IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 357 OF 2013

BETWEEN

JOSEPHAT KIPLAGAT …….. APPELLANT

AND

MICHAEL BARTENGE ..…….. RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Kitale, (Obaga, J.), dated 20th August, 2013

in

HC MISC. APPLICATION NO. 40 OF 2012)

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JUDGMENT OF THE COURT

1. This is an appeal from the ruling of **Obaga, J.** granting the respondent's motion seeking an order of certiorari to quash the award of the Kaplamai Land Disputes Tribunal, *(the Tribunal)* that was adopted as judgment of the court in Kitale Chief Magistrate's Court, **Land Case No. 42** of **2004** on 4th April, 2005. The Tribunal, in its award dated 23rd November, 2004, ordered that the appellant be given 12 out of 14 acres of plot No. 70 Karara farm *(the suit property)* that was held by the respondent.

2. The respondent was aggrieved by that decision and in his application for judicial review seeking to quash the said award, he advanced grounds that: there was no claim that was registered against him as required under **section 3 (3)** of the **Land Disputes Tribunals Act** *(now repealed)*; he was never served with any claim as per **section 3 (4)** of the repealed Act; the decision was made by strangers who had not been appointed as per **sections 4** and **5** of the repealed Act; and that an alleged "*commitment*" that he had allegedly made in favour of the appellant over the suit land was unknown to him.

3. The appellant opposed the application by the respondent. He argued, ***inter alia,*** that leave to apply for the judicial review order was sought outside the statutory period of six months; that the prayers in the statement were not in tandem with the prayers in the motion; and that the Chairman of the Tribunal had

not been joined as one of the respondents.

4. The learned judge held that the application for leave had been filed within the stipulated period of time; that the statement in the application for leave was basically the same as the one accompanying the motion; and that it was not mandatory that the Chairman of the Tribunal be sued, as long as the Tribunal had been sued.

5. Regarding the proceedings before the Tribunal, the learned judge held that the claim that was before the Tribunal had not been served upon the respondent as required under the law; and that the members of the Tribunal had not been duly gazetted as required under **section 5** of the repealed **Land Disputes Tribunals Act.** He therefore allowed the motion as sought by the respondent.

6. Being dissatisfied with the said decision, the appellant preferred this appeal. The appellant faulted the learned judge: for failing to address himself to all the issues for determination; for failing to take into consideration the relevant laws and the grounds of opposition to the application; and for failing to pay attention to the pleadings and the evidence on record.

7. Mr. Kibii, learned counsel for the appellant, submitted that the judgment that was quashed by the order issued on 20th August, 2013 had been executed in 2006 when the respondent was evicted from the suit land in terms of the Tribunal's award which had been adopted as a judgment of the court way back in 2005.

8. Mr. Kibii further submitted that leave to commence judicial review proceedings was obtained on 3rd August, 2012, which was outside the 6 months statutory period; that the relief sought in the statement that accompanied the application for leave did not correspond to the prayers in the notice of motion, and that the appellant was not to blame if at all any member of the Tribunal had not been gazetted.

9. Mr. Wafula, learned counsel for the respondent, submitted that since the members of the Tribunal had not been gazetted, the Tribunal's decision was a nullity. As regards the grant of leave, counsel submitted that the application was filed in time, that is, on 21st April, 2005, but leave was granted on 27th July, 2012. Mr. Wafula conceded that in the intervening period the appellant was evicted from the suit premises, the award of the Tribunal having been adopted as a judgment of the court, a decree issued and executed.

10. We have considered the record of appeal as well as the submissions made by counsel. Prior to enactment of the **Fair Administrative Action Act, 2015,** which gave effect to the provisions of **Article 47** of the **Constitution,** judicial review in this country was strictly limited to consideration of the decision making process, and not with the merits of the decision. However, **section 11** of the **Fair Administrative Action Act** has widened the scope of the orders that a court may grant in judicial review matters, including, declaring the rights of the parties in respect of any matter to which an administrative action relates. See this Court's decision in **SUCHAN INVESTMENT LIMITED V THE MINISTRY OF NATIONAL HERITAGE & CULTURE & 3 OTHERS [2016] e KLR.**

11. It is trite law that where a decision is arrived at contrary to statutory provisions or without jurisdiction, an order of certiorari would issue to quash the decision. See **DIRECTOR OF PENSIONS V COCKAR [2000] 1 E. A. 38.**

12. The High Court, in granting the order of certiorari to quash the Tribunal's award, upheld the respondent's contention that he had not been served with the claim that had been brought against him at the Tribunal. The court also agreed with the respondent that the Tribunal was not properly constituted as its members had not been gazetted.

13. The appellant had not led any evidence to demonstrate that the respondent had actually been served with the claim as required under **section 3 (4)** of the repealed **Land Disputes Tribunal Act** which stated that:

"Every claim shall be served on the other party, or where there are more than one, on each of the parties to the dispute and the provisions of the Civil Procedure Act as regards service of summons shall thereafter apply."

14. Order 5 of the **Civil Procedure Rules** stipulates that summons *(or a claim)* can only be served by a person duly authorized by the court; an advocate or an advocate's clerk approved by the court, among others. Thereafter, the serving agent in all cases is required to swear an affidavit of service stating the time and manner in which the service was effected.

15. The proceedings before the Tribunal were conducted in the absence of the respondent. The record of the Tribunal showed that the respondent was allegedly served with the claim by an unnamed village elder; and that he declined to accept service. A village elder is not an authorized process server under **Order 5** of the **Civil Procedure Rules.** In any case no affidavit of service was sworn and filed with the Tribunal.

16. Proof of service of court process is critical in all judicial or quasi-judicial proceedings. If it is demonstrated that there was no service and a decision is reached without due process, on application, an applicant is entitled to an order to set aside the *exparte* judgment or award ***ex debito justitiae*** *(as a matter of right).*

17. In his affidavit in reply, the appellant said nothing regarding the issue of service and membership of the Tribunal.The respondent had annexed to his affidavit a copy of a Kenya Gazette showing names of persons who had been appointed by the Minister for Lands and Settlement to be members of the respective panels of elders for Land Disputes Tribunals established for various Registration Districts.

18. The High Court established that none of the three members who made the impugned decision had been gazetted as members of the Tribunal under Trans-Nzoia Registration District.The High Court was therefore right in arriving at the conclusion that a decision made by unauthorized persons is a nullity in law.

19. A decision that is a nullity in law cannot be allowed to stand because there was an element of delay in prosecuting the application for the order of certiorari. As rightly pointed out by the learned judge, the application for leave was filed within six months from the date of making of the Tribunal's award; it is the grant of the leave that came much later, after the Tribunal's award had been adopted as a judgment of the court; a decree issued and executed. Whereas we are concerned by the inordinate delay in prosecution of the respondent's application, that delay *per se* cannot be a bar to grant of an order of certiorari to quash an award that was a nullity. Since the award was a nullity, so was the resultant decree that was executed.

20. We are alive to the fact that this judgment has not resolved the dispute over the suit land. We however believe there are other avenues through which the issue of ownership of the suit land can be determined. It would therefore be prejudicial for this Court to declare the rights of the parties.

21. We are satisfied that the learned judge came to the right conclusion in granting the order of certiorari that had been sought by the respondent. Consequently, this appeal is dismissed with costs to the respondent.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.