REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT
MISCELLANEOUS APPLICATION No. 456 OF 2006

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF: LAND DISPUTE TRIBUNAL KAKUZI AWARD IN RESPECT OF LAND PARCEL ITHANGA/PHASE 1/290

AND

IN THE MATTER OF: THE CHIEF MAGISTRATE L.T.D. CASE

NO.79 OF 2005

AND

IN THE MATTER OF: LAND DISPUTES TRIBUNAL ACT NO.18 OF

1990
AND

IN THE MATTER OF: THE REGISTERED LAND ACT CAP.300

LAWS OF KENYA

BETWEEN

MUATHE KALELI……..……..……..……..APPLICANT

-VERSUS-

LAND DISPUTE TRIBUNAL KAKUZI…….……1ST RESPONDENT

CHIEF MAGISTRATE COURT THIKA….……..……2NDRESPONDENT

AND

JOSEPH MUTINDA MUSYIMI..……..……INTERESTED PARTY

J U D G M E N T

On 16th August, 2006 the Exparte Applicant herein Muathe Kaleli applied for leave to institute Judicial Review proceedings against the Respondents, the Land Disputes Tribunal Kakuzi ***(1st Respondent)*** and the Chief Magistrate's Court Thika ***(2nd Respondent)*** for orders of Certiorari and Prohibition and that such leave operates as stay of the proceedings, judgement and all consequential orders in Thika Chief Magistrate's Court LDT Case No.79 of 2005 in respect of the award of Kakuzi Land Disputes Tribunal concerning Land Parcel No. Ithanga/Phase 1/290. One Joseph Mutinda Musyimi was joined in the proceedings as an Interested Party.
The application was placed before Visram, J on 29the April 2008 who granted leave as prayed and directed that the substantive motion be filed and served within 21 days of that date.

Pursuant to that grant of leave, the Exparte Applicant ***(hereinafter referred to as the applicant)*** filed the substantive motion for Judicial Review on 15th May 2008 seeking the following orders:

1) That the order of certiorari do issue to remove into the high court and quash the decision of the first respondent of the Land Dispute Tribunal Kakuzi Act No.18 of 1990 and which was adopted as a judgment of the court by the second respondent in Thika Magistrate Court LDT Case No.79 of 2005 on 21st February 2006.

2) The order of PROHIBITION do issue prohibiting the second respondent from hearing and entering any further proceedings or issuing any further orders in Thika Chief Magistrate's Court LDT Case No.79 of 2005.

3) That an order do issue staying all proceedings and all others emanating from Thika Chief Magistrate's Court LDT Case No.79 of 2005 and all other consequential orders.

4) That the costs herein be borne by the respondents.

The application is supported by the statutory statement dated 12th May 2008 and the verifying affidavit sworn by the applicant on the same date. The application is opposed by the 1st and 2nd Respondent who were represented in these proceedings by Mr. Onyiso instructed by the Hon. Attorney General. Mr. Onyiso filed grounds of opposition on 23rd June 2009 and though he had indicated that he was to file a Replying affidavit and written submissions, he never did so upto the time case was scheduled for hearing.

The Interested party was properly served with the Notice of Motion dated 12th May 2008 and skeleton arguments in the application on 16th April 2009 and 14th June 2009 as evidenced by affidavits of service sworn by Peter Kariuki Mwangi on 5th May 2009 and 23rd June 2009 respectively but he did not bother to file any reply to the same. He did not also attend the court on any date scheduled for either mention or hearing of the case though served with numerous mention and hearing notices as can be seen from several affidavits of service filed in the court record including the one sworn on 13th December 2011 by the same process server, Peter Kariuki Mwangi for hearing scheduled on 14th December 2011.

The said hearing date had been taken by consent of counsel for the Applicant and the Respondents but there was no representation for both the Respondent and the Interested party on the hearing date. Hearing then proceeded in their absence with Mr. Kamiro highlighting his skeletal arguments filed in court on 8th October 2008.

Before delving into the Applicant's case, I think it is important first to deal with the issues raised by the Respondent in the grounds of opposition. I will deal with the first two grounds of objection at this stage while the third one which appears to be questioning the merits of the applicant's case will be considered when evaluating the merits or otherwise of the applicant's case.

The first issue taken up by the Respondent is that the Notice of Motion dated 12th May 2008 was filed out of time without leave. To resolve this issue, one only needs to look at the date when leave was granted and time given for filing the substantive motion.

From the court record, it is clear that leave was granted on 29th April 2008 and the applicant was given 21 days within which to file and serve the substantive motion. It is not disputed that the Notice of Motion was subsequently filed on 12th May 2008 and clearly this was before the expiration of 21 days. There is therefore no substance, in that ground of objection.

The second objection seems to imply that the Notice of motion is incompetent as it was not brought in the Name of the Republic. It was filed in the name of the applicant.

