



Case Number:	Judicial Review 4 of 2019 (JR)
Date Delivered:	01 Feb 2022
Case Class:	Civil
Court:	Environment and Land Court at Migori
Case Action:	Judgment
Judge:	Mohammed Noor Kullow
Citation:	Bina Mwita v Land Registrar Kuria & another; Makorere Mwita (Interested Party) [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Migori
Docket Number:	-
History Docket Number:	-
Case Outcome:	Notice of Motion dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**JUDICIAL REVIEW NO. 4 OF 2019 (JR)**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND**

**ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF ARTICLES 36(1),25,23,20,57,47,48 CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATION ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF THE RESIDENT MAGISTRATE’S COURT AT KEHANCHA (LDT NO. 16 OF 2007)**

**AND**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26**

**LAWS OF KENYA AND ORDER 53 CIVIL PROCEDURE RULES**

**BETWEEN**

**BINA MWITA.....APPLICANT**

**VERSUS**

**LAND REGISTRAR KURIA.....1<sup>ST</sup> RESPONDENT**

**LAND SURVEYOR KURIA.....2<sup>ND</sup> RESPONDENT**

**AND**

**MAKORERE MWITA.....INTERESTED PARTY**

**JUDGMENT**

**INTRODUCTION**

1. The ex-parte Applicant herein vide an Ex-parte Chamber Summons Application dated 6<sup>th</sup> August, 2019 and brought under Certificate of Urgency; sought Leave of the Court to file the present Notice of Motion.

2. On 17.09.2019, the Honourable Judge issued directions and Orders; granting the ex-parte Applicant Leave to file the substantive judicial review proceedings and subsequently, the Respondents and the Interested Party to file their responses thereto.

3. Consequently, the Applicant filed the Notice of Motion dated 22<sup>nd</sup> July, 2019 and sought the following orders: -

**a) The judicial review proceedings and leave granted to the Applicant on the 17<sup>th</sup> day of September, 2019 do operate as stay of the decision of subdivision, transfer and or any other dealings with the suit land.**

**b) That the Applicant to be granted an Order of Certiorari that is the high court be pleased to recall and quash and revoke the decision of the Land Registrar- Kuria Sub County and the Land Surveyor Kuria Sub-County of subdivision and registration of land title no. NYABASI/ BOMERANI/77 into NYABASI/ BOMERANI/1664 and NYABASI/ BOMERANI/ 1665 by way of revocation of the same and subsequently rectify the register in relation to Parcel No. NYABASI/ BOMERANI/77**

**c) That the costs of this Application be provided for.**

4. The Application is anchored on the 5 grounds set out on its face and further on the grounds set out in the Statutory Statement dated 07.10.2019 and the Verifying Affidavit sworn on even date; which I have noted accordingly.

5. In a nutshell, the gist of the Applicant's claim is that Respondents' actions of implementing and/or executing the decree of the court issued vide Kehancha Resident Magistrate Court LDT No. 16 of 2007 dated on 07.12.2007 is ultra-vires, unprocedural, against the rules of natural justice and an illegality and the same should be annulled forthwith.

6. It is his claim that the Respondent implemented and/or executed the decree of the court issued on 07.12.2007 more than 12 years later without issuing him a Notice to Show Cause and further without the leave of the court as procedurally required and thus the said actions are null and void.

7. He posits that it is against the rules and principles of natural justice to implement and execute a decree of the court without his involvement, participation or notification since he is the 1<sup>st</sup> registered owner of the suit land and the same amounts to an infringement of his constitutional right to protection of property.

8. According to the Applicant, the Respondent sought to implement and execute a decree which had which had expired over 12 years ago and hence the same was an illegality. He further asserts that the rules of natural justice demand that the Respondent adopt a fair procedure in the line of their duty.

9. On 03.12.2019, this court issued directions that the substantive judicial review motion be disposed by way of written submissions. All the parties were given sufficient time to file and exchange their submissions which I have taken into account in arriving at my decision.

#### **APPLICANT'S SUBMISSIONS**

10. The Applicant's submission was anchored on two points; that the Land District Tribunal did not have the requisite jurisdiction to arbitrate over the suit property and whose decision was to the effect of conferring title over the suit property to the Interested Party against the Applicant who was the 1<sup>st</sup> registered owner.

