



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**MISC. CIVIL APPLICATION NO. 127 OF 2012.**

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT**

**AND**

**IN THE MATTER OF AN APPLICATION BY OCHEREBUKU BARASA AND AGGREY**

**SHIKUKU BARASA FOR ORDERS OR CERTIORARI.**

**BETWEEN**

**REPUBLIC .....RESPONDENT**

**VERSUS**

**BUSIA MUNICIPALITY LAND DISPUTES TRIBUNAL .....RESPONDENT.**

**RHODA BARASA AND OTHERS.....INTERESTED PARTY**

**R U L I N G.**

**OCHEREBUKU BARASA and AGGREY SHIKUKU BARASA** hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> Applicant, through M/S. Bogonko, Otanga & co. Advocates filed the ex parte application by chamber summons under Order 53 Rule 1 and 2 of the Civil Procedure Rules praying for the following:

1. That leave to apply an order of certiorari to quash the findings and award of Busia Municipality Land Disputes Tribunal as adopted by Busia SPM CC. Land case No. 126 of 2011.
2. That the grant of leave to operate as stay of execution.
3. That the cost to abide the outcome of the main application.

The application is filed together with the Statutory Statement and verifying affidavit sworn by Ocherebuku Barasa on 14<sup>th</sup> May, 2012 in which the following grounds among others are set out.

1. That the Applicants are the registered owners of Land parcel South Teso/Angoromo/7452 and 7453.
2. That on or about 6<sup>th</sup> October, 2011 the Interested party and others filed a claim before Busia Municipality Disputes Tribunal claiming that the Applicants had obtained registration fraudulently.

3. That the Busia Land Disputes Tribunal ordered that the two parcels of land be transferred to the names of the Interested party and the decision was adopted as the court's judgment on 6<sup>th</sup> January, 2012 in Busia Land case No.126 of 2011.
4. That Busia Municipality Land disputes tribunal did not have jurisdiction to entertain the claim in view of the provisions of the law.
5. That the interested party was claiming the parcels of land in capacity as the wife of the late Barasa Karani without having obtained letters of administration in respect of the estate and therefore lacked capacity to file the claim.

When this matter came up for hearing on 20<sup>th</sup> May, 2013, the court requested Mr. Otanga Advocate, representing the Exparte Applicant, to address the court on whether leave would be granted outside the six months period. This was in view of the fact that the tribunal decision was adopted by the Magistrates court on 6<sup>th</sup> January, 2012 and the application was filed on 19<sup>th</sup> July, 2012. Counsel requested for time to prepare and filed written submission on 22<sup>nd</sup> May, 2013. In the submission counsel referred the court to the following two cases in support of the view that the proceedings and the order of the tribunal was a nullity and the court has inherit powers to quash nullities and illegalities.

- a. **REPUBLIC -VS- JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBARG AFFAIR AND 3 OTHERS, EXPARTE MWALULU & OTHERS (2004)eKLR.**
- b. **MUNGAI NJOROGE –VS- GITHUNGURI LAND DISPUTES TRIBUNAL & OTHERS (2007)eKLR.**

The issue for the court's consideration is whether or not this court has the power to extend the period of filing for leave to apply for certiorari orders outside the six months period. The two decisions above were not dealing with an application for leave to file for certiorari orders. The courts were dealing with substantive applications and I agree with the positions taken in respect of orders that are nullities and illegalities. This court is dealing, not with the substantive application, but with an application for leave to file the substantive application. The court cannot therefore at this stage make a decision as to whether or not the orders made by the tribunal were nullities or illegalities.

The heading of the application shows that is brought under order 53 Rule 1 and 2 of the Civil Procedure Rules. Rule 2 requires that an application for leave be made not later than 6 months after the date of the order complained of. This rule is in the same terms with section 9 (3) of the Law Reform Act and superior courts have held that this court has no powers to the extend the 6 months period set by the statute. The following cases are relevant on the issue.

- a. **NYERI HCC. MISC. APP. NO.90 OF 2003.**

**MOTOKAA NTHAUTHO – APPLICANT**

-VS-

**JOSEPH NJERU & 3 OTHERS RESPONDENTS.**

- b. **JAMES GITHINJI KIARA –VS- WILLIAM WACHIRA MWANIKI (2005) eKLR.**
- c. **REPUBLIC –VS- CHAIRMAN MERU CENTRAL DISTRICT LAND DISPUTE TRIBUNAL AND 2 OTHERS, EXPARTE STEPHEN MUKUMU MWIRICHIA (2006)eKLR .**
- d. **NYERI HCC. MISC. APP. NO.112 OF 2008 DICKSON MWIRICHO MURIUKI**

-VS-

**CENTRAL PROVINCIAL LAND DISPUTES APPEAL COMMITTEE & 6 OTHERS**

I concur with the position on the issue of lack of jurisdiction to extend the statutory period of six months as held in the cases cited above. The Court of Appeal has also in several cases restated the position contained in the above cases as shown herein below:

a. **KIMANZI MBOO –VS- DAVID MULWA, COURT OF**

**APPEAL NO. 233 OF 1996** where the court held that under the Law Reform Act, as well as Order 53 Rule 2 of the Civil procedure Rules no application for leave can be entertained unless it is made within 6 months of the date of the award or order.

b. **WILSON OSOLO –VS- JOHN OJIAMBO & ANOTHER (1996) eKLR** where the Court of Appeal held.

.....” **It can readily be seen that Order 53 Rule 2 is derived verbatim for section 9 (3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules that the procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act.”**

The provisions of Order L111 Rule 2 of the then Civil Procedure Rules is in same terms with Order 53 Rule 2 of the Civil Procedure Rules 2010 which is also in the same terms with section 9 (3) of the Law Reform Act. The decision of the Court of Appeal on the interpretation of the two provisions is binding on this court. This court has no jurisdiction to extend the six months period within which an application for leave to apply for certiorari orders is required to be filed. For this reasons the application dated 21<sup>st</sup> May, 2012 is dismissed with costs.

**S. M. KIBUNJA**

**JUDGE.**

**Dated this 4<sup>th</sup> day of July, 2013**