From the face of the application, it is clear that the application was filed by the applicant in his own name Muathe Kaleli not in the name of the Republic as has been the practice since 1959 when the Farmers Bus Service Case was decided – ***see*** **Farmer Bus Service & Others –vs- The Transport Licensing Appeal's Tribunal [1959] EA 779.**

In this case, the East African Court of Appeal held that prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled.

However, after Kenya became a Republic on 12th December 1964 applications for Judicial Review are made in the name of the Republic. This is because Judicial Review is a mechanism set up by the State to check the excesses of its officers, statutory bodies and tribunals. The Republic brings the application on behalf of the aggrieved party who is called the Exparte Applicant who does not have the capacity to bring the application in his own name.

The applicant herein cannot therefore purport to institute an application for Judicial Review in his own capacity without the Republic being involved. In **Job Cheruiyot Kerui –Vs- Attorney General Misc. App.No.1079/07 and Welamondi –Vs- The Chairman, Electoral Commission of Kenya [2002] IKLR** J. Wendoh and J. Ringera respectively found that a Judicial Review application which was not brought in the name of the Republic was incompetent and proceeded to strike out the same. In the Welamondi Case, J. Ringera expressed himself as follows:

"On Kenya's assumption of Republican status on 12th December 1964, the place of the Crown in all legal proceedings was taken by the Republic. Accordingly the orders of certiorari, mandamus or prohibition now issue in the name of Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue"

The court proceeded to set out the format of a Judicial Review application both at the leave stage and the Notice of Motion stage.

Following the principles laid down in the two cases I have cited as well as many others on the subject, I find that the Notice of Motion filed herein in the name of the Applicant is incompetent and is liable for striking out.

Turning now to the merits of the Exparte Applicant's case, I find that though the applicant's case is clearly set out in the statutory statement and depositions in the verifying affidavit in a way that leaves no doubt to this court that if the said averments are verified to represent the true factual position the 1st Respondent had no jurisdiction to entertain the dispute concerning ownership of Land Parcel Ithanga/Phase 1/290 and to make the award which was subsequently confirmed as an order of the court by the Chief Magistrate Thika in LDT Case No.79/05. However, the proceedings before the said Land Disputes Tribunal Kakuzi and the award which was allegedly confirmed as an order of the court were not annexed to the verifying affidavit to substantiate the claims in the applicant's pleadings. The brief proceedings in the Chief Magistrate's Court Thika annexed to the verifying affidavit and marked MKI only show that the award was read in court on 24th January 2006 and confirmed as a judgment of the

court on 21st February 2006 but the actual award made by the Land Disputes Tribunal was not exhibited.

Similarly no title documents were exhibited to prove that infact the Exparte Applicant was the registered owner of Land Parcel No. Ithanga/Phase I/290 or that any title document had been issued in respect of the said parcel of land.

In the Circumstances, there is no evidence placed before this court to confirm or prove that the 1st Respondent entertained a dispute involving ownership of registered land and made an award ordering that the parcel of land in question be transferred to the Interested party herein, thereby overturning a decision made by a competent court in Thika Magistrates Court Succession Cause No.110 of 1994.

In the absence of such evidence, there is no basis upon which this court can make a finding of fact that the aforesaid Land Disputes Tribunal dealt with disputes involving registered land and made an award which was ultra vires Section 3(1) of the Land Disputes Tribunal Act.

Secondly, in not attaching the proceedings and award in the Land Disputes Tribunal to his pleadings, which was the subject of the court order sought to be quashed by order of certiorari, the Exparte Applicant violated the provisions of Order 53 Rule 7(1) of the Civil Procedure Rules which states as follows:

"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."

It is clear from a reading of this section which is couched in mandatory terms that an applicant for orders of certiorari must either attach a copy of the order or record being impugned or account for his failure to do so. In this case, the applicant has neither attached the award subject of the court order being impugned nor has he explained his failure to do so.

It is difficult to understand why the applicant's counsel made such fatal omissions in this case which has driven the applicant off the seat of justice even when he was so deserving of the remedy of judicial review if what he has deponed in his verifying affidavit is anything to go by. I sympathise with the applicant's situation but this being a court of law, it can only be guided by evidence placed before it in support of a litigant's case and the applicable law and nothing else. I can only hope that the applicant will pursue other legal remedies which may be available to him.

In this case however, I am satisfied that the applicant besides not following the mandatory requirement in order 53 Rule 7 has not laid before the court any evidence to demonstrate that he is deserving of the orders of certiorari and prohibition sought in his substantive motion. Consequently, I find no merit in the Notice of Motion dated 12th May 2008 and it is hereby dismissed with no orders as to costs.

Dated, **Signed**and**Delivered** by me at Nairobi this 22nd day of February 2012
C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk
Applicant in person
N/A for Respondents
N/A for Interested Party