



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JR NO. 3 OF 2009

M'IBARI GATUGUTI..... APPLICANT

VERSUS

LAND ADJUDICATION OFFICER

IMENTI SOUTH/NORTH DISTRICTS 1ST RESPONDENT

ARBITRATION BOARD MWERU III

ADJUDICATION SECTION.....2ND RESPONDENT

JULIUS KAARIA MARETE REPRESENTING

MARETE M'RAIBUNI.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The exparte applicant through the firm of M/s Maitai Rimita & Co. Advocates moved this court vide chamber summons under order LIII rule 1 civil Procedure Rules dated 3rd February 2009 seeking the following orders:

(i) Spent

(ii) That leave be granted to the applicant to apply for an order of certiorari to remove to this court the decision of Mweru III Adjudication section Arbitration Board made on 25th November, 2008 in Arbitration Board case no. 177,178, 179, 180, 181, and 182 of 2006 (all inclusive) as consolidated with case No.s 282, 283, 284, 285m 464, 466,467, 468 and 469 of 2006 other orders therein made without jurisdiction and against the law of the land ad sanctioned by the 1st respondent.

(iii) That leave be granted to the applicant to apply for an order of mandamus to issue to the land adjudication officer Imenti South/North District compelling him to constitute a proper arbitration board to hear de-novo arbitration board case 177, 178, 179, 180, 181 and 182 of 2006 (all inclusive) and no's 282, 283, 284, 285, 464, 465, 466, 467, 468 and 469 of 2006 (all inclusive) as provided for under section 7 of cap 284 Laws of Kenya.

(iv) That leave so granted do operate as a stay of further proceedings or implementation of the arbitration of Board's said decision pending further orders of this court.

(v) The costs of this application be provided for.

2. The application is supported by grounds on the face of that application a verifying affidavit sworn by the applicant a statement of facts and copies of the alleged arbitration Board and decision issued on 25/11/2008.

3. When the application filed under certificate of urgency was placed before the duty judge Justice W. Ouko (as he then was) who upon perusal of the application and the documents in support thereof certified the same urgent and granted the exparte applicant leave to institute Judicial proceedings within 21 days. The learned Judge also ordered the leave so granted to operate as a stay of further proceedings.

4. On 19th February 2009 the exparte applicant filed a Judicial Review motion under order LIII rule 3 CPR basically seeking the same

orders in the chamber summons dated 03/02/2009. On 13/11/2009 the interested party filed his replying affidavit in opposition to the notice of motion. On 06/05/2015 the respondents filed grounds of opposition also opposing the notice of motion.

EXPARTE APPLICANT'S POSITION

5. According to the exparte applicant a dispute had arisen between him and the interested party over land parcel number 405, 407, 392, 424, 307, 391, 418, 430, 514 and 328. Following that dispute, he filed arbitration Board case no's 177, 178, 179, 180, 181 and 182 of 2006. The interested party also filed arbitration board case no's 282, 283, 284, 285, 464, 465, 466, 467, 468 and 469 of 2006 respectively. Subsequently an arbitration board was constituted and the two sets of cases were heard and determined on 24th and 25th November 2008 and gave their decision on 25th November 2008. It is the exparte applicants position that the said arbitration board gave their decision hurriedly without giving due attention.

6. The exparte applicant also contends that the land adjudication officer failed to appoint not less than five persons to the arbitration board as required under section 7 of the land adjudication act cap 284 laws of Kenya. The exparte applicant therefore submits that the said arbitration board not having been properly constituted, the proceedings of the board and the subsequent decision is a nullity and should be quashed.

INTERESTED PART'S CASE

7. The interested party contends that the application by the exparte applicant is misconceived as justice looks at the substance but not the form. He argued that the legal technicalities complained of by the exparte applicant should not be used to deny him his right.

RESPONDENT'S POSITION

8. The respondents in their grounds of opposition urged the court to dismiss the notice of motion for being a non starter lacking merit misconceived and an abuse of court process.

EXPARTE APPLICANT'S SUBMISSIONS

9. The exparte applicant contends that the hearing by the said arbitration board was done in a hurry leaving no doubt that proper due attention was not afforded to him. The exparte applicant also argues that the officers who were appointed for that arbitration were three (3) in number contrary to section 7 of the land adjudication Act cap 284 Laws of Kenya.

