REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L MISC APPLICATION 5 OF 2014 (JR)

IN THE MATTER OF AN APPLICATION BY ROSALINE TUBEI, ROSELINE KOMBICH & ROSEBELLA KERUI- THE OFFICIALS OF TONIOK WOMEN GROUP, JACKSON KIPROP, SIMON CHERUIYOT & MUSA LANGAT- THE OFFICIALS OF TONIOK YOUTH GROUP, EZEKIEL CHESANG, JULIUS KURERE JOHON KOTUT FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF LAND DISPUTE TRIBUNAL ACT 1990 (NO 18 OF 1990) (REPEALED)

AND

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF LOCAL GOVERNMENT ACT CAP 265 LAWS OF KENYA (REPEALED)

AND IN THE MATTER OF GOVERNMENT LANDS ACT CAP 280 LAWS OF KENYA (REPEALED)

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT CAP 281 LAWS OF KENYA (REPEALED)

VS

IN THE MATTER OF LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE KOIBATEK LANND DISPUTE TRIBUNAL UNDATED DECISION MADE IN FEBRUARY 2011 ON THE SUBDIVISION OF L.R. NO. PERKERRA/101/230 MEASURING 46 ACRES IN TO PUBLIC UTILITIES NAMELY: PRIMARY SCHOOL, SECONDARY SCHOOL, DISPENSARY, CHURCHES WATER TANK AND CHIEF'S CAMP AND THAT THE EXISTING PREMISES IN THE SCHOOL COMPOUND MUST CEASE TO EXIST AND THE ADOPTION OF THE SAID DECISION BY THE SENIOR RESIDENT MAGISTRATE COURT, ELDAMA RAVINE ON THE 1ST MARCH 2011

BETWEEN

ROSALINE TUBEI, ROSELINE KOMBICH &

ROSBELLA KERUI-THE OFFICIALS OF TONIOK WOMEN GROUP,

JACKSON KIPROP, SYMON CHERUIYOT &

MUSA LANGAT- THE OFFICIALS OF TONIOK YOUTH GROUP

EZEKIEL CHESANG

JULIUS KURERE

JOHN KOTUT.....EXPARTE APPLICANTS

AND

PATRICK K. CHERUIYOT & 3 OTHERS.....RESPNDENTS

(Judicial Review; application seeking leave to commence judicial review proceedings out of time; applicant seeking leave to commence judicial review proceedings to quash the decision of the Land Disputes Tribunal; whether court may extend time to commence judicial review proceedings out of the 6 month limitation period provided in the Law Reform Act; held that there can be no provision for extension of time; leave to commence judicial review proceedings declined; application dismissed)

RULING

1. I have before me an application stated to have been brought under the provisions of Order 53 Rules 1(1), (2) and (4), Rule 2 and Rule 3 of the Civil Procedure Rules, and Section 8(2) and 9 of the Law Reform Act, CAP 26, Laws of Kenya. The prayers sought are drafted in a long-winded manner, but in my view, and to be concise, the application seeks the following orders which I have paraphrased :-

(1) That leave be granted to commence judicial review proceedings out of time.

(2) That leave be granted to the ex-parte applicants to apply for an order of certiorari to quash the proceedings and decision of the Koibatek Land Disputes Tribunal in respect of Land Reference No. Perkerra/101/230 in Koibatek Land Disputes Tribunal Case between Patrick Cheruiyot and Toniok Primary School and 5 Others.

(3) That leave be granted to the ex-parte applicants to apply for an order of certiorari to quash the proceedings, order and/or decree in Eldama Ravine Senior Resident , Land Dispute Case No. 1 od 2011, Patrick K. Cheruiyot v Toniok Primary School & 5 Others.

(4) That pending the hearing and determination of the substantive notice of motion, the ex-parte applicant's properties, structures and business premises situate on L.R No. Perkerra/101/230 not be destroyed by the respondents.

2. Again, the grounds upon which the application is based are unnecessarily wordy and are twenty in number, covering 4 pages. I can easily compress the various grounds upon which the application is based into one critical complaint :-

That the Koibatek Land Disputes Tribunal did not have jurisdiction to entertain the dispute over the land L.R No. Perkerra/101/230 (the suit land).

That is the main reason why the ex-parte applicants want that decision quashed by an order of certiorari.

