



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

JUDICIAL REVIEW CASE NO. 2 OF 2016

KABARARWA CLAN.....APPLICANT

VERSUS

KIRAWI CLAN.....RESPONDENT

RULING

The applicant is Kabararwa clan and seeks orders that the Honourable Court be pleased to grant leave to the Applicant to commence Judicial Review proceedings in the nature of **PROHIBITION** to prohibit the respondent from proceeding and executing the decision of the Award by the Marakwet Land Dispute delivered on 26th February, 2007 and that the Honourable court be pleased to grant leave to the applicant to commence Judicial Review proceedings in the nature of Mandamus to compel the District Commissioner, Marakwet District not to subdivide the disputed parcel between the applicant and respondent following the Award on Marakwet Land Dispute Tribunal No. 9 of 2007 pending hearing and determination of this suit.

They also seek an order that the grant of leave do operate as a stay of execution of the Award by the Marakwet Land Dispute Tribunal and the Applicant do continue to use the said parcel without any interference whatsoever from the respondents pending the hearing and determination of this suit.

The grounds of the application are that the Applicants are in possession of the land since time in memorial and continue enjoying peaceful possession of the same and that the suit land has been the Applicant's ancestral land and that they have been the sole owners. The respondents misled the Tribunal to believe the suit land was their hence the Award. The Applicants were not accorded a chance to have the Award appealed against. The applicant is apprehensive that the respondent will proceed and execute the Award unless prohibited to do so pending hearing and determination of the suit. The decision by the District Commissioner, Marakwet District shall proceed and have the Award executed unless compelled not to do so by the Honourable Court. The applicant is also apprehensive that the respondents will interfere with their peaceful possession and quiet enjoyment of the suit land and therefore it is mete and just to grant the orders sought.

In the statement the applicant prays for leave commence Judicial Review proceedings in the nature of **Prohibition** to prohibit the respondent from proceedings and execution the decision of the Award by the Marakwet Land Dispute Tribunal delivered on 26th February, 2007 and leave to commence Judicial review proceedings in the nature of **Mandamus** to compel the District Commissioner Marakwet District **not to subdivide** the disputed parcel between the applicant and respondent following the Award on Iten Land Dispute Tribunal No. 09 of 2007, pending hearing and determination of this suit.

The applicant ultimately prays that the grant of leave do operate as a stay of execution of the Award by the Marakwet Land Dispute Tribunal and the applicant do continue to use the said parcel without any

interference whatsoever from the respondent pending the hearing and determination of this suit and an order for costs.

The application is Supported by the affidavit of James Rotich who states that the applicant has stayed in the suit parcel since time in immemorial and has been enjoying peaceful possession of the suit land without any interference from other persons. The respondent on the other hand have never been his neighbour and cannot lay any claim on the disputed parcel. That during the hearing at the Land Dispute Tribunal, Malakwen Rotich and the deponent vehemently opposed the proposal to have the disputed parcel subdivided between the applicant and the respondent.

That in confirmation of the Minutes at the Tribunal neither Malakwen Rotich, Paulo Kisang Yano nor him appended their signatures upon delivery of the Award by the Tribunal. That he is informed by his Advocate on record which information he verily believes to be true that for an Award by the Tribunal to be adopted, all parties involved must append their signatures. The Tribunal failed to take into consideration all facts at hand before arriving to that decision. The Land Dispute Tribunal erroneously came to a decision that the two clans have been living in harmony on the said parcel yet the facts are clear that the parcel belongs to the Applicant.

That on 7.06.2011, the Honourable Court at Iten adopted the Award and issued a decree which the respondent intends to execute any day. He is apprehensive that the respondent together with the District Commissioner will proceed and execute the Award unless prohibited to do so pending hearing and determination of the suit. That he is also apprehensive that the respondent will interfere with their peaceful possession and quiet enjoyment of the suit land. That on 4.04.2016, he had instructed his Advocates on record to file an application before the Principal Magistrate's Court at Iten, however, the same was dismissed by the said court directing the proper way to address their grievance of the Award is by Judicial Review.

In the replying affidavit of Richard Chelanga Kande, it is stated that he has been advised by their Advocates on record that the Applicant's application does not meet the threshold provided for under Order 53 of the Civil Procedure Rules for the issuance of prerogative writs for prohibition and mandamus as prayed by the applicant. That Applicant is not challenging legality of the Land Disputes Tribunal's Award which was adopted as the judgment of the court and that it is not proper for the applicant to seek an order of prohibiting the respondent from enjoying and realization of the fruits of its lawfully obtained judgment which has never been challenged on appeal. The court has no jurisdiction to issue orders of prohibition and mandamus against the respondent who is executing the decree. The Tribunal, the District Commissioner and the Magistrate's Court have not been enjoined as parties to the proceedings.

That the application is not meritorious and the same is an abuse of the court process meant to frustrate the execution of a lawfully obtained decree. The applicant herein sought similar orders in the Lower Court vide Iten SPMCC Land Disputes Tribunal Case No. 9 for 2007. The learned trial Magistrate heard the application and on 22.6.2016 delivered the Ruling dismissing the same. That decree of the Lower Court vide Iten SPMCC Land Disputes Tribunal Case No. 9 of 2007 has never been challenged on appeal and the same is the subject of execution by the respondent.

That the applicant has not complied with the clear provisions of Order 53 of the Civil Procedure Rules thus rendering the application incompetent. That the application for leave to commence Judicial Review proceedings to challenge the Tribunal's Award delivered on 26.2.2007 has been filed in this court with unreasonable delay i.e. after a period of 10 years and therefore, the applicant is guilty of laches.

M/s Wangutusi, leaned counsel for the applicant argues that that the court has the discretion to issue the orders sought and to do justice under the Administration of Justice Act. The applicant did not have a chance to appeal. The applicant was not before the tribunal when the award was made. They were not present when the award was adopted.

Mr Omwenga learned counsel for the respondent submits that a writ cannot be issued against a private citizen thus the Kirawi clan. Moreover that the persons against whom the order is sought have not been

enjoined. He further argues that such orders cannot be issued to prohibit execution of the decree.

It is trite law that an ORDER OF PROHIBITION is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. An order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision.

It is settled law that an order of *Mandamus* compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, thus that the duty has not been performed according to the law, then Mandamus is wrong remedy to apply for because, like an order of PROHIBITION, an order of Mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

In the application before court, a decision has already been made and yet there is no leave sought for an order of certiorari. Moreover the prayer for leave to seek for Mandamus as sought cannot be granted as it seeks to **“compel the district commissioner Marakwet from subdividing the disputed parcel of land”** This prayer is superfluous as it actually seeks to prohibit and not to compel.

I have considered the application herein and do find that the decision being challenged was adopted on 23rd February 2011 and therefore even if leave was sought for an order of CERTIORARI, the same cannot be granted due to delay. The Law Reforms Act, Section 9(3) and ***Order 53, Rule 2 of the Civil Procedure Rules*** provides for the time for applying for *Certiorari* in certain cases thus that 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. However, an application for leave to apply for an order of certiorari was not sought and therefore the application fails on grounds that judicial review orders of Mandamus and Prohibition are incapable of quashing a decision.

Moreover, the applicants have directed the application to a clan which is not the Tribunal that made the decision being challenged. It is trite law that judicial review proceedings should be commenced in the superior courts against public bodies, inferior tribunals or persons in authority and not individuals or clans. Ultimately the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF OCTOBER, 2016.

ANTONY OMBWAYO

JUDGE