



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 23 OF 2015

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF WRIT OF *CERTIORARI*

IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT

IN THE MATTER OF THE REGISTERED LAND ACT

IN THE MATTER OF JUDICIAL REVIEW BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

AND

DOMINIC D. MBOGO.....EX-PARTE APPLICANT

AND

DICKSON KANYAKI SIMON.....1ST INTERESTED PARTY

NAZARIO NJAGI KANYAKI.....2ND INTERESTED PARTY

JUDGEMENT

1. The dispute before this court has a chequered history spanning more than a decade. The land dispute involved members of one family, that is, a father and his sons over what was then registered as *Title No. Kagaari/Kanja/1038* (hereinafter the *suit property*). The father, who was the 1st interested party herein is long deceased leaving his two sons to continue with the legal battle.
2. The *ex-parte* Applicant (hereinafter *the Applicant*) appears to have acquired the suit property from his grandfather whereupon he was registered as proprietor in 1980 or thereabouts. Whereas he asserted absolute ownership of the suit property his father and siblings thought otherwise. They contended that the Applicant was a trustee and held the property on his own behalf and on behalf of his family members.
3. In a bid to terminate the perceived trust and obtain their share of the suit property the Applicant's father and two of his siblings sued the Applicant in *SPMCC No. 46 of 1998*. The said suit was struck out by the Magistrate's court on the ground did that it had no jurisdiction to deal with trust concerning land. The parties were advised that only the High Court could entertain a question of trust. Whether such advice was sound or not is beyond the scope of this judgement.
4. The record shows that the aggrieved family members did not give up on the matter. They apparently proceeded to the Embu District Land Disputes Tribunal (hereinafter *the Tribunal*) which entertained their claim and proceeded to make an award in their favour. By the said award, the Applicant was to get 4 ½ acres, his father was to get ½ acre whereas his two siblings, Nazario Njagi Kanyaki and Kelvin Murimi were to get one (1) acre each.
5. The award of the Tribunal was apparently adopted as a decree by the Chief Magistrate's Court at Embu in *Award Case No. 36 of 2007*. The record further shows that the said decree was executed and the suit property sub-divided accordingly.
6. By a chamber summons dated 6th December 2007 filed by the firm of Njue Njeru & Co Advocates the Applicant sought leave of the High

Court to apply for an order of *certiorari* to remove into the High Court and quash the decision of the Tribunal dated 22nd August 2007 on the ground that the Tribunal lacked jurisdiction. The said application was supported by a 3-paragraph statutory statement which gave neither a description of the parties nor the specific reliefs being sought as required under **Order 53 of the Civil Procedure Rules**. (hereinafter the *Rules*)

7. The record of proceedings indicates that the Applicant never prosecuted the said chamber summons for at least seven (7) years in consequence of which it was dismissed for want of prosecution on 18th June 2014.

8. It would appear that the Applicant's first advocate died during the pendency of the said chamber summons. Consequently, on 13th November 2014 the firm of P.N. Mugo & Co Advocates filed a notice of motion dated 7th November 2014 seeking the setting aside of the dismissed order made on 18th June 2014. The said application as apparently allowed on 10th May 2016.

9. The record further shows that the Applicant did not prosecute the reinstated chamber summons for nearly two years. The said application for leave was eventually heard on 8th February 2018 when leave was granted. The court directed the Applicant to file the substantive motion within 14 days and serve all interested and affected parties within 14 days and file an affidavit of service. The court further directed that the said leave shall operate as stay. However, as shall emerge in the course of this judgement the order of stay was made in error as the award and decree the subject of the challenge had long been implemented.

10. The Applicant filed his notice of motion dated 26th February 2018 on 27th February 2018. However, the record shows that the Applicant also filed a new statutory statement, a new verifying affidavit and supporting affidavit without leave of court in violation of the provisions of **Order 53 Rule 4 of the Rules**. In the said supporting affidavit, the Applicant stated that his father (the 1st interested party) was long deceased and that he was being represented by the 2nd interested party since they had jointly sued him in previous proceedings.

