



REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 12 of 2008

**JOHN GICHOBI NDEGWA.....
APPELLANT**

AND

**REPUBLIC..... 1ST
RESPONDENT**

**THE DISTRICT LAND DISPUTES TRIBUNAL CENTRAL DIVISION-KIRINYAGA...2ND
RESPONDENT**

**KERUGOYA SENIOR RESIDENT MAGISTRATE’S COURT.....3RD
RESPONDENT**

**GRACE GACHUI KATHEI.....4TH
RESPONDENT**

*(Being an appeal against Judgment & Order of the High Court of Kenya at Embu (J. N. Khaminwa, J)
dated 25th June, 2007*

in

Misc. Appl. No. 123 of 2006)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (*Khaminwa, J.*) delivered on 25th June, 2007 apparently granting an order of certiorari quashing the decision of Land Disputes Tribunal, Central Division Kirinyaga (tribunal) dated 26th January, 2005.

The case before the tribunal (No. 22 of 2005) was filed by *John Gichohi Ndegwa* (the appellant herein) against *Grace Gachui Kathei* (the respondent) herein. The appellant claimed a portion of land title No. Inoi/Kamondi/615, which Luka Kathei his grandfather, had allegedly promised to give him before he died. The respondent is the fourth wife of the deceased. The elders found that land title Inoi/Kamondo/615 was sub-divided into three portions; numbers 1011, 1012, 1013 and that sub-division of No. 1011 was further sub-divided and sub-division No. 1628 comprising of 0.765 Hectares registered in the name of the respondent. The Tribunal ultimately awarded the appellant one acre from land title No.

Inoi/Kamondo/1628 and ¾ acres to the respondent.

The documents in the Record of Appeal show that the award of the Tribunal was filed before the Resident Magistrate Court at Kerugoya for enforcement and that the Award was adopted as a judgment of the Court on 17th March, 2005. The documents further show that the respondent filed Civil Appeal No. 22 of 2005 in the High Court Embu, but the appeal was summarily rejected on 18th August, 2005.

By a chamber summons dated 26th September, 2006, Grace Gachui applied under **Order LIII Rules 1(2), 3 and 4** of the Civil Procedure Rules for leave to apply for an order of certiorari to quash the decision of the Land Dispute Tribunal, Kirinyaga Central Division, Tribunal Case No. 30 of 2004.

Before that application was heard, the respondent filed another application, by notice of motion dated 6th November, 2006. The second application was brought under **Order XLIX Rule 5** of the Civil Procedure Rules for two orders namely; extension of time and leave to file an application for an order of certiorari seeking an order that the application for leave to file application for an order of certiorari and the statement of facts filed on 26th September, 2006 be deemed as properly filed.

The second application was granted *ex parte* by the High Court (Khaminwa, J.) on 23rd November, 2006. The High Court further ordered the respondent to file an application for orders of certiorari within 21 days. Indeed on 14th December, 2006, the respondent filed an application dated 7th December, 2006 for an order of certiorari to quash the decision of the Tribunal dated 26th January, 2005 on the main ground that the tribunal acted in excess of jurisdiction in determining matters relating to title to land registered under the Registered Land Act (now repealed).

When the application came for hearing *interparties* before the High Court on 25th June 2007, **Mr. Chomba** who was holding brief for Mr. Magee for the respondent (Grace Kathei), applied for adjournment on the ground that the matter had not been recorded in their diary.

The application for adjournment was opposed by **Mr. Mutahi**, learned counsel for the respondent herein. The court ultimately rejected the application for adjournment whereupon Mr. Mutahi addressed the Court briefly on the application, after which the Court gave an extemporal judgment.

“It is my finding that the award was made in excess of jurisdiction. The Tribunal had no power to deal with registered land. Also the issue of a trust is raised. The tribunal is not empowered to deal with issues of trust. Lastly, it is my finding that at the time the dispute was filed in the Tribunal, the disputed land had already been sub-divided and the title was nonexistent.”

