



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
JUDICIAL REVIEW NO. 4 OF 2016
(FORMERLY EMBU ELC MISC NO. 24 OF 2014)

GRACE GACHUI KATHEI.....EX-PARTE APPLICANT

VERSUS

THE DISTRICT LAND DISPUTES TRIBUNAL,

CENTRAL DIVISION KIRINYAGA.....1ST RESPONDENT

KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT...2ND RESPONDENT

JOHN GICHOBI NDEGWA.....3RD RESPONDENT

JUDGMENT

On 14th December 2006 **GRACE GACHUI KATHE** the Applicant herein filed this Notice of Motion citing the then **Order LIII Rule 3(1) of the Civil Procedure Rules** and sought the following order:

1. ***“An order of certiorari to remove the decision of Land Disputes Tribunal Central Division Kirinyaga District dated 26th January 2005 and quash the same and all subsequent orders therein”***
2. ***“That costs of this application be provided for”.***

That application was supported by the Applicant’s affidavit sworn on 5th December 2006 and the grounds set out therein.

The gravamen of the application is that at all material times, the Applicant was the registered proprietor of land parcel No. INOI/KAMONDO/1623 (the suit land) which was the subject of a dispute in the **KIRINYAGA CENTRAL DIVISION LAND DISPUTES TRIBUNAL** (The Tribunal) in **CASE No. 30 of 2004** in which she was the defendant and the 3rd Respondent (**JOHN GICHOBI NDEGWA**) was the Plaintiff. The Tribunal awarded the 3rd Respondent one acre out of the suit land against her wish and despite her objection, the same was adopted as an order of the Court. It is her case that the Tribunal’s decision was against the law hence this application. It is instructive to note that no statement of facts was filed although the record shows that on 23rd November 2006, the late **KHAMINWA J.** had granted the Applicant leave to file this application out of time. The said statement of facts contains several averments the main one and which is relevant herein is that the Tribunal had no jurisdiction to determine the dispute relating to the suit land as it did.

The 1st and 2nd Respondents did not file any responses but the 3rd Respondent filed a replying affidavit in which he deponed, inter alia, that the application seeking leave to seek orders of certiorari was lodged out of time and also that there is no provision in law for extension of time within which to file an application for Judicial Review. The 3rd Respondent also deponed that the Applicant was guilty of material non-disclosure as she had not disclosed having filed an appeal at the **EMBU HIGH COURT CASE No. 22 of 2005** which was rejected.

The application came up before **KHAMINWA J.** on 25th June 2007 with **MR. CHOMBA** advocate holding brief for **MR. MAGEE** advocate for the 3rd Respondent while **MR. MUTAHI** advocate appeared for the Applicant. **MR. CHOMBA** applied for an adjournment which was opposed by **MR. MUTAHI**. The Judge rejected the application for adjournment and granted the orders of certiorari. The 3rd Respondent however filed **CIVIL APPEAL No. 12 of 2008** at the **COURT OF APPEAL NYERI** which allowed the appeal and directed that the substantive application for certiorari dated 7th December 2006 and filed on 14th December 2006 be heard by another Judge.

The matter was thereafter mentioned before **BWONWONGA J.** on 6th November 2014 and it was agreed that the application would be disposed of by way of written submissions. Nothing appears to have happened thereafter until the case was placed before me on 5th December 2016 **MUCHEMI J.** having made orders on 20th September 2016 transferring the matter to this Court most probably following the decision of the Court of Appeal in the case of **KARISA CHENGO & OTHERS VS REPUBLIC 2015 e K.L.R.** The 3rd Respondent who has since died was meanwhile substituted with his son **GABRIEL MWANGI GICHOB**. Submissions have been filed as directed.

I have considered the application, the statement of facts, the replying affidavit and the submissions by counsel.

It is not in dispute that the orders sought to be quashed was the award by the Tribunal dated 26th January 2005. This application was filed on 14th December 2006 one (1) year later. Prior to that, the Applicant had moved to Court on 6th November 2006 seeking leave to file application out of time. Leave was granted by **KHAMINWA J.** on 23rd November 2006. **Order 53 Rule 2 of the Civil Procedure Rules** provides that an application for leave to apply for an order of certiorari shall not be made later than six (6) months after the date of the order, decree or judgment sought to be quashed. It reads:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings 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, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”. Emphasis added

The application for leave to seek orders of certiorari should therefore have been filed by 25th July 2005 since the order of the Tribunal sought to be quashed was made on 26th January 2005. This application was therefore filed out of time in contravention of the provisions of **Order 53 Rule 2 of the Civil Procedure Rules**.

What about the extension granted by **KHAMINWA J.** on 23rd November 2006 to file this application out of time? The **Law Reform Act** which is the substantive law governing prerogative orders does not provide for the enlargement of time within which a party seeking such orders can file the application. **Section 9 (3) of the Law Reform Act** states:

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding 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 proceedings 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” Emphasis added

Therefore, while the twenty one (21) days period within which the application can be filed once leave is granted, can be extended upon application, the six (6) month period within which to apply for such leave cannot be extended. In the case of **OSOLO VS JOHN OCHOLA & ANOTHER 1995 e K.L.R.**, the Court of Appeal held as follows:

“It can readily be seen that Order 53 Rule 2 (as it stood) is derived verbatim from Section 9 (3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules, that procedure cannot be availed of for the extension of time limited by statute, in this case the Law Reform Act. There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (Cap 22 Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here”.
Emphasis added

It is also clear from the decision of the Court of Appeal in **AKO VS SPECIAL DISTRICT COMMISSIONER KISUMU & ANOTHER 1989 K.L.R 163** that there is an absolute prohibition against bringing an application for certiorari after the six months period stipulated in law. This Court also retains the jurisdiction to set aside any ex parte orders of leave particularly in clear cases where the leave was obtained in contravention of the law – see **AGAKHAN EDUCATIONAL SERVICES VS REPUBLIC & OTHERS C.A CIVIL APPEAL No. 252 of 2003**. That is what the 3rd Respondent has asked this Court to do when he depones in paragraph 2 (a) and (b) of his replying affidavit that:

2 (a) “That the application for leave to seek orders for certiorari filed on 26.9.2006 was fatally defective and was lodged out of time”

(b) “That the application for extension of time was incompetent and bad in law and further that there is no provision in law for extension of time within which to file an application for Judicial Review”

Those averments are in keeping with the decisions in the cases of **AKO** (supra) and **OSOLO** (supra) both of which are binding on this Court. Therefore, whereas the Applicant’s grievances are genuine since the Tribunal had no jurisdiction to make the award that it did with respect to registered land, this application was filed outside the time stipulated in law and the extension of time granted to her is not allowed by law or precedents which binds this Court.

The up-shot of the above is that the Notice of Motion dated 7th December 2006 and filed on 14th December 2006 is incompetent. It is accordingly struck out with costs to the 3rd Respondent.

B. N. OLAO

JUDGE

31ST MAY, 2017

Judgment dated, delivered and signed in open Court this 31st day of May 2017

Ms Kiragu for 3rd Respondent present

Ms Wambugu for Mr. Mutahi for Applicant present

No appearance by the other parties

Right of appeal explained.

B. N. OLAO

JUDGE

31ST MAY, 2017