



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

MISC ELC NO. 38 OF 2014

(FORMERLY CIVIL SUIT NO. 17 OF 2012)

REPUBLIC APPLICANT

VERSUS

CHAIRMAN EVURORE LAND DISPUTES TRIBUNAL RESPONDENT

NICHOLAS NYAGA NJAGI INTERESTED PARTY

ANDREW NJUE MWANIKI EXPARTE APPLICANT

JUDGEMENT

1. By a notice of motion dated 13th June 2012 brought under the provisions of **Order 53 of the Civil Procedure Rules, section 3A of the Civil Procedure Act** and **all enabling provisions of the law**, the Applicant sought leave to apply for an order of *certiorari* to quash the decision or award of the Siakago Land Disputes Tribunal (hereinafter called the Tribunal) in Tribunal case No. 462 of 2010. He also sought an order for the leave once granted to operate as stay of the decision of the Tribunal. The grounds for the said application were contained in the affidavit filed with the application. The Applicant later on filed a statutory statement on 29th September 2012 and a verifying affidavit on 2nd October 2012.

2. The record of proceedings shows that the said application for leave was heard on 10th October 2012 before the Hon Justice H.I. Ong'udi who granted the leave sought and directed that the substantive application for judicial review be filed within twenty one (21) days.

3. The record further shows that on 22nd November 2012 the Applicant filed a notice of motion dated 22nd November 2012 seeking an order of *certiorari* and the following declarations/orders;

a. That the Siakago Mbeere District Land Dispute Tribunal acted without jurisdiction in agreeing to hear a dispute relating to parcel of land number Evurore/Nthambu/657 in Tribunal case No, 462 of 2010 while the issue of ownership had been dealt with by a court of competent jurisdiction.

b. That this honourable court do deem it fit to move and declare the ruling of the Siakago Mbeere District Land Tribunal null and void ab initio.

c. That this honourable court do order the Mbeere District Land Registrar to restore and reinstate the name of the Applicant as the absolute owner of parcel number Evurore/Nthambu/657.

4. The said notice of motion was, with leave of court, amended on 11th August 2017 to seek the following reliefs;

a. That this honourable court be pleased to issue an order of certiorari to call unto this court and quash the decision of Evurore Land Disputes Tribunal in its tribunal case No. 462 of 2010 filed before the Senior Principal Magistrate's Court at Siakago as LDT case No. 2 of 2011.

b. That costs of this application be provided for.

5. The Applicant also filed a totally new statutory statement dated 11.08.2017 even though no leave had been sought or granted to file a new statutory statement. The court has also noted that the name of the Tribunal changed from Siakago to Evurore *Land Disputes Tribunal* in the amended application.

6. The Attorney General appeared for the Respondent and filed a replying affidavit sworn by Margaret Njoroge in opposition to the said application. The application for judicial review was opposed on several grounds. It was contended, *inter alia*, that the said application was time-barred; that the award of the Tribunal had ceased to exist on its own upon adoption as a decree of the Magistrate's court; and that the Attorney General had not been supplied with all necessary documents, affidavits and attachments filed earlier on.

7. The interested party also filed a replying affidavit sworn on 27th February 2018 in opposition to the said application for judicial review. He supported the decision of the Tribunal and stated that the Applicant was trying to fraudulently acquire a parcel of land which did not belong to him. He also contended that the application was defective in form and should be dismissed.

8. The parties herein agreed to canvass the application for judicial review through written submissions. The Applicant filed his submissions on 19th April 2018, the Respondent filed on 6th June 2018 whereas the interested party filed his submissions on 19th June 2018.

9. The court has considered the application for judicial review, the replying affidavits in opposition thereto as well as the parties' respective written submissions. In my opinion, the main issues for determination are three (3) namely;

- a. Whether the application for judicial review was filed out of time.
- b. Whether the Siakago Land Disputes Tribunal acted in excess of its jurisdiction.
- c. Who shall bear the costs of the application for judicial review.

10. The court has carefully considered the proceedings and the pleadings on record. It is clear that the Applicant was granted leave on **10th October 2012** to file an application for judicial review within twenty one (21) days from that day in accordance with the provisions of **Order 53 of the Civil Procedure Rules**. The provisions of **Order 53 Rule 3 (1)** state as follows;

“3 (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made 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 the hearing.”

11. The record shows that the Applicant filed his substantive notice of motion on 22nd November 2012 which was about **42 days** after leave was granted. There is no indication on record to show that the Applicant ever sought or obtained an extension of time to file the said notice of motion out of time. The court is of the view that the application for judicial review was clearly filed out of time. The said application is incompetent and a perfect candidate for striking out or dismissal. The initial leave granted on 10th October 2012 lapsed upon expiry of the 21 days granted for the filing of the substantive application for judicial review.

12. The court having found, and held, that the application of judicial review is incompetent there would be no need to consider it on merit. There is simply no competent application for judicial review before the court. It shall, therefore, not be necessary to consider whether or not the Tribunal acted beyond its jurisdiction as alleged by the Applicant.

13. The general rule on costs is that although costs of an action are at the discretion of the court, such costs usually follow the event. A successful litigant should therefore be awarded costs unless, for good reason, the court orders otherwise. See **Hussein JanMohamed & Sons Vs Twentsche Overseas Tading Co. Ltd [1967] EA 287**.

14. The upshot of the foregoing is that the Applicant's notice of motion dated 22nd November 2012 which was amended on 11th August 2017 is incompetent and the same is hereby struck out with costs to the Respondent and the interested party.

15. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th** day of **JUNE, 2018**.

In the presence of Ms Muriithi holding brief for Ms Muthoni for the Applicant, and Mr Siro for the Respondent and holding brief for Ms Ndorongo for the interested party.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

28.06.18.