REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 89 of 2008

In the matter of an application for leave to apply for JUDICIAL REVIEW FOR orders of certiorari TO QUASH THE AWARD OF GATANGA LAND DISPUTES TRIBUNAL ADOPTED ON 30TH JULY 2007

AND
In the matter of: the REGISTERED LAND ACT, CAP 300, LAWS OF KENYA

AND

In the matter of: land DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

In the matter of: TITLE NO. LOC. 16/GATURA/804 REGISTERED IN THE NAME OF HARU NGUYAI

REPUBLIC…….....……Applicant
Versus
MWANGI NGUYAI…….....……1ST RESPONDENT

THE CHAIRMAN, GATANGA LAND DISPUTES TRIBUNAL…..……..2ND RESPONDENT

LAND REGISTRAR, THIKA…….....……3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL….....4TH RESPONDENT

EX PARTE HARU NGUYAI

JUDGEMENT

1. By a Notice of Motion dated 12th November 2008, the *ex parte* applicant herein, **Haru Nguyai**, seeks the following orders:

a. That this Honourable court do grant an order for certiorari, to move into the High Court and quash the proceedings and award of the Gatanga, Land Disputes Tribunal issued on 25th April 2007 and adopted by the Chief Magistrate's Court Thika on 30th July 2007.

b. Costs of this application be provided for.

2. The application is supported by a Statement filed on 24th October, 2008, an affidavit sworn by the *ex parte* applicant herein, **Haru Nguyai** on 28th October 2008.

3. According to the *ex parte* applicant, he is the registered proprietor of the property known as Loc. 16/Gatura/804 situated at Muranga and measuring 0.71 ha (hereinafter referred to as the suit parcel). The 1st respondent on the other hand is the *ex parte* applicant's brother and owns property known as Loc. 16/Gatura/471 also situated at Muranga measuring 1.66 ha. The said parcels of lands were allocated to the two brothers by their late father **Nguyai Mwichi** during the demarcation process an allocation which both of them were satisfied with before the surveyor was directed to complete the subdivision and show each of the brothers their respective portions. Each portion, it is deposed, has a road connecting it to the river. In early 1970's the *ex parte* applicant relocated to Turi Molo and left his younger brother as caretaker of the land. Later in order to educate his children the *ex parte* applicant sold part of his portion of land and subdivide the same hence a new title was issued for the remaining portion in 1987 while the 1st respondent retained his portion.

4. However sometimes in April 2007, the *ex parte* applicant received information from his said younger brother that Gatanga Land Disputes Tribunal had directed Thika Lands Registrar to resurvey his parcel of land and the 1st respondent's and give access to the river although he was neither involved nor afforded an opportunity of being heard. In his view the 1st respondent has been making efforts to have the said land subdivided using local administration. After the Tribunal's decision, the said award was filed and confirmed by the Magistrate on 30th July 2007 which award directed the Land Registrar, Thika to re-survey the *ex parte* applicant's said land and the 1st respondent to give access to the river. Although the notice from the Tribunal for the hearing was purportedly sent through the Chief of Kariara, the *ex parte* applicant contends that he neither received the said notice nor did he receive the statement of claim. According to him the tribunal acted unfairly by not giving him an opportunity to present his case and further acted outside its jurisdiction by dealing with land registered under the ***Registered Land Act***. It is further contended by the *ex parte* applicant that the Tribunal acted outside its jurisdiction by ordering the re-survey of the said land whereas the Land Registrar had specifically stated that the dispute did not involve boundaries but that the respondent was claiming a portion of the land next to the river. The *ex parte* applicant discloses that his earlier application seeking to quash the decision of the Tribunal was struck out on a technicality.

5. In opposition to the application, the 1st respondent filed a replying affidavit on 6th February 2009 sworn on 3rd February 2009. In the said affidavit he admits that the applicant and himself were allocated land by their late father, Nguyai Mwichi and that the processed titles to their respective lands in 1976 and 1987 respectively. He, however, came to realize that the actual position on the ground is that the applicant had encroached on his boundary thereby trespassing and blocking his access to the river. Despite his requests to the applicant to have the boundary adjusted to reflect the true position the applicant, according to the 1st respondent, declined forcing the 1st respondent to lodge a complaint with the Tribunal whose proceedings both the applicant and the 1st respondent attend and participated in. In his view the issue was not in respect of title since both of them have their respective titles but the actual position of the boundary on the ground and that is what the Tribunal ordered. In his view, even if a resurvey is ordered each one of them will still remain with their respective acreage as per their respective titles. According to him the Tribunal acted within its jurisdiction as the dispute clearly touches on the boundary.

