



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL NO. 296 OF 2010**

**BETWEEN**

**RAHAB WANGARI GATUNA ..... APPELLANT**

**VERSUS**

**MURANGA DISTRICT**

**LAND DISPUTES TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**THE PRINCIPLA MAGISTRATE**

**MURANGA ..... 2<sup>ND</sup> RESPONDENT**

**JAMES KAMAU KIHUNGI ..... 3<sup>RD</sup> RESPONDENT**

*(APPEAL FROM THE RULING AND ORDER OF THE HIGH COURT OF KENYA AT NYERI (SERGON J.) DELIVERED ON 14<sup>TH</sup> MAY 2010*

*IN*

*MISC. CIVIL APP. NO. 54 OF 2008)*

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**JUDGMENT OF THE COURT**

1. By a Notice of Motion dated and filed in Court on 29<sup>th</sup> April 2008, the appellant, Rahab Wangari Gatuna as the Interested Party moved the High Court Under Order LIII Rule 3 of the Civil Procedure Act and Rules for the following orders:
  - i. *That an Order of Certiorari to remove the proceedings and award of the Muranga District Land Disputes Tribunal in case No. LDT 23 of 2008 in respect of land parcel No. Loc.8/Matharite/Kiaheho/574 into the Honourable Court for the purpose of their being quashed and an order that the proceedings be quashed forthwith on their removal into the High Court.*
  - ii. *That an Order of Prohibition do issue prohibiting the Principal Magistrate’s Court at Muranga from proceeding with or entering judgement in terms of the award dated 28<sup>th</sup> February 2008.*

iii. ***That the costs of this application be borne by James Kamau Kihungi.***

2. The High Court did not hear the Notice of Motion on merit because a preliminary issue was raised that the Motion sought to quash a decision that was made nine (9) months before leave to file the application was obtained. It was submitted that under the provisions of Order LIII Rule 1 (2) of the Civil Procedure Rules, an application for judicial review can only be made within 6 months of the act or decision complained about.
3. The learned Judge upon hearing the preliminary issue held that the decision sought to be quashed was made on 23<sup>rd</sup> May 2007 by the Kahuro Land Disputes Tribunal in Muranga and the application for leave was filed on 22<sup>nd</sup> April 2008 which was nine (9) months after the decision was made. The learned Judge struck out the Notice of Motion observing that under Order LIII Rule 1 (2) of the Civil Procedure Rules, leave to apply for an order of certiorari can only be made not more than six months from the date of the act or decision complained against.
4. Aggrieved by the decision to strike out the Notice of Motion, the appellant has lodged this appeal and the main ground cited is that the learned Judge misdirected himself on the facts when he held that the award of Kahuro Land Disputes Tribunal was made on 23<sup>rd</sup> May, 2007.
5. At the hearing, learned counsel **J. N. Mbutia** appeared for the appellant while learned counsel **John Gacheru** appeared for the respondent.
6. Counsel for the appellant elaborated on the ground of appeal noting that the main issue is to ascertain the date upon which the Kahuro Land Disputes Tribunal made the award. It was submitted that the learned Judge erred in finding that the Tribunal made its award on 23<sup>rd</sup> May 2007. In support of this submission, counsel pointed out that there was no handwritten record of the proceedings of the Tribunal and what was on record was a typed version of the proceedings. That the typed version indicated that the Tribunal held its sittings on 23<sup>rd</sup> May 2007. At the end of the typed record, it is stated that “the judgment was read to both parties on .....” The date upon which the judgment or award of the Tribunal was made is not shown instead there is a blank space.
7. Counsel for the appellant submitted that the parties were not aware of the award or the date of award by Tribunal and the appellant only became aware of the same when she learnt that the Chairman of the Tribunal had filed the award in court. The filing date is given as 8<sup>th</sup> February 2008 which date is derived from the court stamp. Counsel further pointed out that even the respondent was not aware of the date upon which the Tribunal made the award. In support this submission, counsel pointed that the respondent in his chamber summons application dated 14<sup>th</sup> March 2008 (seeking the court to enter judgment based on the award) did not indicate the date when the Tribunal made the award. The appellant submitted that counting from 8<sup>th</sup> February 2008 when the award was filed, then the Notice of Motion dated 29<sup>th</sup> April 2008 was filed within six (6) months of the decision being sought to be quashed. It was submitted that in the absence of the date of award, the only available date is 8<sup>th</sup> February 2008 which is the date when the Chairman of the Tribunal lodged the award in court at the Senior Principal Magistrate’s Court in Muranga.
8. Counsel for the respondent submitted that the typed record of the proceedings of the Kahuro Land Disputes Tribunal is the only authentic record available; the typed version shows that the sittings of the Tribunal were held on 23<sup>rd</sup> May 2007 and does not show that the Tribunal adjourned its sittings; the only inference that can be drawn is that the Tribunal made its award on the same day of its sitting which is 23<sup>rd</sup> May 2007. Based on this inference, the respondent submitted that the learned Judge was correct in finding that the Notice of Motion dated 29<sup>th</sup> April 2008 was filed nine (9) months after the decision sought to be quashed was made.
9. We have considered the rival submissions by learned counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle v Associated Motor Boat Co. [1968] EA 123***, thus:

