**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. MISC CASE NO. 29 OF 2015**

**(FORMERLY MISC APPLICATION 160 OF 2014)**

**IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF EMBU LAND DISPUTES TRIBUNAL CASE NO. 22 OF 2008**

**AND**

**IN THE MATTER OF CHIEF MAGISTRATE'S COURT EMBU AWARD CASE NO. 9 OF 2010**

**AND**

**IN THE MATTER OF JUDICIAL REVIEW**

**REPUBLIC OF KENYA.......................................................................APPLICANT**

***VERSUS***

**CHAIRMAN EMBU LAND DISPUTES TRIBUNAL............1ST RESPONDENT**

**THE CHIEF MAGISTRATE EMBU LAW COURTS............2ND RESPONDENT**

**GEORGE NYAGA WAMAI......................................................3RD RESPONDENT**

**JEREVASIO IRERI PATRICK....................................EX-PARTE APPPLICANT**

**JUDGEMENT**

1. By a chamber summons dated 4th September 2014, the Applicant sought and obtained leave to apply for an order of *certiorari* to quash the decision of the Embu Land Disputes Tribunal (hereinafter the Tribunal) dated 6th August 2014 in *Tribunal Case No. 22 of 2008*.

2. The said application was based upon the statutory statement of the Applicant dated 4th September 2014 and his verifying affidavit sworn on the same date. The said application indicated that the award of the Tribunal was adopted as a judgement by the Magistrate's Court in *Embu CMCC Award No. 9 of 2010*.

3. The Appellant was aggrieved by the said award for several reasons. First, he contended that by the time the award was adopted as a judgement of the Magistrate's Court, there was an appeal pending before the Provincial Appeals committee. Second, it was contended that his father, who was the original Respondent before the Tribunal was deceased by the time the award was delivered. Third, that he had been joined as an interested party to the proceedings before the Magistrate's Court against his will. Fourth, that the Tribunal had exceeded its jurisdiction by directing the relocation of boundaries after 30 years after the concerned owners had been registered as proprietors.

4. The substantive notice of motion dated 7th October 2014 was consequently filed on 8th October 2014 seeking an order of *certiorari* to quash the award of the said Tribunal which was adopted as a judgement of the court on 4th April 2012. The Applicant also sought that costs of the application be provided for.

5. Contrary to the provisions of **Order 53 of the Civil Procedure Rules** and the established practice in judicial review matters, and without

leave of court, the Applicant filed a new statutory statement and supporting affidavit at the time of filing his said notice of motion. The court has also noted that the Applicant raised two new grounds which were not contained in his application for leave.

6. The new grounds were, first, that the Tribunal proceedings were faulty in that the witnesses present were not called to give evidence. The second was that the Tribunal had misdirected itself in its consideration of the evidence because the 3rd Respondent had admitted during cross-examination that the person who had sold the land to him did not show him the boundaries of that parcel.

7. The 1st and 2nd Respondents filed a replying affidavit sworn by Margaret Njoroge on 18th October 2017. It was contended that the application for judicial review was time-barred because it was not brought within 6 months from the date of the award of Tribunal.

8. The 1st and 2nd Respondents further stated that the Tribunal had not misdirected itself in either matters of fact or law but had acted within its jurisdiction under the **Land Disputes Tribunal Act, 1990** (now repealed). It was contended that Applicant was in effect appealing on the merits of the award as opposed to a judicial review.

9. It was further contended by the 1st and 2nd Respondents that the Applicant ought to have raised the issue of limitation at the earliest opportunity before the Tribunal and not after the making of the award. It was finally contended that the award which the Applicant was seeking to quash was no longer in existence since it had been adopted as a judgement of a competent court hence it could not be the subject of an order of judicial review.

10. The 3rd Respondent, George Nyaga Wamai, filed a replying affidavit sworn on 6th November 2014 in opposition to the said application for judicial review. It was contended that the Applicant had filed an appeal against the award of the Tribunal being *Appeal Case No. 44 of 2010* but that he later withdrew it. He annexed a copy of an extract from the proceedings of the Provincial Appeals Committee dated 6th July 2011 to that effect.

