



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

E.L.C. NO 4 OF 2014

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN, EVURORE LAND DISPUTES TRIBUNAL.....1ST RESPONDENT

**SENIOR PRINCIPAL MAGISTRATE, SIAKAGO LAW COURTS.....2ND
RESPONDENT**

IRERI KIATHI.....INTERSTED PARTY

AND

NJERU KIRIMO.....EX-PARTE APPLICANT

RULING

INTRODUCTION

Mr Njeru Kirimo, the ex-parte applicant, has by his notice of motion of 13th July, 2012 sought an order of certiorari to quash the Siakago magisterial judgement and decree of 15th October, 2010, which adopted the award of Evurore Land Disputes Tribunal. The judgement and decree were made in favour of Mr Ileri Kiathi, the interested party, who by virtue of the said judgement and decree was registered as the owner of land parcel number **Evurore/Evurore/371**.

The said notice of motion is opposed by Mr Ileri Kiathi, the interested party, the Chairman of Evurore Land Disputes Tribunal and the Siakago Senior Principal Magistrate. The opposition to the notice of motion is based on grounds of law. First, the interested party and the respondents have pointed out that the motion was filed out of time. Second, they have also argued that the order sought is in vain, because it is directed against the wrong party (Chairman, Evurore Land Disputes Tribunal). The case for each party to this motion is summarized below:

The Case for Mr Njeru Kirimo, the Ex-parte Applicant.

In his written submissions, the ex-parte applicant has raised the following issues:

1. Whether this court can issue an order of certiorari to quash the decision of the Evurore Land Disputes Tribunal, which was adopted by the Siakago Senior Principal Magistrate's Court,
2. Whether the notice of motion is time barred to the extent that this court cannot entertain it and grant the remedies sought, and

3. Who is to bear the costs of this application.

Furthermore, according to the counsel for the ex-parte applicant, the Evurore Land Disputes Tribunal acted beyond its jurisdiction by making an award in favour of the interested party. In support of that contention, counsel for the ex-parte applicant has stated that the ex-parte applicant has the absolute ownership rights and interests as the registered land owner.

Additionally, the ex-parte applicant sought leave to file for order of certiorari and was granted on 2nd July, 2012. The court granted him permission to file for the order of certiorari. In counsel's view, by virtue of the grant of leave to file for an order of certiorari, the ex-parte applicant cannot be said to have filed his application out of time. In support of his submission, he has cited **Article 47 of the 2010 Constitution** which gives every person the right to administrative action that is expeditious, efficient and procedurally fair. He has also relied on **Section 3 of the Environment and Land Court Act**, which enables this court to facilitate the expeditious, proportionate and accessible resolution of disputes. Finally, he has cited **Section 13(3)** of the same Act which gives jurisdiction to this court to determine applications for redress of infringement of a person's rights to property and he has stated that the limitation of time does not prevent him from approaching this court.

In all fairness to counsel, he has also pointed to the supervisory jurisdiction of this court over subordinate courts, local tribunals and authorities as clearly set out in **Section 13(1) of the Environment and Land Court Act** in support of his application. The sum total of counsel's submission is that the limitation of time, which is six months within which to file for an order of certiorari is not a barrier to the court in granting the ex-parte applicant, the order sought. He has therefore urged this court to allow his application and issue an order of certiorari to quash the order of the Evurore Land Disputes Tribunal. He has also submitted that the ex-parte applicant should be awarded costs of this application.

The case for Mr Ireri Kiathi, the interested party:

In his submissions, counsel for the interested party has stated that the notice of motion is fatally defective, because leave was not granted to the ex-parte applicant to file it out of time. According to him, the application is time barred. In support of his submission, he has cited **Order 53, Rule 7 of the Civil Procedure Rules** and **Section 9(3) of the Law Reforms Act**, which appear to support his submission. He has therefore urged the court dismiss the application with costs to the interested party.

The case for the Chairman of Evurore Land Disputes Tribunal, First Respondent and the Senior Principal Magistrate's Court at Siakago, Second Respondent

The Hon. Attorney General as Counsel for the two respondents has raised the following issues in his submission:

1. Whether this court can issue an order of certiorari to quash the decision of Evurore Land Disputes Tribunal, which was adopted as an award number 18 of 2010 by the Senior Principal Magistrate Court at Siakago on 27th April, 2010,
2. Whether the ex-parte applicant's notice of motion is statute barred to the extent that this court cannot entertain it and grant the remedies sought.
3. Who is to bear the costs of this application.