11. He further submitted that the decree of the court in question issued on 07.12.2007 over 12 years ago was not capable of enforcement by virtue of prescription of time. That the Respondents ought to have issued a Notice to Show Cause and which notice should have been served upon the Applicant before the said execution and implementation.

12. He relied on the cases of Nyandarua District Land Tribunal vs Meshack Mwangi Maina Misc. Application No. 314 of 2004, Constitutional Petition No. 290 of 2009 between Daniel Migicho Njoroge vs Hon. Attorney General & 2 Others.

#### **INTERESTED PARTY'S SUBMISSIONS.**

13. The gist of the Interested Party's submissions was on whether the decree of the court issued in Kehancha LDT No. 16 of 2007 on 07.12.2007 was executed within the statutory stipulated time. It is his submission that the decree which was executed on 21.05.2019 was executed well within the required time.

14. On whether the Land District Tribunal had the requisite jurisdiction to adjudicate over the suit property, he did submit in the affirmative. He submitted that the tribunal was properly constituted and derived its mandate from the law and further that the Applicant has never appealed the decision of the said decision of the tribunal.

15. I have read and considered the substantive motion, the evidence adduced and the rival submissions by the parties herein and the various authorities cited in support of each case and I have taken the same into account in arriving at my decision.

#### **DETERMINATION AND ANALYSIS**

16. The issues for determination from the present Application are as follows: -

- a) Whether the execution and/or implementation of the Decree issued on 07.12.2007 was done within the limitation period.
- b) Whether an Order of Certiorari can issue against the Respondents in the circumstances.

#### **A) Whether the execution and/or implementation of the Decree issued on 07.12.2007 was done within the limitation period**

17. Section 4(4) of the Limitation of Actions Act provides as follows;

*"(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.*

18. Brief background to contextualize the matter, the decree herein was issued on 7<sup>th</sup> December, 2007 vide Kehancha Resident Magistrate Court LDT No. 16 of 2007. The effect of the said Order and Decree was to sub-divide and transfer a portion of the suit property NYABASI/ BOMERANI/77 into 2 portions; NYABASI/ BOMERANI/1664 and 1665. One of the portions measuring 3Ha was to be transferred to the Interested Party to hold in trust for their family while the Applicant herein retained the other portion measuring approx. 5Ha to hold in trust for their family. Nothing seemed to have happened since 2007 until 21<sup>st</sup> May, 2019 when the Respondents implemented the said decree and transferred the portion of the suit parcel to the Interested Party as stated in the decree and which culminated into the present Application.

19. The limitation period within which a decree must be executed and/or implemented is 12 years. The decree herein was issued on 07.12.2007 which therefore means that the 12year period would have lapsed on 7<sup>th</sup> December, 2019. The decree in this case was executed/ implemented on 21<sup>st</sup> May,2019. This in my view is still within the statutory stipulated timelines of 12years.

20. Therefore, the claims by the Applicant that the decree was not executed within the required timelines do not hold water and are therefore dismissed. I accordingly find that the execution and implementation of the decree in question herein was done within the limitation period.

#### **B) Whether an Order of Certiorari can issue against the Respondents**

21. According to the Judicial Review Handbook by Michael Fordham, 6<sup>th</sup> Edition page 5; Judicial Review is a central control mechanism of administrative law, by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest, policing parameters and duties imposed by Parliament, guiding public authorities and securing that they act lawfully, ensuring that they are accountable to the law and not above and protecting the rights and interests of those affected by the exercise of public authority power.

22. An Order of *Certiorari* can issue to quash a decision already made, if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or so such like reasons. See **Kenya National Examination Council vs Republic Ex-parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996**

23. One of the grounds that may be considered when granting an Order of *certiorari* is Procedural impropriety; this is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice to act or failure to act with procedural fairness towards the one to be affected by the decision, it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision.

24. Illegality on the other hand arises when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality See **Pastoli vs Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.**

25. The Applicant herein contends that the Respondents executed and/or implemented the decree issued on 07.12.2007 almost 12 years after it was issued, without serving him with a Notice to Show Cause as required by law and without his knowledge or involvement, which action amounted to an illegality. The Interested Party on the other hand avers that the execution of the said decree was done before the lapse of the limitation period and further that the Applicant has never appealed against the decision in reference.

26. Order 28 Rule 18 of the Civil Procedure Rules provides as follows: -

*18. (1) Where an application for execution is made—*

*(a) more than one year after the date of the decree;*

*(b) .....*

*(c) .....*

*the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:*

27. It is not in doubt that No Notice to Show Cause was issued to the Applicant. It is also common ground that the execution of the decree in question was done more than a year after it was issued, to be precise, the decree was executed and/or implemented after 11 years. The Civil Procedure clearly outlines the procedure that ought to be followed where an application for execution of a decree is made more than a year after the date of a decree. The Interested Party in this case has not demonstrated whether any notice was issued to the Applicant before execution of the decree or whether any application for execution was made. To this end, I agree with the Applicant that he ought to have been notified and issued with a Notice to Show Cause before the execution of the decree issued on 07.12.2007.

28. However, in order to grant the order of *Certiorari* as sought, it is important to interrogate the actions of the Respondents, as public bodies being complained of and whether the same amounts to an illegality as alleged to warrant the quashing of the subdivision of the suit property NYABASI/ BOMERANI/77 into 2 portions; NYABASI/ BOMERANI/1664 and 1665 and the subsequent transfer of one portion of the property to the Interested Party. In determining whether the said actions by the Respondents was an illegality I am guided by the abovementioned definition of what amounts to illegality.

29. It is my considered view that the Respondents herein in subdividing the suit property NYABASI/ BOMERANI/77 into 2 portions; NYABASI/ BOMERANI/1664 and 1665 and the subsequent transfer were acting pursuant and on the strength of the valid court decree issued on the 7<sup>th</sup> December, 2007; whose effect was to subdivide the suit property into two portions and thereafter effect transfer of one portion of particular acreage to the Interested Party while the other portion was to be retained by the Applicant. No decision was made by either the 1<sup>st</sup> Respondent, Land Registrar or the 2<sup>nd</sup> Respondent, Land Surveyor suo moto or on their own capacity, to enable this court interrogate the process by the Respondents in arriving at the said decision. In addition, the decree in

question is and remains a valid court decree; no appeal has ever been preferred against the said decision nor has it been set aside, reviewed or varied in any manner whatsoever.

30. Further, the Applicant has made claims on the jurisdiction of the Land Tribunal in issuing the award which was later adopted by the court. The Land Dispute Tribunal Act outlines an elaborate procedure on the process of Appeal of any decision or award made by the Tribunal. If the Applicant did not follow the said procedure, he cannot raise the same and challenge the said decision at this juncture and camouflage the Appeal in the Judicial Review Application.

31. This court in exercising its judicial review jurisdiction is not entitled to act as a court of Appeal over the matter but rather is only concerned with the decision making process. It is not in doubt that the procedure stipulated under Order 22 Rule 18 of the Civil Procedure Rules was not complied with; there was no Notice to Show Cause issued despite execution having taken place more than 11 years since the date of the decree. However, it is important to note that the Respondents in effecting the said subdivision and the subsequent transfer were not acting on their own accord, it is not the decision they made themselves but were guided by the valid court decree and thus there is no decision capable of being quashed.

32. Further, the Respondents cannot be faulted to not have complied with Order 22 Rule 18, there was no duty incumbent upon them to have asked the Interested Party (decree holder) whether or not he had issued a Notice to Show Cause as per the Rules. In any case, the right party to have followed the said laid out procedure under the Civil Procedure Rules is the Interested Party herein. It is therefore my considered opinion that Judicial Review is not the proper forum to challenge the issue of non-compliance with Order 22 Rule 18.

33. In view of the above; I find that the Applicant's prayer for an order of Certiorari cannot issue against the Respondent and the same is therefore **not merited**. The upshot of the foregoing is that the Notice of Motion Application dated 22.07.2019 is not merited and the same is hereby dismissed with no orders as to costs

**DATED, SIGNED and DELIVERED** virtually at **MIGORI** on **1<sup>ST</sup>** day of **FEBRUARY, 2022**.

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of:-**

Non appearance Applicant

Nonappearance Interested Party

Nonappearance Respondents

Tom Maurice - Court Assistant



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