11. The 3rd Respondent also contended that upon the adoption of the award of the Tribunal as a judgement, a decree was duly extracted on 6th August 2014 and that the Applicant was merely trying to appeal against the said decree through the back door. He, therefore, urged the court to dismiss the application for judicial review with costs.

12. The court shall only consider the Applicant's application for judicial review on the basis of the leave granted pursuant to the original statutory statement dated 4th September 2014 and verifying affidavit sworn on the same date. The court shall not take into account the additional grounds which were sneaked in on 8th October 2014 when the substantive notice of motion was filed.

13. Under the provisions of **Order 53 Rule 4 of the Civil Procedure Rules**, no grounds shall be relied upon or relief sought in a judicial review application except those set out in the statutory statement. This is, of course, subject to the power of the court to grant leave for the statutory statement to be amended, or for additional affidavits to be filed. In the instant case, however, no such leave was sought to either amend the statement or file an additional affidavit.

14. The court has considered the Applicant's application for judicial review, the replying affidavits in opposition thereto as well as the submissions of the 3rd Respondent. The applicant and the Attorney General did not file any submissions in spite of the orders made on 31st January 2018 for them to file their written submissions within set timelines.

15. In my view, the following issues arise for determination in this matter;

a. Whether or not the application for judicial review is time-barred.

b. Whether or not the award of the Tribunal can be quashed separately from the resultant decree.

c. Whether the Applicant has made out a case for the grant of an order of *certiorari*.

d. Who shall bear the costs of the action.

16. On the 1st issue, there is no doubt that the only substantive prayer which the Applicant seeks is an order of *certiorari* to quash the award of the Tribunal under the provisions of **Order 53 of the Civil Procedure Rules**. Under the provisions of **Order 53 Rule 2 of the Rules**, an application for an order of *certiorari* must be made within 6 months from the date of the judgement, order, decree, conviction or other proceedings sought to be quashed. A similar time line is given by **section 8 and 9 of the Law Reform Act (Cap 26).**

17. There is no contest that the award sought to be quashed was made on 8th December 2009. There is also no dispute that the Applicant filed his chamber summons dated 4th September 2014 for leave to apply for judicial review on 9th September 2014. In those circumstances, it is clear beyond peradventure that the Applicant sought leave about five (5) years after the award of the Tribunal was made contrary to **Order 53 Rule 2 of the Civil Procedure Rules**. The said award was adopted as a judgement by the Magistrate's Court and a decree issued in 2012.

18. In the case of **Ako Vs Special District Commissioner Kisumu & Another [1989] KLR 163,** it was held that the limitation of 6 months was statutory and absolute and could not be liberalized under the procedural provisions of the Civil Procedure Rules on enlargement of time.

19. Even if the time were to be reckoned from the time the award was adopted as a judgement of the Magistrate's court, the Applicant would

still run foul of the limitation period of six months. The decree was made in 2012. The court, therefore, agrees with the 1st and 2nd Respondents' view that the application for judicial review is time-barred.

20. The 2nd issue is whether the award of the Tribunal can be quashed separately apart from the resultant decree. The Applicant did not seek an order of *certiorari* against the decree. The Attorney General contended that the award had already crystallized into a decree and as such had no separate existence and cited the case of **Masagu Ole Koiotalel Naumo Vs Principal Magistrate Kajiado Law Courts & Another [2014] eKLR**.

21. There is no dispute in this matter that the award of the Tribunal was adopted as a judgement of the Magistrate's Court in *Embu CMCC Award No. 9 of 2010*. A decree was thereafter issued in 2012 on the basis of that judgement. The real issue is whether the award of the Tribunal is still in existence on its own and whether it is capable of quashing separately. The court is of the view that the award of the Tribunal was perfected into a judgement and a decree. It would not be possible to quash the award in its original form. It was converted into a decree for enforcement by the Magistrate's Court.