6. It is further contended by the 1st respondent that as the decree which is sought to be quashed is not attached to the application, the application is incompetent. Apart from that the application is time barred having been brought more than six months from the date of the award.

7. On their part the 2nd, 3rd and 4th Respondents on 18th February 2009 filed the following grounds of opposition:

1. The judicial review application was filed on 24th October 2008, approximately fifteen months after the decision of the 2nd respondent had been adopted by Chief Magistrate, Thika; beyond the

six months statutory period.

2. The ex parte applicant is seeking to quash the decision of the Chief Magistrate's Court Thika who is not a party to this judicial review application.

3. There are no orders sought against the 3rd and 4th Respondents who have been erroneously enjoined as such in the present application.

4. No judicial review order may be granted against the 1st Respondent who is not a quasi-judicial tribunal/subordinate Court or a public officer discharging a public duty.

8. On behalf of the applicant, it was submitted that the proceedings ere heard in the absence of the applicant without him being afforded an opportunity of being heard. According to the applicant there is no evidence on record that the applicant was ever served since service is personal. It is submitted that the Tribunal acted fraudulently by purporting that he gave evidence when he was not present at the said hearing having not been served. In the applicant's view the Tribunal acted in excess of its jurisdiction since the dispute was not a boundary dispute and a claim for a portion of the land. By giving access to the river, it is submitted that the Tribunal acted outside its jurisdiction. The applicant's further submission is that the Tribunal had no powers to entertain a dispute in respect ownership of a parcel of land registered under the ***Registered Land Act*** and cited **Republic vs. Chairman, Nandi Hills Division Land Disputes Tribunal and 3 Others Eldoret Misc. Appl. No. 195 of 2005**.

9. On behalf of the 1st respondent, it was submitted that since the *ex parte* applicant was notified of the hearing of the case through the Assistant Chief Kiambiriria Turi, there was no violation of the rules of natural justice. It is submitted that the applicant attended the proceedings, was heard and actively took part and even called a witness hence there is no evidence that the Tribunal acted fraudulently. In the applicant's opinion, the Tribunal acted within its jurisdiction under section 2 of the Land Disputes Act 1990 and submitted that land is said to be land whether or not ***Registered Land Act*** and that only areas under adjudication are exempted. According to the 1st respondent, the dispute was a boundary dispute and that it was not going to interfere with the acreage.

10. Having considered the foregoing the first issue for determination is whether this application was brought within the period stipulated under the ***Law Reform Act***, Cap 26 Laws of Kenya. Section 9(3) thereof provides:

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.

11. In this case, the impugned decision was made on 25th April 2007 and was adopted by the Chief Magistrate's Court on 30th July 2007. The applicant's earlier challenge to the said decision vide Nairobi Miscellaneous Application No. 953 of 2007 between **Harun Nguyai and Mwangi Nguyai & 3 Others** was on 30th June 2008 struck out. These proceedings were instituted on 24th October 2008, clearly outside the limitation period provided under the above cited provision. See **Speke Hotel (1996) Limited vs. Uganda Revenue Authority Kampala HCMCA No. 3 of 2009 [2008] 2 EA 353.**

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.

14. These proceedings were instituted out of time and as was held in **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**:

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s.9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose…As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

15. 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.

16. The Court is however, of the opinion that in order to uphold the values of the Constitution, the Court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it insufficient to properly realise the Constitutional aspirations to "read in" the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the Legislation unconstitutional. This remedy was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17** in which the said Court the expressed itself *inter alia* as follows:

"Attention needs to be given to the situation that would arise if Parliament fails timeously to cure

the under-inclusiveness of the common law and the Marriage Act. Two equally untenable consequences need to be avoided. The one is that the common law and section 30(1) of the Marriage Act cease to have legal effect. The other unacceptable outcome is that the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration; after three years of litigation Ms Fourie and Ms Bonthuys will have won their case, but be no better off in practice. What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples. These requirements are not irreconcilable. They could be met by reading into section 30(1) of the Marriage Act the words "or spouse" after the words "or husband", as the Equality Project proposes. Reading-in of the words "or spouse" has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word. Before I conclude this judgment I must stress that it has dealt solely with the issues directly before the Court. I leave open for appropriate future legislative consideration or judicial determination the effect, if any, of this judgment on decisions this Court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection. As the SALRC has indicated, there are a great range of issues that call for legislative attention. The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief. In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples."