10. The learned counsel submitted that once the arbitration Board was not properly constituted in accordance with the law, the proceedings of the board and the subsequent decision is a nullity abinitio and should be quashed. He cited the case of Chief Constable of the North wales police vs. Evans (1982) I WLR 455.

RESPONDENT'S SUBMISSIONS

11. The respondents through Mr. Kieti, Litigation counsel submitted that an arbitration board is competent and properly constituted when half of its members are present in any particular meeting. He stated that half of the minimum number is two (2) which is sufficient to conduct proper business. In the instant case, the board members present were 3 which has surpassed the minimum required. The respondent also submitted that the exparte applicant has not demonstrated how he was treated unfairly. The respondents further submitted that the exparte applicant was given ample opportunity to be heard together with his four witnesses.

INTERESTED PARTY'S SUBMISSIONS

12. The interested party did not file any submissions despite having been given several indulgencies.

ISSUES FOR DETERMINATION

- (i) Whether the arbitration board was properly constituted pursuant to section 7 of the Land Adjudication Act Cap 284 laws of Kenya?
- (ii) If the answer to 1 above is in the affirmative, whether the proceedings and decision arising therefrom is a nullity and should be quashed?
- (iii) Who shall bear the costs of this Judicial Review?

ANALYSIS AND DECISION

13. I have considered the notice of motion application, the supporting documents and the response by the respondents and the interested party in opposition thereto, I have also considered the submissions by counsel appearing for both sides. The main ground of the exparte applicant's application is that the arbitration Board constituted to hear this cases was not properly constituted. Section 7 of the Land Adjudication Act Cap 284 laws of Kenya provides as follows:

“7 (a) The provincial commissioner of the province in which the adjudication area lies shall upon the request of the adjudication officer, appoint a panel for the adjudication area, consisting of not less than six and not more than twenty five persons and the adjudication officer may from time to time appoint in writing not less than five persons from the panel

to form an arbitration board.....”.

14. From the proceedings attached to the verifying affidavit by the exparte applicant and the decision of the arbitration board Mweru III adjudication section that heard the cases on 24th and 25th November 2008, it is apparent that only three members of the board were present’.

15. My understanding of the said Section 7 of the Land Adjudication Act Cap 284 Laws of Kenya is that it is mandatory that a panel of not less than six and not more than twenty five persons for an adjudication area. It is further a mandatory requirement that the adjudication officer appoints in writing not less than five persons from that panel to form an arbitration board from time to time.

16. The wording of that section is couched in mandatory terms such that the adjudication officer has no discretion to appoint a lesser number. Failure by the adjudication officer to appoint the mandatory required number of board members to hear the cases renders the proceedings and the decision a nullity and of no legal effect.

17. Suffice to say that the above statutory requirement is not a procedural technicality as submitted by counsel for the respondents. The requirement in my view is not a procedural technicality which can be cured by article 159 of the constitution. For that reason alone this judicial review application succeeds. Consequently I make the following orders:

(i) That an order of certiorari do issue to remove to this honourable court the decision of Mweru III adjudication section arbitration Board made on 25th November, 2008 in Arbitration Case No’s 177, 178, 179, 180, 181 and 182 all of 2006 as consolidated with case no’s 282, 283, 284, 285, 464, 465, 466, 467, 468 and 469 all of 2006 and other orders made without jurisdiction for purposes of quashing the same.

(ii) That an order of mandamus do issue to the land adjudication officer Imenti South/North districts compelling him to constitute a proper arbitration board in accordance with the law to hear de-novo arbitration board cases no. 177, 178, 179, 180, 181 and 282, 283, 284, 285, 464, 465, 466, 467, 468 and 469 all of 2006 within 30 days from the date hereof.

(iii) The costs of this application to be borne by the respondents.

Read, delivered and signed in the open court at Meru this 14th day of June, 2018

E.CHERONO

ELC JUDGE

In the presence of:

CC: Galgalo

Ms. Nyaga holding brief for Rimita for exparte applicant

N/A for interested party

N/A for respondent/advocate