22. Even if it were possible to surgically separate the award from the decree, it would be futile to quash the award while the resultant decree remains unchallenged. The court draws support for this view from the Court of Appeal decision in **Florence Nyaboke Machani Vs Mogere Amosi Ombui & Others [2014] eKLR.**

23. The 3rd issue is whether the Applicant has made out a case for the grant of an order of judicial review. In case the court is wrong on the 1st and 2nd issues, the merits of the application for judicial review shall be considered. In the case of **Municipal Council of Mombasa Vs Republic & Another [2002] eKLR** which was cited by counsel for the 3rd Respondent, the purpose of judicial review was summarized as follows;

> **"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. The court has considered the Applicant's complaints as particularized in paragraph 3 hereof. There is no material on record to demonstrate that by the time the award of the Tribunal was made the Applicant's late father, who was the original Respondent in the Tribunal, was deceased. On the contrary, the material on record indicates that by the time the appeal to the Provincial Appeals Committee was withdrawn on or about 6th July 2011, the Appellant's father was said to be unwell hence he was represented by his son. The record further shows that the Appellant's father actively participated in the proceedings before the Tribunal and even agreed to have the District Land Registrar (hereinafter the Registrar) and the District Surveyor (hereinafter the Surveyor) to visit the disputed boundary and re-establish the beacons. Even if the Appellant's father had died after the Tribunal hearing but before the making of the award, it is doubtful if the validity of the award would be affected.

25. The Appellant's complaint that the Magistrate's Court adopted the award of the Tribunal whilst an appeal was pending against the award is not well founded. The material on record shows that the appeal was withdrawn in 2011 whereas the award was adopted in 2012. Even if such irregularity had taken place, it could be corrected by way of appeal as prescribed by the enabling legislation and not by way of judicial review.

26. The Appellant contended that the Tribunal lacked jurisdiction because the claim was statute-barred under the **Limitation of Actions Act (Cap 22).** The court's understanding of the dispute between the parties was that it was a boundary dispute. That is what the application for judicial review states. That is how the Tribunal and the parties before it understood the dispute. The parties consequently agreed to have the Registrar and the Surveyor to re-establish the boundaries. The claimant before the Tribunal was not claiming any land from the Applicant's father.

27. In the opinion of the court, the resolution of a boundary dispute between neighbours is not a claim for the recovery of land which must be filed within 12 years from the date of the accrual of a cause of action. The Registrar was empowered under the **Registered Land Act** (now repealed) to determine boundaries without regard to the period of limitation respecting a claim for recovery of land. The court finds no merit in this ground. The court notes from the record that no objection was taken before the Tribunal on its jurisdiction. Instead, the record shows that both parties agreed to have the Registrar and the Surveyor to determine the boundaries.

28. The final complaint by the Applicant was that he was joined in the proceedings before the Magistrate's Court as an interested party against his will. This complaint is totally groundless and outright mischevious. The Applicant admitted that he acquired a portion of one of the properties in issue before the Tribunal from his late father. There was no way the Registrar and Surveyor could have relocated the boundaries without involving him as the new owner of the adjoining parcel of land.

29. In the court's view, it was not only the right thing to do but it was the duty of the Magistrate's Court to join the Applicant as the owner of an adjoining parcel of land and who was likely to be affected by the decree. The consent of the Applicant was not required. It is, of course, likely that if the Applicant had been left out he would have moved the court quickly alleging violation of the rules of natural justice in a bid to frustrate execution of the decree.

30. The court, therefore, finds no merit whatsoever in the application for judicial review. It is for dismissal on the merits. None of the grounds for judicial review known to law have been established by the Applicant.

31. The 4th and last issue is on costs of the action. Under **section 27 of the Civil Procedure Act (Cap 21)** costs of an action are generally at the discretion of the court subject to the proviso that costs shall follow the event. So, a successful party should normally be awarded costs unless, for good reason, the court orders otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** There is no good reason why the Respondents in this case should not be awarded costs of the action.

32. The upshot of the foregoing is that the court finds no merit in the application for judicial review. Consequently, the Applicant's notice of motion dated 7th October 2014 is hereby dismissed with costs to the Respondents.

33. It is so decided.

**JUDGEMENT DATED, SIGNED** and **DELIVERED** in open court at **EMBU** this **19TH** day of **JULY, 2018.**

In the presence of the Applicant in person, Mr Siro for the 1st and 2nd Respondents and Mr Kathungu for the 3rd Respondent.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**19.07.18**