



Mr. Ngeiywa for the interested party opposed the application on the grounds that the motion was brought outside the 21 days required from the day of grant of leave. He also argued that the proceedings sought to be quashed were not annexed. He therefore argued that the application was incompetent and ought to be struck out.

I have considered the application as well as the grounds raised in opposition to the same. I will first deal with issues of competence of the motion and if it is found to be competent, I will then go to the issue of the points raised by the Ex-parte applicant. A point has been raised that leave was granted outside the required period. The Tribunal proceedings sought to be quashed were dated 25/9/2003. The verdict of the tribunal was adopted as judgment of the court on 22/12/2003. The parties to the tribunal proceedings became aware of verdict of the tribunal on 22/12/2003 when the same was read and adopted as judgment of the court. Though the award was dated 25/9/2003, there is nothing to show that the same was read to the parties on that date. It therefore follows that the time started running from 22/12/2003. The application for leave was filed on 6/4/2004. The applicant was therefore within the 6 months period required to file an application for leave.

An issue was raised that the motion was amended contrary to the provisions of the law. The position as stipulated by the rules is that a motion for judicial review should not be amended. What is required to be amended is a statement accompanying the motion. This is the position but here is a case where an application to amend the motion was made and a judge granted the same. This was after the advocate for the interested party did not object to it. This is not a matter which can now be raised and it does not fall on me to decide whether that was right or not as that is a jurisdiction to be exercised by a higher court.

Another issue was raised that the motion was filed outside the 21 days required. Leave to bring the substantive motion was granted on 16/3/2006. The motion was filed on 6/4/2006. The motion was filed on the 21st day and was therefore within time.

There was an issue raised that the proceedings which are sought to be quashed were not annexed to the application. A look at the record shows that the proceedings were introduced by a further affidavit in support of the amended motion.

I now come to the final issue which was raised as regards competence of the motion. It was contended that the Chief Magistrate's Court was not made a party to the application yet its decision is sought to be quashed.

Order 53 Rule 3 (2) for the Civil Procedure Rules provides as follows:-

***“The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of, motion shall be served on the presiding officer of the court and on all parties to the proceedings”.***

The Ex-parte applicant sought to quash the proceedings of Cherangani Land Disputes Tribunal which were adopted as judgment in Kitale Senior Principal Magistrates Court Land Case No. 87 of 2003.

There is no way proceedings of the Tribunal can be quashed without the subsequent adoption being quashed as well. It was therefore necessary for the Kitale Senior Principal Magistrate's Court to be made a party and be served with the Notice of Motion. The failure to make the court a party renders the application incompetent. This is an omission which cannot be cured by Article 159 (1) (d) of the Constitution. In this regard I agree with the finding of Justice Martha Koome as she then was in Kitale High Court Miscellaneous Application No. 55 of 2007 between **Sammy Wycliffe Malesi Vs. Republic & 2 Others** where the judge said as follows:-

***“The ex-parte applicant's application is brought under the provisions of order 53 of the civil Procedure rules which is a special jurisdiction and the rules governing the procedure are set out under the provisions of Section 9 of the Law Reform Act and not the Civil Procedure Rules. By dint of the provisions of Order 53 Rule 3 (2) the order sought to be quashed was by the Chief Magistrate yet the Chief Magistrate was not a named party to the proceedings. In that case there is no way the ex-parte applicant could have complied with the provisions of Order 53 Rule 3 of the Civil Procedure Rules”.***

I find that the application herein is incompetent for failure to join the Chief Magistrate's Court as a party. The application is struck out with costs to the interested party and the respondents.

It is so ordered.

**[Dated, signed and delivered in open court on this 29th day of July, 2013.]**

**E. OBAGA.**

**JUDGE.**

In the presence of Mr. Wabwire for the 1st respondent.

Court Clerk – Rumaita.

**E. OBAGA.**

**JUDGE.**

**29/7/2013.**