17. As was recognised by this Court in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR:**

"The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises… We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables as to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights."

15. The matter before me, however, is not an application for extension of time to challenge the decision of the Tribunal and therefore even if I were minded to extend time there would be no sufficient material disclosed before me to enable exercise my discretion in favour of the applicant

16. Apart from the foregoing, Order 53 rule 3(2) of the Civil Procedure Rules provides:

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

17. The Notice of Motion dated 12th November 2008 does not indicate that it was intended to be served upon the officer of the court whose decision is sought to be quashed. There was an attempt to amend the Notice of Motion but by a ruling delivered on 27th May 2009, that attempt was unsuccessful and the *ex parte* applicant seems to have thrown in the towel since there was no further attempt to bring the said court into these proceedings. Without serving the Chief Magistrate, Thika Court, it would not be proper for this Court to quash the decision made by the said Court as to do so would be in contravention of the rules of natural justice and the afore-cited provisions of the law. In **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353,** it was held that:

"Judicial review proceedings are meant to avoid technicalities of procedure in order to achieve flexibility, promptness, speed and finality hence the avoidance of the application of the Civil Procedure Rules, hook, line and sinker….The flexibility is reflected in Order 53, rule 2 which requires that the Notice of Motion be served on all persons directly affected, except where a court is involved, in which case the presiding officer of the court must specifically be served and where it is not possible to serve reasons must be given in the terms prescribed in Order 53, rule 3. Judicial review proceedings have the potential of affecting parties who have not been served."

18. In fact in **Barclays Bank of Kenya vs. City Council of Nairobi Nairobi HCMA. NO. 4475 of 2005** it was held that the court whose proceedings are sought to be quashed should be joined as a Respondent.

19. Where a decision of the Tribunal has been adopted by the Court the law is that the former is subsumed into the latter and the former ceases to exist with the result that the only decision that can be quashed is the Magistrate's adoptive decision. **Khamoni, J** in **R vs. Chairman Land Disputes Tribunal, Kirinyaga District & Another *Ex parte* Kariuki [2005] 2 KLR 10**held:

"The Court judgement having been entered by a Court, in law, not only was it improper but was also irregular for this notice of motion to have been filed praying for an order of *certiorari* to quash the decision of the Land disputes Tribunal since under section 7(2) of the Land Disputes Tribunals Act the Court enters judgement in accordance with the decision of the tribunal and upon judgement being entered a decree issues and is enforceable in the manner provided for under the Civil Procedure Act. Once such a decision is adopted by a Court, it becomes a judgement of the court thereby ceasing to exist as a decision, which can be separately quashed as contemplated in this notice of motion. What has to be dealt with now is a judgement of a court and not a decision of a tribunal just as a party would have appealed against the decision of the Provincial Land Disputes Appeals Committee and not against the decision of the Land Disputes Tribunal had the appellant's appeal in the Provincial Land Disputes Appeals Committee been heard and determined without the existence of an intervening court judgement adopting the tribunal's decision."

20. Without joining the Court to these proceedings, the decision of the Court cannot be quashed and since the decision of the Tribunal nolonger exists as an independent decision, the same cannot similarly be quashed. In any case even if the decision of the Tribunal could be quashed, it would mean that the decision of the Court would still exist and the Court would have acted in vain. Judicial review remedies being discretionary in nature, the Court does not grant them in vain.

21. Lastly, in **Republic vs. Ministry of Finance & Another Ex Parte Nyong'o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR 299 Nyamu, J** (as he then was) held, inter alia, that Judicial review orders are invariably directed at public bodies and authorities. Such orders may only be granted where the respondent is exercising quasi-judicial authority. It has not been alleged in this case that the 1st respondent was exercising any powers leave alone quasi-judicial ones. Whereas it would have been proper to join him as an interested party, it was obviously inappropriate to join him as a respondent in

these proceedings.

22. In result, I find no merit in the Notice of Motion dated 12th November 2008 which is hereby dismissed with costs to the Respondents.

Dated at Nairobi this 29th day of April 2013
G V ODUNGA
JUDGE

Delivered in the presence of Miss Wanjiru for the applicant, Mr. Ndung'u for the Respondent and Miss Kenyani for the 2nd to the 5th Respondents