The Hon. The Attorney General in his written submissions on behalf of the two respondents has urged this court to dismiss the application of the ex-parte applicant. According to him, the motion for the order of certiorari is time barred. Secondly, he has submitted that the order of certiorari is not one of the efficacious order in respect of this judicial review application. He has also submitted that if the court were to issue the order of certiorari, it will amount to issuing an order in vain. The basis of his submission is that the Evurore Land Disputes Tribunal award had been adopted as judgement of the Senior Principal Magistrate Court at Siakago in award number 18 of 2010 on 27th April, 2010.

Finally, he has submitted that there was inordinate delay on the part of the ex-parte applicant in

filing his application, that was time barred by one year and two months. This computation of one year and two months is based on the fact that the award sought to be quashed was made on 30th March, 2010 and leave to apply for an order of certiorari was filed on 6th July, 2011.

It is for the foregoing reasons that he has urged the court to dismiss this application with costs to the first and second respondents.

ISSUES FOR DETERMINATION BY THE COURT:

Having perused the submissions and the supporting affidavits of the parties, the following are the issues for determination:

1. Whether the notice of motion is time barred in terms of Section 9(3) of the Law Reform Act Cap 26 of the Laws of Kenya as read with Order 53 Rule 7 of the Civil Procedure Rules.
2. Whether an order of certiorari can be directed to the Chairman of Evurore Land Disputes' Tribunal to quash the tribunal's award made on 30th March, 2010 in its tribunal case number 417 of 2010, which was adopted as the magisterial court judgement in case number 18 of 2010 by the Senior Principal Magistrate at Siakago Court.
3. Whether a court is entitled to issue an order in vain.
4. Who is to bear the costs of this motion.

THE APPLICABLE LAW

The provisions of the law that govern the issuance of the order of certiorari are found in **Section 9(3) of the Law Reforms Act, Chapter 26 of the Laws of Kenya**. There are further enabling provisions in **Order 53 Rule 7 of the Civil Procedure Rules**. In addition to these statutory provisions, there are superior court judgements that have judicially interpreted these provisions.

According to Section 9(3) of the Law Reform Act, the order for certiorari should be applied for not later than six months from the order, judgement or proceedings complained of. In terms the provisions of that section are as follows:

“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 judgement, order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law; and where that judgement, 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”

In addition to the provisions of **Section 9(3) of the Law Reform Act**, there are further enabling provisions in **Order 53 Rule 7 of the Civil Procedure Rules** which provide as follows:

“Leave shall not be granted to apply for an order of certiorari to remove any judgement, order, decree, conviction or other proceeding 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 shorter period as may be prescribed by any Act; and where the proceeding 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”.

The combined effect of the foregoing statutory provisions is that an application for the order of certiorari must be made within six months following the order, judgement or proceeding that is sought to be quashed. These provisions are couched in mandatory language. These statutory provisions have been judicially approved in **An application by Gideon Waweru Gathunguri (1962) E.A 520**. In that case, it was held that the provisions of Section 9(3), Law Reform Miscellaneous Provisions) Ordinance, 1956

imposed an absolute period of limitation of six months. That court further held that leave to file for an order of certiorari, should not have been granted. That court stated thus:

“If the limitation period depended only upon rules of court incorporated in the Civil Procedure Rules then the time for the application could have been extended under O. XLIX, R. 5 OF THE Civil Procedure Rules. This rule, however, cannot have effect to defeat the express limitation absolutely imposed by s. 9 sub-s (3) of the Law Reform (Miscellaneous Provisions) Ordinance, 1956”.

In that case, the Supreme Court of Kenya (now renamed the High Court of Kenya) was faced with a situation in which a judge of that court had granted ex-parte leave to the applicant to apply for an order of certiorari by oversight because the provisions as to limitation were not brought to the notice of the judge who granted leave. During the inter-partes hearing, a bench of two judges (Rudd Ag CJ and Wicks, J) held that it could not revoke the leave that had been granted. Instead, they dismissed the main application for the grant of the order of certiorari even though leave had been granted. The reason they gave was that the order of certiorari was a discretionary remedy and for that reason the court could not exercise its discretion in granting it because the application was time barred. As a result, they dismissed the application.

ANALYSIS OF THE FACTS IN THE LIGHT OF THE APPLICABLE LAW:

The award sought to be quashed was made on 30th March, 2010 by Evurore Land Disputes Tribunal in its tribunal case number 417 of 2010. Furthermore, the application for leave to apply for an order of certiorari was made on 10th June, 2011.

