



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC MISC. APPLICATION NO. 21 OF 2018**

**WILLIAM SHIMONYELE MUSHILING'ANI.....APPLICANT**

**VERSUS**

**CHAIRMAN LAND DISPUTE TRIBUNAL**

**(ILEHO DIVISION).....RESPONDENT**

**(THROUGH THE ATTORNEY GENERAL)**

**ALBERT MUSHIULING'ANI SHIMONYELE**

**RICHARD CHELOLI SHIMONYELE.....INTERESTED PARTIES**

**RULING**

The application is dated 1<sup>st</sup> August 2018 and is brought under order 53 rule 1, 2 and 3 of the Civil Procedure Rules seeking the following orders;

1. That the applicant be granted leave to apply for an order of certiorari to remove into this court and quash the decision of the Ileho division land disputes tribunal dated 21<sup>st</sup> September, 2011 and adopted vide Kakamega CMCC miscellaneous award No. 50 of 2011 on the 6<sup>th</sup> December, 2012 concerning land parcel number Kakamega/Lubao/456.
2. That the leave sought herein if granted, do operate as a stay of execution of the aforesaid tribunal decision and subsequent judgment of the lower court in respect thereto pending the hearing and final determination of the intended substantive application for an order of certiorari or until further orders of this honourable court.
3. That the costs of this application be provided for.

It is grounded upon the annexed affidavit of William Shimonyele Mushiling'ani and on the following general grounds, that the trial tribunal exceeded its powers by purporting to subdivide and/or deprive the applicant his land parcel number Kakamega/Lubao/456. That illegal and/or irregularities committed on the aforesaid parcel title indicating clear evidence of fraudulent transaction. That the applicant will suffer irreparably if the decision and judgment aforesaid is affected. That the applicant has subsequently met village elders and the provincial administration officer, the interested parties and they have mapped out an acceptable and reasonable sub-division of applicants land.

The applicant submitted that, he is the registered proprietor of the Land No. Kakamega/Lubao/456 after inheriting the same from his father (Annexed marked "WSM 1" is a copy of official search). That the interested parties herein are his sons and they have been living peacefully on the aforesaid suit land. That the interested parties herein filed a claim in the Ileho Division Land dispute tribunal being case number 6 of 2011. That the said claim was heard, but the tribunal acted ultra vires of its mandate by awarding the interested parties herein 2.3 acres and in the due cause was left with 3.4 acres of the aforesaid land together with his wife and (12) other children. (Annexed and marked "WSM 2" is a copy of the proceedings and ruling of the tribunal case). That the said tribunal decision was filed in court for adoption vide Kakamega CMCC miscellaneous award No. 50 of 2011. That thereafter he filed an appeal against the tribunal ruling vide Kakamega High Court Civil appeal No. 2 of 2013 after obtaining stay of execution of the former tribunal ruling. That his said appeal was struck out on technicality grounds. That he was advised in the judgment of the said appeal that he ought to file a judicial review in order to quash the tribunal ruling (Annexed and marked "WSM 3" is a copy of the said judgment).

The respondent herein opposed the application on grounds that the instant application for leave to apply for orders of Judicial Review is fatally defective and against the provisions of order 53 rule 2 of the Civil Procedure Rules, 2010. That there is no prima facie case for leave to be granted. That the applicant has not fulfilled the conditions for grant of orders of leave to operate as stay.

The interested parties submitted that, an application orders of Judicial Review under the provisions of order 53 rule 2 of the Civil Procedure Rules, 2010 must be brought within six months. This is now six years later. It is their submission also that the tribunal had jurisdiction to entertain the matter.

This court has considered the application and the submissions therein. Provisions that come to mind are Sections 9 of the Law Reform Act and Order 53 (2) of the Civil Procedure Rules, 2010. Section 9 (3) of the Law reform Act provides as follows:-

*"In the case of an application for an order of certiorari to remove any judgment, 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 judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, 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."*

The above provision is replicated in Order 53 Rule 2 of the Civil Procedure Rules, 2010 in the following words:-

*"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."*

**In the case Milka Nyambura Wanderi & Another v Principal Magistrate's Court Murang'a & 4 Others (2014) eKLR** the court declined to grant leave as it was time barred, the application for leave having been made more than six months after the decision sought to be quashed. In another case Republic vs. Mwangi Nguyai & 3 Others Ex parte Haru Nguyai (2013) eKLR Odunga J stated:

*"Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents [sic] who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes".*

In the instant case the decision in question was made on 6<sup>th</sup> December 2012 in Kakamega CMCC Miscellaneous Award No. 50 of 2011. This application was filed on the 2<sup>nd</sup> August 2018. This is a period of almost 6 years. The applicant has been sleeping on his right and the same cannot be available to him through this application. This Judicial Review application is fatally defective and against the provisions of order 53 rule 2 of the Civil procedure rules, 2010. This application had to be brought within a period of six months as per the provisions of the law. Having found this I see no reason to go into the merits and the demerits of the decision sought to be quashed and or the jurisdiction of the said tribunal. I find this application has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**