11. The court has perused the affidavit of service sworn by the process server called Wilfred Njeru Kigoro on 15th May 2018. It states that on 1st March 2018 he travelled to Kathande village, Kagaari North location and served the notice of motion upon the 2nd interested party. There is no averment in the affidavit that either the 1st interested party or his legal representative was served. There is also no indication of the Applicant's other brother Kelvin Murimi having been served. Kelvin was awarded one acre out of the suit property by the Tribunal hence he would clearly be affected if the court were to grant the Applicant the orders sought in the judicial review application.

12. The Attorney General filed grounds of opposition dated 15th August 2018 on behalf of all the Respondents. It was contended that the Applicant's notice of motion dated 26th February 2018 was fatally defective for contravening the provisions of **Order 53 Rules 1 and 7 of the Rules**. It was further contended that the application was misconceived, incompetent and an abuse of the court process.

13. The 1st interested party did not file any response to the application since he was deceased. There is no evidence on record to demonstrate that his legal representative, if any, was served with the application for judicial review. The Applicant's other sibling, Kelvin Murimi who is evidently an affected party and who ought to have been joined as an interested party was not served either. So, he did not file a response to the said application.

14. The 2nd interested party filed a replying affidavit on his own behalf sworn on 10th May 2018. He confirmed the existence of the award of the Tribunal and the resultant decree issued in *Embu CMCC Award Case No. 36 of 2007*. He also stated that the 1st interested party was deceased and that no personal representative had been appointed to administer his estate.

15. The 2nd interested party further stated that the suit property i.e. parcel No. 1038 was no longer in existence since the same had been subdivided and given new parcel Nos. being *Kagaari/Kanja/9570, 9569, 9568 and 9567*. He stated that the Applicant had failed to disclose that he (2nd interested party) had already obtained a title deed for *Kagaari/Kanja/9569* and that he had extensively developed the said land by erecting a permanent house thereon, planting tea bushes, coffee stems, bananas and other crops. He attached photographs of the said developments to his affidavit.

16. When the said application was listed for hearing on 16th May 2018, it was directed that it shall be canvassed through written submissions. The parties were given various timelines for filing and exchanging their respective submissions. The record shows that the Applicant filed his submissions on 19th June 2018, the Respondents filed theirs on 16th August 2018 whereas the 2nd interested party filed his on 21st September 2018. The 1st interested party could not file submissions for obvious reasons.

17. The court has considered the Applicant's notice of motion dated 26th February 2018, the statutory statement and verifying affidavit filed with the chamber summons dated 6th December 2007, the Respondent's grounds in opposition thereto as well as the 2nd interested party's replying affidavit. The court has also considered the written submissions on record. The court is of the opinion that the following issues arise for determination;

- a. Whether the application for judicial review is defective and in contravention of **Order 53 of the Rules**.
- b. Whether the Applicant has made out a case for the grant of an order of *certiorari*.
- c. Who shall bear the costs of the application.

18. It was submitted by the Respondents that the notice of motion dated 26th February 2018 was filed out of time since it ought to have been filed within 6 months from the date of the order or decree being challenged as required under **Order 53 Rule 2 of the Rules**. It was

submitted that the award of the Tribunal was made in 2007 and the same adopted as a decree of the court the same year. The Respondent relied on the case of **Kenya Breweries Ltd Vs Municipal Council of Mombasa & 4 Others (2009) eKLR** in support of the submission that the application was time-barred.

19. The second violation alleged by the Respondent was with respect to the requirements of **Order 53 Rule 7 (1) of the Rules**. That rule stipulates as follows;

“7 (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.”

20. The Applicant did not address the issue of the application for judicial review being statute barred under **Order 53 Rule 2 of the Rules**. The court has considered the issue carefully and is satisfied that there was no violation of the said rule. The said rule provides that;

“(2) Leave shall not be granted to apply for an order of certiorari to remove any judgment, 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.”

21. It is evident that what is required to be filed within 6 months is the application for **leave** and not the substantive notice of motion for judicial review. The record shows that the chamber summons for leave dated 6th December 2007 was filed on 6th December 2007 before the lapse of 6 months from both the date of the Tribunal’s award and the subsequent decree. The Applicant’s undoing was his failure to prosecute the said application for leave for other ten (10) years.

