



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

JUDICIAL REVIEW NO. 11 OF 2012

IN THE MATTER OF AN APPLICATION BY PETER MURIUKI NJERI DOMINIC NJERU ANTHONY AND EMILIO NYAGA NJIRU FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAND DISPUTE TRIBUNAL ACT NO. 18 OF 1990 LAWS OF KENYA

AND

IN THE MATTER OF GACHOKA LAND DISPUTE TRIBUNAL CASE NO. LDT 3/2010

BETWEEN

NJIRU MBITE; PETER MURIUKI NJIRU; DOMINIC NJERU ANTHONY & EMILIO NYAGA NJIRU; DOMINIC NJERU ANTHONY & EMILIO NYAGA NJIRU

AND

IN THE MATTER OF THE PRINCIPAL MAGISTRATE COURT AT SIAKAGO LAND

DISPUTE CASE NO. 18 OF 2011

PETER MURIUKI NJIRU1ST APPLICANT

DOMINIC NJERU ANTHONY2ND APPLICANT

EMILIO NYAGA NJIRU3RD APPLICANT

VERSUS

GACHOKA DISTRICT LAND TRIBUNAL1ST RESPONDENT

PRINCIPAL MAGISTRATE SIAKAGO2ND RESPONDENT

AND

NJIRU MBITIINTERESTED PARTY

JUDGMENT

By his Chamber Summons application dated 17th August, 2011, the applicant sought leave to apply for an order of certiorari to bring to this Court for quashing the decision of the Gachoka Land Dispute Tribunal as contained in the award/order in Tribunal Case No. 3 of 2010 made on 4th April 2011 in respect of land parcel MBETI/GACHURIRI/1267, 1268, 1269, 1275 and 1261 and proceedings in Land Dispute Tribunal No. 18 of 2011 before Siakago Principal Magistrate's Court including the Decree and Orders issued on 21st July 2011 where the Respondent purported to determine the issue of ownership of the above registered land and further ordering the re-distribution of the same without and in excess of its jurisdiction under the Act.

The matter was placed before Muchelule J. on 24th August, 2011 who granted the leave sought and further ordered that the substantive Notice of Motion be filed in 21 days.

The applicant however filed the Notice of Motion on 18th October, 2011 and in his replying affidavit in opposition to the application, the interested party NJIRU MBITI has similarly deponed that the Notice of Motion was filed fifty four (54) days late and should be dismissed with costs.

Submissions have been filed by both sides which I have considered together with the application.

The issue here is whether infact there is a proper application before this Court.

As stated earlier, leave to file Judicial Review proceedings was granted by Justice Muchelule on 24th August, 2011 who directed that the substantive motion be filed in 21 days. This was no doubt in compliance with the provisions of **Order 53 Rule 3 (1) of the Civil Procedure Rules** which provides as follows:-

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by Notice of Motion to the High Court, and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the Notice of Motion and the day named therein for hearing”

It is not in dispute that pursuant to the leave granted on 24th August, 2011, the substantive Notice of Motion was infact filed on 18th October, 2011. That was some fifty four (54) days after the leave was granted which is well beyond the twenty one (21) days granted by the Judge and stipulated in the law as the period within which the Notice of Motion should be filed. In response to this failure to file the Notice of Motion within 21 days, Mr. Mungai for the applicant has urged me to ignore that lapse as a mere technicality which in any case has not prejudiced the respondent. Counsel has further invoked **Article 159 of the Constitution** on the need for doing justice without undue regard to procedural technicalities. Mr. Mungai has also invoked the Double O principle and cited the case of **HUNKER TRADING COMPANY LTD VS ELF OIL KENYA LTD C.A CIVIL APPLICATION NO. 6 OF 2010 (NBI)**. On behalf of the interested party, Mr. Muyodi submitted that the Notice of Motion having been filed outside the 21 days without leave, the same is fatally defective and ought to be dismissed.

With regard to the Double O or Oxygen principle raised by Mr. Mungai, all I can say is that the said principle is meant to encourage good management of cases and this includes obedience to Court orders and directions. Having failed to comply with the order of Justice Muchelule dated 24th August, 2011, the applicant is himself in breach of the Double O principle and he cannot now invoke the same to assist him.

On the issue of the lapse to file the Notice of Motion within 21 days as directed being a mere irregularity or technicality which can be cured by **Article 159 of the Constitution**, all I can say is that there is no application before me for the extension of the period of 21 days within which the Notice of Motion ought to have been filed as directed by Justice Muchelule and also as required by law. If such application for extension of time had been before me, then I would have considered it on its own merits. For now, what is clear is that the Notice of Motion was filed outside the 21 days and no explanation has been offered for

that lapse. In the circumstances, there is no proper application before me. In the case of WILSON OSOLO VS JOHN OJIAMBO OCHOLA AND THE ATTORNEY GENERAL C.A. CIVIL APPEAL NO. 6 of 1995 (NBI), the Court of Appeal while considering Order 53 Rule 3 (i) of the Civil Procedure Rules which provides for the 21 day period within which to file the Notice of Motion addressed itself as follows:-

“It was a mandatory requirement of Order 53 Rule 3 (i) of the Civil Procedure Rules then (and it is now again so) that the Notice of Motion must be filed within 21 days of grant of such leave. No such Notice of Motion having been apparently filed within 21 days of 15th February, 1982 there was no proper application before the Superior Court. This period of 21 days could have been extended by a reasonable period had there been an application under Order 49 of the Civil Procedure Rules” emphasis added.

What I understood the Court of Appeal to be stating is that whereas the 21 day period can be extended in appropriate cases, a Notice of Motion filed outside the 21 days without leave cannot be a proper application. That decision binds this Court.

Ultimately therefore, the Notice of Motion filed herein on 18th October, 2011 is hereby dismissed with costs.

B.N. OLAO

JUDGE

5TH DECEMBER, 2014

5/12/2014

Before

R. Limo

Mbogo – CC

Mr. Magee holding brief for Mr. Mungai for Ex-parte Applicant – present

COURT: Judgment delivered in the presence of Mr. Magee holding brief for Mr. Mungai for Ex-parte Applicant present

Mr. Momanyi for Interested party absent.

R. LIMO

JUDGE

5TH DECEMBER, 2014