicant's submission is that the motion is merited as the Kanduyi Land Disputes Tribunal exceeded its mandate by virtue of the award they gave. The interested party submitted that the leave to file for orders of judicial review was obtained outside the time allowed under order 53 of the Civil Procedure Rules and section 9 (3) of the Law Reform Act and ought to be dismissed. They relied on the following case law to support their submissions;

(a). *Justus Makhade Iholi & another vs. Loice Alili Ombeto & 3 others [2013] eKLR,*

(b). *Oyoo & 5 others vs. Syongo & 2 Others [2005] KLR 423*

(c). *Ako Vs. Special District Commissioner Kisumu & Another [1989]KLR 163*

The respondent also submitted on the item of leave being obtained outside the six months which is against the law. The respondent submits the applicant did not explain why it took him three (3) years to obtain the leave. He also submitted that it was fatal not to make the Bungoma SPM's court a party to these proceedings yet it was its order sought to be quashed. He relied on the following case law;

(a). *Kitale Misc civil app no 55 of 2007, Sammy W. Malesi vs Republic & 2 Others*

(b). *Dickson Miricho Muriuki Vs Central Provincial LD Appeals Committee & 6 Others (2008) eKLR*

(c). *Republic vs Busia Municipality LDT & Another(2013)eKLR*

4. I have taken into consideration all the pleadings, submissions rendered and case law cited. I make an opinion that there are three issues that rise for determination in this application

i. Whether leave was obtained outside the time provided

ii. Whether failure to enjoin the Bungoma SPM's court was fatal to the application.

iii. Whether the motion has merit.

In beginning with the 1st issue, the interested party and respondent submitted that leave was obtained three (3) years from the date of the decision. They computed time by stating the Kanduyi LDT decision was adopted as an order of the court on 2nd August 2005 while leave was granted on 9th June 2008. The applicant did not submit anything on this objection. Section 9 (3) of the Law Reform Act requires a party aggrieved by a decision of a decision making body and wishes to seek orders quashing it must make an application for leave within 6 months of the date of the decision. In all the three (3) case law cited by the interested party, the notices of motion were struck out because leave was granted outside the six months. For instance in **Oyoo 5 others vs. Syongo supra** the decision sought to be quashed was made on 4th June 2004 while the application seeking leave was filed on 16th December 2004. In my computation this was 12 days outside the six months provided in law. In the case of **R. Vs. Busia Municipal Council LDT supra**, the decision sought to be quashed was made on 6th January 2012 and the application for leave made on 19th July 2012. This was about 13 days outside the six months provided in law.

5. In this motion, I find the cases cited are distinguishable because the decision herein was adopted by court on 2nd August 2005. The application for leave was made on 30th December 2005. All the parties agree that time began running from 2nd August 2005. Section 9 (3) of the Law Reform Act provides;

“In the case of an application for an order of certiorari to remove any order, judgment, decree etc, for the purpose of it 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...”(underline mine for emphasis).

In this instance, the applicant made its application for leave within 5 months from the date of the decision except the court granted the orders on 9th June 2008. The Act does not say the court must grant the orders of leave within six months. If that was the intention of the framers of the statute, they would have said so. For that reason, I dismiss the submission that the motion is statutorily time barred.

6. The respondent’s submission that failure to join the magistrate’s court that adopted the award in my view is a matter which touches on form. They relied on the decision of Koome J. (as she then was) in the case of **Sammy W. Malesi vs Republic & 2 Others** supra. In comparison to a decision of a court with similar jurisdiction, Ringera J (as he then was) in **Jotham Mulati Welamondi vs. The Chairman, Electoral Commission Kenya [2002] I KLR 486** expressed himself as follows:

“All orders of certiorari, mandamus or prohibition are issued in the name of the Republic and applications thereof are made in the name of the Republic at the instance of the person affected by the action or omission in issue.”

Nevertheless in Republic exparte Minister for Finance & The Commissioner of Insurance vs. Charles Lutta Kasamani civ. Appl (application) no. Nbi 281 of 2005, the court of appeal stated;” suffice it to say that a defect in form in the title or heading of an appeal or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment..... Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this court.”

7. Guided by the above holding of the court of appeal, I take a similar view that the failure to join the Bungoma SPM's court to this motion was not incurably defective and ought not on its own be the basis upon which an otherwise competent application be dismissed. Further as was stated by Ringera J in Jotham Mulati Welamondi case supra, prerogative orders are issued against the crown and not the magistrate's court. The crown (Republic) was a party in this motion and therefore there is no prejudice occasioned to any of the parties to this application. Consequently I also find the second objection as without merit and proceed to dismiss it.

8. The final issue is whether the motion is merited i.e did the Kanduyi Land Disputes Tribunal act in excess of its jurisdiction as claimed by the applicant? The award sought to be quashed was as follows; *that the disputed land parcel no. E. Bukusu/W. Sangalo/1268 be partitioned as follows,*

i. Claimant Nicasio Simiyu be given one (1) acre.

ii. Objector Erick Barasa be given 4 ½ acres.

iii. The panel further recommends that the land was not a straight transfer and therefore it requests for non-partisan surveyor for the correct partition on the ground.

The jurisdiction of the tribunal is given under section 3 (1) of the repealed Land Disputes Tribunal Act. The title in question is registered in the name of Erick Barasa Wanyonyi, the exparte applicant. From the reading of this award, if and when it is executed, the result will be an alteration being made in the register of the suit title. The current title deed would have to be canceled to create new titles for the one acre awarded to the interested party and the remaining 4 ½ acres retained by the exparte applicant.

Furthermore, the tribunal even questioned the manner in which the exparte applicant acquired his title when they said, “*the land was not a straight transfer.*”

9. It is my humble opinion that the interested party's claim was based on fraud because he said he sold 41/2 acres of this land to the exparte applicant yet the exparte applicant's acquired for himself title for 5 ½ acres. This was not a boundary dispute as put by the interested party as it were; he was claiming a portion of the land comprised in the suit title. The tribunal thus lacked jurisdiction to entertain such a claim as it did not fall under the 3 categories given in section 3 (1) of the Act. They have no powers to make awards which result into cancellation of titles. It follows therefore that this motion is merited and is hereby allowed with the following orders being made;

(a) The decision of the Kanduyi Land Disputes Tribunal case no. 5 of 2004 which was adopted as an order of the court in Bungoma SPMC land case no. 41 of 2005 be and is hereby called into this court and quashed.

(b) The cost of the motion is awarded to the exparte applicant.

Dated and Delivered in Bungoma this 7th day of **October 2014.**

A. OMOLLO

JUDGE