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and***

*should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).*

This court further stated in Jabane – v- Olenja [1986] KLR 661

664, thus:

*“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”*

10. Our perusal of the record shows that the typed record of the Kahuro Land Disputes Tribunal does not indicate the date of the award, there is a blank. It is conjecture as to why the date of the award was not typed on the record. The learned Judge of the High Court when faced with this issue directed that the original file of Muranga Senior Principal Magistrate's Land Disputes Tribunal No. 23 of 2008 should be produced in court; there is no record as to whether the original file was ever produced in court and whether the directive was implemented. Cases where judgments have not been dated have severally come before this court. In Fredrick Jones Kinyua & Peter Kiplagat Koech – v- Wanda Baird, Civil Appeal No. NAI 17 of 1999, the appellant filed an undated judgment with the result that the record of appeal was struck out. In Palace Dry Cleaners Limited –v- Abdi Ahmed Abdi Civil Appeal No. 265 of 1996 this court stated that dating of a ruling is mandatory and in the absence of such dating, an appeal is incompetent and will be struck out. (See also Mohamed Omar Shunguli – v- Armie Ngiana Rama, Civil Appeal No. 16 of 1992; Simon Lokwa Acharia – v- R Criminal, Appeal No. 156 of 2004; Captain Musa Hassan Bulhan –v – Kenya Airways Limited & Official Receiver 2006 e KLR).
11. It is not in contention that the Kahuro Land Disputes Tribunal award was filed in court on 8<sup>th</sup> February 2008; it is also not in contention that the typed record of Tribunal proceedings does not indicate the date of the award. The date of award is the relevant and critical factor in determining whether the Notice of Motion dated 29<sup>th</sup> April 2008 was filed within time. The standard of proof in civil proceedings is on a balance of probabilities. The absence of the date of award on the record of the Tribunal means that there is no proof that the award was made on 23<sup>rd</sup> May 2007. This is given credence when the same typed record shows that the Tribunal visited the suit property on 14<sup>th</sup> September 2007. One would ask whether the date of 14<sup>th</sup> September 2007 was a typographical error, it is not within the duty of this court to speculate the answer to this. At the hearing of this appeal, neither party could confirm if the Tribunal actually visited the suit property on 14<sup>th</sup> September 2007. We find that the Tribunal could not have visited the suit property on a date after it had made an award. We are left in doubt as to whether the award was actually made on 23<sup>rd</sup> May 2007 and whether the Tribunal actually visited the suit property on 14<sup>th</sup> September 2007. In view of the doubt, and on a balance of probability there is no proof that the decision sought to be quashed was made on 23<sup>rd</sup> May 2007. The end result is that the only undisputed date is 8<sup>th</sup> February 2008 when the award was filed at the Senior Principal Magistrate's Court in Muranga. Going by this date, we are inclined to hold that the Notice of Motion dated 29<sup>th</sup> April 2008 was filed within six months of the decision sought to be quashed.
12. The upshot is that this appeal is allowed and we set aside the Ruling and Order of the learned Judge made on 14<sup>th</sup> May 2010 and hereby order that the Notice of Motion dated 29<sup>th</sup> April 2008 be and is hereby re-instated for hearing on merit before the High Court. The other grounds of appeal are merit based and since the Notice of Motion has been reinstated, we are reluctant to

delve into the merits as these shall be canvassed before the High Court. Costs shall abide by the outcome of the hearing before the High Court.

*Dated and delivered at Nyeri this 18<sup>th</sup> day of July, 2013.*

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***OTIENO - ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**