22. On the issue of violation of **Order 53 Rule 7 (1) of the Rules** it is evident from the record that there was no compliance by the Applicant. He did not lodge a copy of the award of the Tribunal verified by affidavit with the Registrar of the court and neither did he account for his failure to do so. The court is, however, of the view that such failure is not fatal and it does not invalidate the proceedings. There is a copy of the award and the decree on record though not verified by affidavit. There is no evidence that the Respondents or any other parties have suffered any prejudice by reason of such default. The court shall consequently invoke **Article 159 (2) (d) of the Constitution of Kenya and section 19 (1) of the Environment and Land Court Act, 2011** to consider and determine the application without undue regard to procedural technicalities.

23. The 2nd issue for consideration is whether the Applicant is entitled to an order of *certiorari* to quash the award of the Tribunal dated 22nd August 2007. The court is aware that one of the purposes of judicial review of administrative action is to ensure that administrative agencies act fairly and lawfully towards the citizen in the decision making process. As was held in the case of **Municipal Council of Mombasa Vs Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, the judicial review court is never concerned with the merits of a decision but the decision making process. In the said case it was observed, *inter alia*, that;

“Judicial review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision...”

24. It must also be remembered that an order of judicial review is discretionary. It is not granted as a matter of course. It may be declined even where an Applicant has satisfied the formal requirements for the grant of such an order. It may be declined where a matter has been overtaken by events or where it would not serve any useful purpose. It may be declined where it is not the most efficacious remedy.

25. The gist of the Applicant’s complaint is that the Tribunal either had no jurisdiction or that it exceeded its jurisdiction in entertaining the land dispute and in making the award. That may well have been the case. However, the court is not inclined to grant the application for the following reasons. First, the 1st interested party is deceased and there was no service upon his personal representative, if any. It is evident that no effort was made by the Applicant to undertake substitution even though he was named as an interested party. It would, therefore, be in violation of the rules of natural justice and the purpose of judicial review to condemn the 1st interested party unheard.

26. The second reason is that one of the Applicant’s brothers, Kelvin Murimi was not served with the application for judicial review despite being a beneficiary of a portion of the suit property. It is evident from the affidavit of service on record that the Applicant did not comply with the court order made on 8th February 2018 requiring service upon all affected parties. It would be a violation of the cardinal rules of natural justice and fair hearing to condemn such a person unheard. The court is not prepared to make any adverse order against such a person.

27. The 3rd reason is that the suit property which was the subject of the dispute amongst the parties is no longer in existence. Although the Applicant failed to make such a disclosure in his notice of motion, it is apparent from the replying affidavit of the 2nd interested party that the suit property was subdivided into several new parcels and shared out. The 2nd interested party was registered as proprietor of one of the resultant parcels i.e. parcel No. 9569 which he has extensively developed and settled upon. It would, therefore, appear that the award of the Tribunal and consequent decree have been fully executed and perfected.

28. It is evident from the documents on record that the suit property was sub-divided a long time ago and the relevant mutation registered in 2014. The Applicant did not make a candid and faithful disclosure of all material facts when he prosecuted his application for leave on 8th February 2018. As a consequence, the court was misled into granting a stay of implementation of an award which had long been executed and perfected. The Applicant did not even attempt to make a full disclosure in his written submissions. Such lack of candour and faithful disclosure may also disentitle a party from obtaining a prerogative order.

29. The 3rd and final issue is on costs of the application. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant should normally be awarded the costs of the suit unless, for good reason, the court directs otherwise. The court is aware that the warring parties herein are members of the same family. The order which commends itself to the court is for each party to bear his own costs.

30. The upshot of the foregoing is that the court finds no merit in the Applicant's application for judicial review. Consequently, the notice of motion dated 26th February 2018 is hereby dismissed. Each party shall bear his own costs.

31. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH** day of **FEBRUARY, 2019**.

In the presence of Mr. Njiru Mbogo holding brief for Mr P.N. Mugo for the Applicant, 2nd interested party in person and in the absence of the Respondents.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

28.02.19