It is clear that the ex-parte applicant filed his application out of time. He was late by one year and two months. This is equally clear from the affidavits and statement of facts of the ex-parte applicant. The application was filed one year and two months after the occurrence of the proceedings that are complained of. It shows that there was inordinate delay by the ex-parte applicant in prosecuting his motion and being a discretionary remedy, the delay operates against the grant of that order in his favour.

The ex-parte applicant has cited **Article 47 of the 2010 Constitution**. The provisions of that Article provide as follows:

47(1) “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

According to the ex-parte applicant, the provisions of this Article are supportive of his application for the grant of the order of certiorari. With respect to the ex-parte applicant, these provisions are not of any assistance to him. What should have been challenged in these proceedings is the magisterial court judgement and decree that was issued on 15th October, 2010, by the Senior Principal Magistrate Court at Siakago in its case number 18 of 2010, which was subject to appeal in terms of **section 65 of the Civil Procedure Act or Judicial Review under Order 53 Civil Procedure Rules**. In the circumstances, this cannot be said to be part of an administrative action that is contemplated under **Article 47**.

Furthermore, the ex-parte applicant has also cited **Section 3 of the Environment and Land Court Act**. These provisions merely provide that the court is to facilitate the just, expeditious and proportionate and accessible resolution of disputes. They similarly do not assist the ex-parte applicant. The reason for this is that the ex-parte applicant is barred by statute in filing for an order of certiorari. What is contemplated by the above **Section 3** are proceedings that have been brought in conformity with the applicable law.

Finally, the ex-parte applicant has also invoked the provisions of **Section 13(1) of the Environment and Land Act**, which provisions confer on this court both the original and appellate jurisdiction to determine matters brought to court. The exercise of these powers by the court are also regulated by law. This means that the matter complained of should have been filed in accordance with the provisions of

Order 53 Judicial Review and Section 9(2) of the Law Reform Act, or Section 65, Civil Procedure Act. These provisions therefore do not assist the ex-parte applicant.

Counsel also further submitted that the court ought to act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. The matter under consideration is regulated by **Section 9(3) of the Law Reform Act**. The provisions of the Law Reform Act cannot be termed as technical rules of procedure and they are also not rules of evidence. In the circumstances, these provisions are of no assistance to the ex-parte applicant.

The application of the ex-parte applicant is time barred in terms of **Section 9(3) of the Law Reform Act**. It was brought after one year and two months which is contrary to the six months limitation period. Additionally, the order of certiorari is a discretionary remedy. The inordinate delay on the part of the ex-parte applicant militates against the grant of the order in his favour. There is yet another barrier in the grant of that order of certiorari in favour of the ex-parte applicant. That barrier is in relation to the adoption of the award by the Senior Principal Magistrate's court at Siakago as a Court Judgement. By virtue of that adoption, the award ceased to exist as a separate entity. In short, it disappeared from existence. The ex-parte applicant should have sought order of certiorari directed against the said magistrate's court and not against the Evurore Land Disputes Tribunal which issued the award.

Furthermore, the statute that set up the Evurore Land Dispute Tribunal amongst other tribunals, has since been repealed by **Section 31 of the Environment and Land Court Act**. The provisions of the repealing statute clearly state that the Land Disputes Tribunal Act number 18 of 1990 has been repealed.

Assuming that this court was to issue an order of certiorari directing that the award of the Evurore Land Disputes Tribunal be quashed, this court will be issuing an order in vain. The reason for this is that Evurore Land Disputes Tribunal is no longer in existence. This issue of not issuing orders in vain was clearly stated by the High Court (Odunga, J) in **Joccinta Wanjiru Raphael V William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 others (2014) eKLR**. According to that court, the court should not issue orders in vain even where it has jurisdiction to do so. In the case under reference, the repeal of the Land Disputes Tribunal Act has brought the matter to the end in the sense that there is no tribunal in regard to which the order of certiorari should be directed to.

VERDICT AND DISPOSAL OF THE APPLICATION:

The ex-parte applicant's application is hereby dismissed because it is time barred. Additionally, as regards the issue of costs, the interested party, the first respondent and the second respondent are entitled to the costs of this application as provided for in **Section 27 of the Civil Procedure Act**, for they have succeeded in this application.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this ...**6th** ...day of ...
November,...**2014**

In the presence of

MS Muriuki for ex-parte applicant

And in the absence of both Mr Okwaro for the interested party and the Attorney General for 1st and 2nd respondents.

Court clerk Kirong

Right of Appeal under Order 43(7) Rule 1(1) (aa) explained to the parties.

J.M. BWONWONGA

JUDGE