



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO 61 OF 2000.

IN THE MATTER OF: LAND DISPUTE TRIBUNAL ACT 1990 OF THE LAWS OF KENYA

AND

IN THE MATTER OF : KALOLENI MAGISTRATE COURT LAND AWARD NO. 8 OF 1996

AND

IN THE MATTER OF: DANIEL KILINGA KOMBE.....INTERESTED PARTY

AND

IN THE MATTER OF: KATANA CHARO.....APPLICANT

RULING

1. This is the Interested Parties Amended Notice of Motion dated 2nd August, 2016. It is brought under Order 53 rule 2, Order 51 rule 1 of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya and all enabling provisions of the law. The original Notice of Motion is dated 24th July, 2009.

2. It seeks orders;

i) That this Honorable Court be pleased to strike out the Applicant's pleadings and/or suit for being incompetent and/or incurably defective and/or being bad in law and similarly all consequential orders issued herein be discharged or vacated.

ii) That costs be provided for.

3. The grounds are on the face of the application and are;

i) That the Applicant/Respondent ought not to be heard by this Honourable Court as his application for leave to apply for judicial review orders was made outside the six months mandatory period hence making the Applicant's pleadings and/or suit bad in law for having contravened the provisions of Order 53 rule 2 of the Civil Procedure Rules.

ii) That for the aforesaid reasons the Applicant's suit ought to be dismissed and/or struck out with costs.

iii) That no prejudice shall be suffered by the Applicant who ought not to have been granted leave to file judicial review orders in the first place.

iv) That if this application is not allowed, the interested parties shall suffer irreparable loss and damage yet the Applicant's suit cannot succeed in any event as it is fatally and/or incurably defective.

4. The application is supported by the affidavit of Raphael Randu Nzai, the 2nd Interested party sworn on the 2nd August, 2016.

5. The application is opposed. There are grounds of opposition filed by the Applicant dated 3rd June, 2011. The Applicants counsel was served with a hearing notice of the Amended Notice of Motion dated 2nd August, 2016 on the 28th August, 2017. The Notice was acknowledged by stamping. Despite this service, they did not file written submissions.

6. On the 30th October, 2017 the court directed upon the application by the Interested parties' counsel that the application be disposed of by way of written submissions. Mr. Alweya for the Applicant was present in court and sought more time to file their submissions.

By the 24th January, 2018 a date for ruling was given. The applicant had not filed their submissions.

7. It is the Interested parties case that the suit herein is time barred having been filed outside the six (6) months period as stipulated under Section 9(3) of the Law Reform Act and Order 53 rule 2 of the Civil Procedure Rules. They have relied on the case of;

1. Republic -versus- Justus Makande Itoti And Another & Loise Alili Omboto J/R No. 6/2012.

2. Republic -versus- Gilbert Hezekiah Miya & Advocates Disciplinary Committee Misc Application J/R No. 391 of 2014.

3. Republic -versus- The Minister for Lands And Settlement Mombasa HCCC Misc Civil Application No. 1091 of 2016.

8. Further that the Applicant does not have a right to revive rights which have been extinguished by statute and therefore this suit is fatally weak and must be struck out.

9. It is the Applicant's case that the relief of prohibition sought is not time barred. That the subject matter of this suit is land in respect of which the Land Dispute Tribunal issued two conflicting decisions and it is fair and just that the Applicant is given a chance to pursue their application.

10. I have considered the Amended Notice of Motion, and the supporting affidavit. I have also considered the grounds of opposition, the interested parties' submissions and the authorities cited. The issues for determination is whether the Applicant's pleadings and/or application are in competent and/or incurably defective.

11. I have gone through the Applicant's Notice of Motion dated 16th March, 2000 and the reliefs sought are;

1. "An order for certiorari to call upto the High Court for quashing all the orders made by the District Magistrate Kaloleni in Land Award No. 8 of 1996.

2. An order of prohibition to prevent the learned District Magistrate from proceeding or dealing in any manner with Land Award No. 8 of 1996 between Daniel Kombe -versus- Katana Charo.

3. An order of striking out Land Award No. 8 of 1996 filed at the District Magistrates Court Kaloleni.

12. The order sought to be quashed was issued on 30th September, 1996 vide these proceedings;

"Coram: Karia Mbuni (RM)

Plaintiff - present in person

Defendant – present in person

Court Clerk – Lewa.

Order: Parties informed of the award as per Section 7 of the Land Disputes Tribunal.

Act: Judgement is hereby entered in terms of the panel's award."

13. I have gone through the provisions of Order 53 rule 2 of the Civil Procedure Rules. This same provision is replicated in Section 9(3) of the Law Reform Act Order 53 rule 2 of the Civil Procedure Rules provides;

"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."

14. It is not in doubt that the Order sought to be quashed was issued on 30th September, 1996. The Applicant's Notice of Motion is dated 16th March, 2000. The same was filed four (4) years after the order was issued. Order 53 rule (2) of the Civil Procedure Rules is set in mandatory terms.

In the case of Gilbert Miya And Advocates Disciplinary Committee Honourable Judge G. V. Odunga held;

"It is therefore clear that applications for judicial review must be commenced within six months from the date when the

grounds for the application arose, the law does not state that the application be made from the date when the applicant became aware of the decision or when the decision was issued to the parties.....”

I am guided by the above authority in observing that the Applicant’s Notice of Motion was brought way after the six months period.

15. In their grounds of opposition the Applicant/Respondent seems to suggest that the relief of prohibition which they also sought is not time barred.

I am of the opinion that this is not true as Order 53 rule 2 of the Civil Procedure Rules deals with all the three writs of mandamus, certiorari and prohibition in the same manner.

In ***Republic –versus- Kenya National Examinations Council Exparte Gathenji And Others Civil Appeal No. 266 of 1996*** it was held as follows;

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However where a decision has been made, whether in excess or lack of jurisdiction, or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision made.....”

I have quoted the above authority to show that the Applicant’s prayer for an order of prohibition would not succeed as the court had already adopted the award of the Land Disputed Tribunal.

16. In the case of ***Aga Khan Educational Service Kenya –versus- Republic Ex-parte Ali Seif And 3 Others (2004) eKLR*** it was held by the Court of Appeal that;

“Order 53 rule 2 of the Civil Procedure Rules and Section 9(3) of the Law Reform Act are set in mandatory terms. It was upon the Respondent to show that the application for leave was made not later than six months from the date of the orders sought to be quashed.”

17. In conclusion I find that this application is merited. The Applicant’s pleadings and/or incurably defective.

18. I hereby, strike out the Applicant’s pleadings and/or suit and all consequential orders issued herein are discharged and/or vacated.

The Interested parties shall have costs.

It is ordered.

Dated, Signed and Delivered at Mombasa on the 11th day of April 2018.

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L. KOMINGOI

JUDGE

11/4/2018.