



IN THE ENVIRONMENT AND LAND COURT OF KENYA

JUDICIAL REVIEW NO.13 OF 2012

VERSUS

EX-PARTE

MARGARET WAITHERERO

DAVID NJUGUNA KANG'ETHE

WILDSON THANJE NJOROGE.....INTERESTED PARTIES

1. The matter before me is a judicial review motion filed on 26 March 2012 seeking the following orders :-

2. *An order of certiorari to remove into this honourable court and quash the decision of the 1st respondent given on 17th August 2011 holding that the Honourable Court compels the District surveyor to visit these plots and mark boundaries and beacons.*

4. *Costs of and incidental to the application to be provided for.*

2. The motion is supported by the affidavits of the two ex-parte applicants which accompanied the application for leave.

4. Upon service, the interested parties filed an application dated 3 April 2012, seeking to have the leave to commence the judicial review motion revised, for the reason that leave was sought outside the 6 months limitation period provided for filing an application for certiorari. In the said application, it is averred that the award was made on 17 August 2011. I directed that the matters raised in that application be subsumed at the hearing of the main motion. A replying affidavit to the main motion was later filed and the core issue raised by the interested parties is that the proceedings herein were commenced outside the 6 month limitation period. No response was filed by the respondent, but Mr. Nguyo for the state, did submit only that the motion was filed outside the limitation period of 6 months.

6. The main point raised by Mr. B.N. Kipkoech for the interested party, and supported by Mr. Wachira Nguyo for the respondent, is that the motion herein was filed outside the 6 months period prescribed by Order 53 Rule 2 of the Civil Procedure Rules, 2010 and the Law Reform Act. He also raised an issue on the competency of the motion since the decision sought to be quashed was never attached to the motion.

8. I raise questions on the competency of the suit because the award sought to be quashed was never supplied to court. Now, if I do not know what it is that I am being called upon to quash, what exactly is it that I will be quashing " How can I quash what I do not know " I think it was incumbent upon the ex-parte applicants to annex what it is that they wanted quashed. If they could not get the award, then they

needed to give reasons why the same could not be in their hands. No reason has been given in this instance. In the premises, I am unable to tell what dispute was presented before the tribunal, what evidence was taken, and what conclusion was reached. It may be said that the decree shows what the award was. That may be true, but it does not tell me what the dispute was. Was the dispute over boundary or was it over ownership " If it was over boundary, to land held in common, then the tribunal would have had jurisdiction, but if it was over ownership, the tribunal would not have had jurisdiction.

3. (1) *Subject to this Act, all cases of a civil nature involving a dispute as to—*

(b) *a claim to occupy or work land; or*

10. It will be seen from the above that part of the jurisdiction of the land disputes tribunal, was to determine division, or the determination of boundaries to land, including land held in common. I note that the ex-parte applicants do not dispute the sale, but only the areas where the interested parties were to settle. As I mentioned earlier, it is not very clear what the dispute as presented before the tribunal was, and one cannot reach a firm conclusion of the nature of the dispute merely by looking at the decree. It was really necessary in the circumstances herein, for the ex-parte applicants to annex the full minutes of the dispute before the tribunal or at the very least the award. Without the same, I really cannot tell what dispute was presented and the nature of the award.

12. The second point is on time. There is consensus that the award was delivered on 17 August 2011.

The application for leave was filed on 7 March 2012 which is a period beyond 6 months. The Law Reform Act at Section 9 (3) provides as follows :-

13. I don't think it can be contested that the limitation period for filing orders of certiorari is 6 months of the decision. This is affirmed by Order 53 Rule 2 of the Civil Procedure Rules, 2010, which is drawn in similar fashion to Section 9(3) of the Law Reform Act. It is worded as follows :-

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 or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

15. In our case, there is no prayer seeking to quash the adoption of the decree or seeking to quash the decree. What is sought is limited only to quashing the award of the tribunal and no more. If the proceedings herein had sought the quashing of the decree, then I would say that the motion was filed within time, for the decree seems to have been passed on 31 October 2011 or at the earliest, 6 October 2011, which would be within 6 months of 7 March 2012, when the application for leave was filed. But as I have said before, the motion herein does not call for the quashing of the decree.

17. I am unable to bring myself to quash the decree, first because there is no specific prayer to do so, and secondly because I am not too sure whether the dispute was actually outside the jurisdiction of the tribunal. I would probably have excused the lack of pleading to quash the decree, if it was glaringly obvious, that we are dealing with a matter in which the tribunal did not have jurisdiction. But that as I have pointed out earlier, is not very clear to me.

19. It is so ordered.

MUNYAO SILA

ENVIRONMENT AND LAND COURT

In presence of :-

N/A for State Law Office for respondent

CA : Janet

JUDGE

AT NAKURU



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