3. The application is supported by the requisite statement and an affidavit of Julius Kurere, the 3rd applicant. From the same, I can discern that there was a dispute touching on the suit land, which dispute was referred to the Koibatek District Land Disputes Tribunal. The complainant before the tribunal was one Patrick Kipkosgei Cheruiyot who seems to have brought the dispute on behalf of Toniok Primary School. It is not very clear what the claim was for, but I think it can safely be assumed that the complainant was alleging that the suit land , of 46 acres, belongs to the school and that the respondents have no claim over it. In its verdict, which is undated, save for the year 2010 being indicated, the tribunal inter alia ordered that the 46 acres be sub-divided into public utilities as follows :-

(i) Primary School

(ii) Secondary School

(iii) Dispensary

(iv) Churches

(v) Water tank

(vi) Chief's Camp.

4. The decision of the tribunal was filed in the Senior Resident Magistrate's Court at Eldama Ravine for adoption. I do not have the exact date when the decision was filed, but I have seen a hearing notice dated 14 February 2011, informing the parties to appear in court on 1 March 2011 for hearing (probably for reading and adoption of the award). I have seen the order showing that the award was adopted on 1 March 2011 as a judgment of the court.

5. The ex-parte applicants have complained that the tribunal did not have jurisdiction and that the proceedings did not follow what was prescribed in the Land Disputes Tribunal Act, Act No. 18 of 1990. It is also stated that the decision was not signed and that the ex-parte applicants were denied an opportunity to be heard. It has been averred that the tribunal failed to take into account that the ex-parte applicants had been allocated some plots within the suit land by the Town Council of Eldama Ravine and that they were paying rates. It is also contended that the decision did not consider that there is a development plan for the suit land approved by the Director of Physical Planning and the Ministry of Lands. It has been stated that the ex-parte applicants have made developments in the land and carry on business on the same, and that if the decision of the tribunal is implemented, their source of livelihood is at risk. It is further averred that the applicants did not get the funds to pay the legal fee in time and to engage counsel of their own choice, and they therefore asked that they be allowed to commence the judicial review proceedings out of time, or else, they will be deprived the right of access to justice.

6. Mr. Kibii, counsel holding brief for Mr. Arusei for the ex-parte applicants, relied on the application and the grounds, in supporting the application for leave to commence judicial review proceedings. He also asked that the leave do operate as an order of stay of the decision.

7. I do not think there is contention that the tribunal rendered a decision sometimes in the year 2010 although that decision is undated. The said decision was adopted as a judgment of the court on 1 March 2011. This adoption was pursuant to the provisions of Section 7 of the Land Disputes Tribunal Act (now repealed by the Environment and Land Court Act, Act No. 19 of 2011, which commenced on 30 August 2011) . The statute in Section 8, provided for a right of appeal to the Provincial Appeals Committee within 30 days. There was a further right of appeal within 60 days of the decision of the Appeals Committee, but only on points of law. It is apparent that the ex-parte applicants did not pursue this right of appeal. They have instead invoked the provisions of the Law Reform Act and the Civil Procedure Rules, which entitle a party, to apply for prerogative orders including orders of certiorari. I have no doubt in my mind that the ex-parte applicants are entirely within their rights to pursue this avenue.

8. However, applications for prerogative orders, have a limitation period. The Law Reform Act, CAP 26,

Laws of Kenya, provides as follows at Section 9 (3) :-

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

S. 9(3)

9. The above provision is echoed in the Civil Procedure Rules, 2010, which in Order 53 Rule 2 provides as follows :-

O.53 Rule 2 :- 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 no later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the 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.

10. It is discernible from the above, that one needs to file an application seeking leave to apply for orders of certiorari, within a period of 6 months of the decision. The decision of the tribunal which is sought to be quashed was made in the year 2010 and the decision of the Magistrate's court, sought to be quashed, was made on 1 March 2011. This application was filed on 31 March 2014, about 3 years after the adoption of the award by the Magistrate's Court. The application is therefore clearly out of time.

11. There is nevertheless a prayer within this application, for time to be extended, so that the ex-parte applicants can proceed to apply for the order of certiorari, out of time. No law nor authority was cited by counsel for the applicant to support this prayer.

