



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 51 OF 2010

BETWEEN

KIURA KIGUNDU..... APPELLANT

AND

DAVID MURIITHI KIGUNDU..... 1ST RESPONDENT

HARISON NJERU KIGUNDU..... 2ND RESPONDENT

MUCHIRA NJOGU KIGUNDU..... 3RD RESPONDENT

NJAGI KIGUNDU..... 4TH RESPONDENT

SENIOR RESIDENT MAGISTRATE

AT KERUGOYA 5TH RESPONDENT

CHAIRMAN PROVINCIAL LAND APPEAL

COMMITTEE TRIBUNAL CENTRAL PROVINCE 6TH RESPONDENT

*(An appeal from the ruling and order of the High Court of Kenya at Embu (W. Karanja, J)
dated 10th February, 2010*

in

Judicial Review No. 5 of 2010)

JUDGMENT OF THE COURT

1. Before us is an appeal from the ruling of the High Court at Embu (W. Karanja, J. (as she then was)) dated 10th February, 2010, wherein the appellant's application seeking leave to institute judicial review proceedings for an order of *certiorari* to quash the decision of the Provincial Land Appeals Committee dated 24th November, 1999 was dismissed.

2. Being the eldest son in his family, the appellant was registered as the proprietor of all that parcel described as Ngariama/Kabari/225 (suit property) after the process of demarcation in the area was completed. It is not in dispute that the appellant was registered as the proprietor of the suit property because at the time of the said demarcation his father was suffering from a mental condition and his mother could not hold title as per the kikuyu customary law. The appellant's family settled on the suit property in 1959. Subsequently, the appellant refused to subdivide and give his brothers their respective portions of the suit property.
3. David Muriithi Kigundu, the 1st respondent, filed a claim at the Gichugu Land Dispute Tribunal (Land Tribunal) seeking *inter alia* subdivision of the suit property amongst the appellant and his four brothers. The Land Tribunal in its award, directed that the appellant's four brothers be given a portion of 1 acre each from the suit property leaving the appellant with 3 acres. Being aggrieved with the said decision the appellant appealed to the Land Disputes Tribunal Appeals Committee at Nyeri (Appeals Tribunal). The Appeals Tribunal in its award dated 24th November, 1999, confirmed the decision of the Land Tribunal. The Appeals Tribunal's award was adopted as a judgment of the court on 2nd June, 2009 by the Principal Magistrate's Court at Kerugoya in Award Cause No. 24 of 1999.
4. Subsequently, on 10th February, 2010 the appellant filed an *ex-parte* application in the High Court, wherein he sought leave to institute judicial review proceedings for an order of certiorari to quash the award of the Appeals Tribunal dated 24th November, 1999 and the subsequent adoption of the award as judgment of the court in Award Cause No. 24 of 1999. The learned Judge (W. Karanja, J.) (as she then was), in dismissing the leave application, held that the same was time barred because leave to institute the judicial review proceedings was sought 10 years after the decision sought to be quashed was made, contrary to the period prescribed by law. It is against the said decision that the appellant has filed this appeal based on four grounds which we believe can be summed up into one issue; whether the learned Judge erred in declining to grant the leave sought by the appellant.
5. The appeal herein proceeded by way of written submissions that were filed by the parties. The appellant, through his written submissions, contended that the Appeals Tribunal's award contravened his proprietary rights enshrined under the Constitution; that the award also contravened section 3 of the Land Disputes Tribunal Act No. 18 Of 1990 (repealed) and the Registered Land Act, Chapter 300, Laws of Kenya (repealed). He further contended that the learned Judge misdirected herself by failing to take into account the foregoing. He urged us not to pay undue regard to technicalities and to set aside the High Court's ruling dated 10th February, 2010 and grant him leave to institute the judicial review proceedings. On the other hand, the respondents through written submissions filed on their behalf by the firm of Rugaita & Co. Advocates, contended that the appellant's application was time barred because he sought leave after the expiry of the prescribed statutory period. They maintained that the learned Judge exercised her discretion properly and urged us to dismiss the appeal.
6. We have considered the grounds of appeal, the record of appeal, written submissions of the parties and the law. The appellant sought leave to institute judicial review proceedings under Order LIII (now Order 53) of the Civil Procedure Rules. A court in granting leave to institute judicial review proceedings exercises its discretionary jurisdiction. Therefore, before we can interfere with the learned Judge's discretion we must be satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or, that she misapprehended the law or failed to take into account some relevant matter. In ***Mbogo & Another vs. Shah (1968) E.A. 93*** at page 95, Sir Charles Newbold P. held,

“.....a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

7. Order LIII rule 2 (now Order 53 rule 2) of the Civil Procedure Rules, which is couched in mandatory terms provides ,

“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...”

The decision of the appeals tribunal which the appellant sought to be quashed was made on 24th November, 1999 and was adopted as a judgment of the court on 2nd June, 2009. The application for leave to institute judicial review proceedings for an order of certiorari was filed by the appellant on 10th February, 2010. Based on the foregoing, we concur with the learned Judge's finding that the appellant's application for leave to institute judicial review proceedings for an order of certiorari was filed beyond the prescribed period of six months after the decision of the appeals tribunal and its subsequent adoption as a judgment of the court. Therefore, the said application was bad in law and could not have been granted. Having found as we have, we see no reason to interfere with the learned Judge's discretion of declining to grant the leave sought.

8. Accordingly, the appeal herein is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 20th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR