



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**MISC. CIVIL APPLICATION NO. 77 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR  
JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18  
OF 1990, THE CIVIL PROCEDURE ACT CAP 21, CIVIL PROCEDURE  
RULES 2010 ORDER 53 SECTIONS 8 & 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF THE LAND DISPUTES APPEALS TRIBUNAL RIFT VALLEY  
PROVINCE**

**BETWEEN**

**REPUBLIC ..... ] APPLICANT**

**VERSUS**

**1. THE CHAIRMAN**

**PROVINCIAL LAND DISPUTES APPEALS**

**TRIBUNAL RIFT VALLEY PROVINCE ..... ] 1ST RESPONDENT**

**2. THE CHIEF MAGISTRATE'S COURT – KITALE .] 2ND RESPONDENT**

**3. JOHNSTONE ADEYA LOKAMAR ..... ] 3RD RESPONDENT**

**MADAYANG TULIAKONG ..... ] EXPARTE APPLICANT**

**RULING**

The ex-parte applicant Madanyang Tuliakong filed a motion dated 17th November, 2011 seeking among other orders removal of the decision of the Provincial Appeals Committee delivered on 13/4/2010 to the High Court for purposes of the same being quashed The motion was filed pursuant to leave granted on 28/10/2011.

The circumstances leading to the filing of the motion are that the interested party Johnstone Adeya Lokamar had filed a claim at the West Pokot Land Disputes Tribunal regarding a boundary dispute with the ex-parte applicant. The dispute was decided in favour of the interested party.

The ex-parte applicant being aggrieved with the decision of the elders preferred an appeal to the Provincial Land Disputes Appeals committee under the provisions of the now repealed Land Disputes Tribunal Act.

The ex-parte applicant did not attend the Appeals Committee to prosecute his appeal despite the fact that he had been summoned to do so on a number of occasions.

The Appeals Committee finally heard the appeal in his absence and dismissed the appeal and affirmed the decision of the West Pokot Land Disputes Tribunal.

The parties in this matter agreed through their respective counsel to have the matter determined based on written submissions. The ex-parte applicant's contention is that he was not served with a hearing notice during the adoption of the Provincial Appeals Committee verdict and that the members of the Appeals Committee were biased against him as they were related to the interested party. The application was attacked by counsel for the respondents on two grounds;

Firstly that the motion was filed outside the stipulated time and secondly the issue of service being complained of was in respect to the adoption of the award by the Appeals Committee by the magistrate's court and not the service of hearing notice of the appeal which the ex-parte applicant had filed before the Appeals Committee. It was further argued that the application offends the provisions of order 53 Rule 7(1) of the Civil Procedure Rules.

On the first point of objection, it is clear that leave to file the main motion was granted on 28/10/2011 under order 53 rule 3(1). The motion was expected to be filed within 21 days. The motion should therefore have been filed and latest by 18/11/2011. The court record shows that the main motion was filed on 21/11/2011. This therefore means that the motion was filed three days outside the required time.

On the second ground of opposition to the motion, it is clear that the ex-parte applicant is complaining about the service effected by a process server called Thomas Achieng. The process server says that he served the ex-parte applicant on 23/6/10.

The service was for purposes of adoption of the Provincial Appeals Committee. The ex-parte applicant says that he is illiterate and could not have appended a signature. Even if this were to be the case, which I doubt, this did not affect the decision of the Provincial Appeals Committee which dismissed his appeal after he failed to attend and prosecute the same.

On the third point of objection, the respondents contend that the motion is incompetent as the same offends the provisions of order 5b Rule 7(1) of the Civil Procedure Rules which states as follows:-

7(1) "In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High court".

I have looked at the record and notice that the applicant did not lodge a copy of the order complained of. There is also no explanation either on record, in the proceedings or in submissions as to why the applicant never lodged the copy of order complained of. I find that the omissions by the applicant were not merely procedural technicalities which can be excused.

These are fundamental procedures which go to the root of the prayers which the applicant is seeking. He should have complied with the same. There is no way a court can quash that which is not brought before it as required by the law.

If the applicant was unable to meet the simple requirements of order 53 of the Civil Procedure Rules, he should have then preferred an appeal to the High court against the decision of the Provincial Appeals Committee on points of law only as required under the repealed Act.

The applicant having done none of these, I find that the application is incompetent. The same is hereby struck out with lists to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 23rd day of January, 2014.

E. OBAGA

**JUDGE**

In the presence of:-

Mr. Chebii for 3rd respondent

Court clerk – Kassachoon.

E. OBAGA

JUDGE

**23/1/14**