12. I am aware that by dint of the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, the court has power to enlarge time, where there is limited time provided for doing any act or taking any proceedings under the Rules. Following this provision, it may be arguable that time may be enlarged to make an application for judicial review outside the 6 month limitation period. However, the challenge here, is that the limitation period is not just in the rules, but is also a statutory provision set out in Section 9(3) of the Law Reform Act (above), and it is trite law that Rules made under statute, cannot override a statutory provision. The Law Reform Act, itself, has no provision for extension of time. I have therefore seen no law, which can entitle me to enlarge time for the filing of an application for certiorari, outside the 6 month limitation period.

13. Apart from the legal provisions, I have not come across a clear authority on the point, delivered within our jurisdiction. The closest, that I have come across, in which the issue of extension of the limitation period was broached, is the case of ***Republic vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai, High Court at Nairobi, Constitutional & Judicial Review Division, Miscellaneous Application No. 89 of 2008.*** In that case, an application seeking orders of certiorari to quash a decision of the Gatanga Land Disputes Tribunal made on 25 April 2007 and adopted by the Magistrate's Court on 30 July 2007. The application was filed on 24 October 2008, clearly outside the limitation period of 6 months. Odunga J, who decided the matter, noted that there was no application for extension of time, and he did not therefore have to substantively deal with that point. He however, in *obiter*, stated as follows at paragraph 15 of the decision :-

In my view it is high time the provisions of Section 9 of the Law Reform Act were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result

that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period. Whether the Court would be entitled to "read in" a provision for extension of time in line with the new Constitutional dispensation, is outside the scope of this decision since the matter before me is not an application for extension of time.

14. It will be seen that the learned judge appreciated that hardship can be caused to parties by dint of the provisions of the limited time and stated that it was a high time that Section 9 of the Law Reform Act was amended. So far, there has been no amendment, and on my part, I have been unable to see what law one can base an application to extend time for the commencement of judicial review proceedings. I do not even think that the oft quoted cure for all, Article 159 (2) (d) of the Constitution, which requires courts to administer justice without undue regard to procedural technicalities, can be of assistance, since I do not think, that provisions of limitation of time, can fall within the domain of technical rules of procedure. In my view, they are part of substantive and not procedural law, and cannot fall within the ambit of Article 159 (2)(d) of the Constitution.

15. There are underlying policy considerations in the rather limited duration of 6 months provided for the filing of judicial review applications. I can do no better than quote the same decision of Odunga J, in ***Republic vs Mwangi Nguyai & 3 Others ex-parte Haru Nguyai ,*** where he stated as follows in paragraphs 12 and 13 thereof, and cited other authorities. He put it thus :-

(12) Judicial review proceedings ought as a matter of public policy to be instituted, heard and determined within the shortest time possible hence the stringent limitation provided for instituting such proceedings. It is recognised that judicial review jurisdiction is a special jurisdiction. The decisions of parastatals and public bodies involve million and sometimes billions of shillings and public policy demands that the validity of those decisions should not be held in suspense indefinitely. It is important that citizens know where they stand and how they can order their affairs in the light of such administrative decisions. The financial public in particular requires decisiveness and finality in such decisions. People should not be left to fear that their investments or expenditure will be wasted by reason of belated challenge to the validity of such decisions. The economy with the current volatile financial markets cannot afford to have such uncertainty. As such judicial review remedies being exceptional in nature should not be made available to indolents who sleep on their rights. When such people wake up they should be advised to invoke other jurisdictions and not judicial review. Public law litigation cannot and should not be conducted at the leisurely pace too often accepted in private law disputes. See **Republic vs. The Minister for Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006.**

(13). In **Republic vs. The Minister For Lands & Settlement & Others Mombasa HCMCA No. 1091 of 2006** *it was held that legal business can no longer be handled in a sloppy and careless manner and some clients must realise at their cost that the consequences of careless and leisurely approach must fall on their shoulders.*

16. It follows that a court cannot grant leave to a party seeking to file an application for judicial review out of time, and if such leave is granted, it can be challenged at the substantive hearing of the motion.

17. It is upon the ex-parte applicants to find other avenues to push their grievances, for the door to access the remedy of judicial review, is now firmly shut and the key to open the door is not available, for it was thrown into the proverbial sea by effluxion of time.

18. I do not see how this application can succeed. I decline to extend time for commencement of judicial review and further decline to grant leave to commence judicial review to quash the subject decision of the tribunal and subsequent decree from the Magistrate's Court. This application is hereby dismissed but I make no orders as to costs.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

N/A for M/s Arusei & Co Advocates for the applicants.