The appeal is against that decision. It is necessary to reproduce the five grounds of appeal thus:

1. **That the learned Judge erred in law in disregarding the replying affidavit sworn on 22/1/2007 by John Gichobi Ndegwa and the contents therein.**
2. **That the learned Judge erred in law in disregarding the fact that the application for leave to file the application for judicial review dated 26/9/2007 was filed out of time.**
3. **That the learned Judge erred in law in extending the time within which to file an application for judicial review.**
4. **That the learned Judge erred in law in disregarding the fact that the respondent’s appeal in High Court Civil Appeal number 22 of 2005 had been dismissed on 18/8/2005 and as such the application for judicial review was incompetent and an abuse of the court process.**
5. **That the learned Judge erred in law in allowing the application dated 7/12/2006 yet time within which to file the same had been improperly and unlawfully extended.**

Regarding the first ground of appeal, it is true that the appellant had filed a replying affidavit to the application for an order of certiorari. The replying affidavit was sworn on 22nd January, 2007. In paragraph 2 of that replying affidavit, the appellant had deposed that the application was incompetent for two reasons namely; firstly, that the application dated 26th September, 2006 for leave was not only fatally defective, but lodged out of time and secondly, because the application for extension of time was incompetent as there was no provision in law for extension of time. Further, in paragraph 3 of the replying affidavit, the appellant had deposed that the respondent was guilty of material non-disclosure in that she did not disclose that she had lodged an appeal to the High Court at Embu –CA No. 22 of 2005 which was rejected.

Mr. Magee for the appellant submitted in respect of the first ground that by failing to take into account the replying affidavit, the trial Judge violated rules of natural justice with the effect that the appellant was not heard. Mr. Magee also submitted that the application for judicial review was filed out of time, that time was irregularly extended as Civil Procedure Act and Rules do not apply to limitation of time prescribed by the Law Reform Act.

Mr. Mutahi supported the decision of the High Court and submitted that both the extension of time and grant of leave to apply for order of certiorari were properly granted.

We have considered the grounds of appeal and the respective submissions.

Regarding the first ground, the main complaint is that the appellant was not heard in opposition to the application for the order of certiorari. Indeed, the record shows that Mr. Chomba who applied for adjournment on behalf of Mr. Magee stated that he did not even have the case file. Although the record does not show what happened after the application for adjournment was rejected, it is apparent that Mr. Chomba did not address the Court in answer to the application. Had he been present, his name and his reply would have been recorded. It seems that the application in essence proceeded *ex parte*.

Secondly, as correctly submitted by Mr. Magee, the trial judge was required to consider the appellant's replying affidavit which was already filed even in the absence of counsel. It is apparent from the extempore judgment that the learned judge did not refer or even consider the replying affidavit. We are satisfied in the circumstances that the High Court erred in failing to give the appellant a fair hearing. The proper remedy for this error is to give the appellant an opportunity to be heard, particularly on the matters raised in the replying affidavit.

That being our view, it is not necessary to consider the other grounds which relate to the competence of the application for leave and the legality of the order extending time to file an application for an order of certiorari. Indeed those matters were raised in paragraph 2 of the replying affidavit but were never considered. Thus we do not have the benefit of the Judge's decision on them. It would be improper to express our views on those matters without a determination by the Court of first instance. The rehearing of the application not only gives the appellant an opportunity to raise those issues, but also gives the High Court an opportunity to determine them judicially.

The error was committed by the Court and was not caused by either party. Thus, neither party should bear the burden of the costs of this appeal at this stage.

For the above reasons, the appeal is allowed to the extent that the order of certiorari granted by the High Court on 25th June, 2007 is set aside. The application for an order of certiorari dated 7th December, 2006 and filed on 14th December, 2006 shall be heard afresh by a different Judge. The costs of this appeal shall be costs in the said application

Orders accordingly.

Dated and delivered at Nyeri this 1st day of November, 2012.

E. M. GITHINJI
.....
JUDGE OF APPEAL

R. N. NAMBUYE
.....
JUDGE OF APPEAL

W. KARANJA
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR