



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. APPL. NO.105 OF 2012

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: KAJIADO SENIOR RESIDENT MAGISTRATE LAND DISPUTE CASE
NO.35 OF 2009

BETWEEN

DANIEL TURERE KAATA APPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE KAJIADO RESPONDENT

RULING

1. In an **amended Notice of Motion dated 31.5.2012** and amended on 8.11.2013 the Applicant is seeking leave to apply for orders of Judicial Review of Certiorari and Prohibition against the decision of Senior Resident Magistrate Kajiado in which he purported to set aside LDT Tribunal Award and all the subsequent orders. The application is based on the provisions of order 53 Rules 1(2) Civil Procedure Rules LDT Act No.18 of 1990 (repealed) ELC Act No.19 of 2011.
2. The Application is supported by the grounds on the face of the Motion **a – h** and the statutory statement and verifying affidavit sworn by Daniel Turere Kaatu on 8.11.2013. The application is opposed by the interested parties who have filed grounds of opposition dated 10.2.2014. The parties agreed to canvas the amended Notice of Motion by way of written submissions but only applicant filed the same.
3. The Applicants brief facts in support of application is that the dispute between the applicant and the interested parties is over **KJD/Kaputiei Sourth/2188** which was referred to Land Dispute Tribunal for determination. The Award was made on 29.10.2009 and upon being forwarded to the SRM's court, it was adopted as court decree. The interested parties made an application to set aside order adopting award as a court judgment. The court set aside the award and all the subsequent orders.
4. The order setting aside award and subsequent orders is the one to be challenged once leave is granted. The Respondent has not filed any reply to oppose the amended Motion. The interested party has filed grounds of opposition principally attacking the application on 2 grounds. The

application is bad in law and improperly before court, the Applicant has not brought himself within the ambits of grounds of Judicial Review orders, it has not been demonstrated that the order of court was irregular, irrational and illegal, and finally it is stated that the court had jurisdiction under Section 7 of LDT Act to entertain application.

5. After going through aforesaid materials, I find the following issues emerging:
 1. Whether the application is defective and bad in law.
 2. Whether the Applicant has met the threshold of grant of leave to apply for Judicial Review as sought? What is the order as to costs?

Order 53 Rule 1 (2) Civil Procedure Rules 2010 states that:

“An application for leave shall be made ex parte to a judge accompanied by statement and verifying affidavit setting out facts to be relied upon.”

In **Justice Khaminwa –vs- JSC (2014) eKLR**, the court held:

“Leave would be granted if on material available the court considers, without going to depth, that there is an arguable case...”

6. The Applicant’s contention is that once the court adopts the LDT award as a judgment of court, the court becomes *functus official* and cannot set aside the said order or judgment nor can the court purport to set aside the award. The material aforesaid discloses an arguable case in terms of **JUSTICE KHAMINWA CASE, supra**.
7. The issue raised by the interested parties is that the application is bad in law.

Order 53 Rule 1(2) Civil Procedure Rules contemplates the leave to be sought via a chamber summons not by way of a Notice of Motion. However, the aforesaid defect does not go to the root of the application. The same can still be determined without prejudice to any party. The court finds that the Notice of Motion has merit and thus makes the following orders:

1. The amended Notice of Motion dated 31.5.2012 and amended on 8.11.2013 is granted in terms of prayers 2 and 3.
2. Parties to bear their own costs.

Dated and Delivered at Machakos, this 13th day of March, 2015.

CHARLES KARIUKI

JUDGE