REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE
Misc. Civil Application 23 of 2008

REPUBLIC ::::::::::::::::::::::::.....::::::::::::::: APPLICANT.

VERSUS

TONGAREN LAND DISPUTES TRIBUNAL COMPRISING OF:

BASIL MUKOSI MAKOKHA & 3 OTHERS :::::::::: 1ST RESP.

THE RESIDENT MAGISTRATE, KIMILILI

TERESA N. WAWIRE :::::::::::::::::::: INTERESTED PARTY.

PATRICK W. MUKHWANA ::::::::::::::::::::::::::EX-PARTE.

R U L I N G.

The applicant, Patrick Wawire Mukhwana, sought leave of this court to apply for an order of certiorari to remove into this court and quash the decision of Tongaren Land Disputes Tribunal which decision was read and adopted as a judgment of the court on 6th November, 2007 in Kimilili R.M.C. Land case No. 16 of 2004. His application seeking the leave was correctly brought by way of exparte chamber summons which was dated 5/3/2008. It was however not framed in conformity with the laid down procedure as it erroneously reflected the Republic as the Applicant. An exparte application for leave under order LIII Rule 1 of the Civil Procedure Rules is made not by the Republic but by the applicant himself but once leave is granted, the Notice of Motion seeking the order of certiorari, prohibition or mandamus is made in the name of the Republic. The applicant in this case failed to heed the decisions in **MOHAMED AHMED vs. REPUBLIC (1957) EA 323** and **FARMERS BUS vs. TRANSPORT LICENCING (1959) E 779.**

As the flaw relates to form rather than subsistence, it is not fatal but this wrong practice must be discontinued.

The application was made on the grounds inter alia, that the Land Disputes Tribunal had no jurisdiction to entertain the claim or to order subdivision or distribution and transfer of the land and further, that while the award was undated, the panel of elders was not properly constituted.

The principles of law applicable in this application are that the applicant must show that there is prima facie evidence of an arguable case. At this stage the court is not called upon to go into the

matter in depth, see the Court of Appeal decision in IN **THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS** and **IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT**, Civil appeal No. 144 of 2000 in which the Court of Appeal approved and applied the principles in the English case of **REPUBLIC vs. SECRETARY OF STATE** exparte **HARBAGE (1978) 1 ALLER 324** in which it was stated

"It cannot be denied that leave should be

granted, if on the material available, the court considers without going into the matter in depth

that there is an arguable case for granting

leave ……."

The first point the court has to decide is whether the applicant has established on prima facie basis that the decision of Tongaren Land Disputes Tribunal which the applicant seeks to have and if so whether there is a prima facie evidence of an arguable case for the leave sought. Admittedly, the decision was read to the parties and adopted as a judgment of the court on 6/11/2007 in Kimilili RMC Land case No. 16 of 2004. Did it continue to exist even after its adoption as a judgment of the court"

Can it be said that there is in this application material showing that there is an arguable case for granting leave" First, an applicant seeking leave under Rule 1 of Order LIII of the Civil Procedure Rules must show existence of a decision which is amenable to judicial review, that is to say a decision which is a public law one as distinct from private law one. In **Republic vs. Electricity Commissioners (1924) 1 KB 171** the English Court in the seminal statement stated that

"Whenever any person or body of persons has legal authority conferred by legislation to make decisions in public law, which affect the common law or statutory rights of other persons as individuals, it is amenable to the remedy of judicial review of its decision either for error of law in so acting, or for failure to act fairly towards the person who will be adversely affected viz by not affording him a reasonable opportunity of learning what is alleged against him and putting forward his own case in answer to it and to the absence of bills against him, on the part of the person by whom the decision is made."

In the instant application, the applicant states that the Tribunal's decision that is sought to be quashed was adopted by the Resident Magistrate court as a judgment of the court from which a decree would ensue. Did the award of the land Disputes Tribunal continue to exist in law after adoption as a judgment of the court for the purpose of being quashed by this court" Section 7(2) of **THE LAND DISPUTES TRIBUNALS ACT 1990** provides with regard to adoption of an award of the Land disputes Tribunal by a Magistrate Court thus:-

"**7(1) The court(Magistrate court) shall**

enter judgment in accordance with the decision

of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided under the Civil Procedure Act."

This provision is reiterated in and is in tandem with Rule 20 of **THE LAND DISPUTES TRIBUNALS (FORMS AND PROCEDURE) RULES 1993**. Once the decision of the Tribunal is adopted as aforesaid, it ceases to continue to exist in law. Instead, it is the judgment and decree ensuing therefrom that take its place. It would be absurd to have in existence both the award and the decree or judgment at the same time. Because of the right of appeal to the Appeals Committee provided for in section 8 (1) of the Land Disputes Tribunals Act 1990, both section 7 (2) of the said Act and Rule 20 of The Land Disputes Tribunals (forms and procedures) Rules 1993 ought to have reflected the period of appeal by providing that judgment may not be entered before the expiry of the 30 days period for appealing. Ostensibly, it is because such provision does not exist that all too often the awards are adopted as judgments long before the expiry of the period for appealing. Perhaps this is a matter the Attorney should take up urgently to handle the necessary amendment effected. But no matter. Once the adoption of the award takes place, unless it is set aside, the award cases to exist in law for the purpose of quashing. Unless a person aggrieved by the award to whom judicial review is available moves to court before the award is adopted as a judgment of the court or first causes them to be set aside the judgment so entered pursuant to the award, the application for leave may be misplaced.

I have perused the chambers summons application, and the statutory statement and verifying affidavit. Although the decision of the Tribunal was amenable to judicial review when it existed, it did not exist as at the time the applicant came to court. In absence of the decision sought to be quashed, it would be futile to grant leave. The question of prima facie evidence of an arguable case for the order sought does not arise in absence of the decision to be quashed. This being the position, I strike out the application on the ground that there is not in being a decision that can be quashed.

G.B.M. KARIUKI.

JUDGE.

11/3/2008

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