



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Miscellaneous Application 27 of 2009

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

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP.26 LAWS OF KENYA AND ORDER LIII RULE 1 AND 2 OF THE CIVIL PROCEDURE

AND

IN THE MATTER OF THE MERU CENTRAL DISTRICT LAND DISPUTE TRIBUNAL CASE NO.67 OF 2008

AND

IN THE MATTER OF MERU CHIEF MAGISTRATE’S COURT LDT CASE NO.19 OF 2009

AND

IN THE MATTER OF LAND PARCELS NOS. ABOTHUGUCHI/KATHERI/2418,2419,2420 AND 2421

REPUBLIC OF KENYAAPPLICANT

VERSUS

THE CHAIRMAN, MERU CENTRAL DISTRICT LDT.....RESPONDENT

STANLEY MUTUA M’RIMBERIA.....1ST INTERESTED PARTY

KIMATHI PATRICK RIMBERIA2ND INTERESTED PARTY

AND

GERALD RIMBERIA M’RIRIA)

KENNETH KIAMBI RIMBERIA).....EX-PARTE APPLICANTS

R U L I N G

The ex parte applicants Gerald Rimberia M'Riria and Kenneth Kiambi Rimberia filed ex-parte Chamber Summons on 9th June, 2009 and after being granted leave by court to apply for prerogative order of certiorari on 11th June, 2009 they filed the substantive notice of motion on 1st July, 2009.

The interested parties upon being served with the notice of motion they filed replying affidavit on 3rd September, 2009. Subsequently the interested parties filed Notice of preliminary objection on a point of law. On 9th December, 2011 when the matter came up for hearing court ordered that the preliminary objection on a point of law be heard first.

The interested parties preliminary objection dated 26th January, 2010 is based on the following grounds:-

- 1. That the application for leave to file the Judicial Review proceedings is wrongly intituled because the applicant is expressed to be the Republic which is unprocedural and the same offends the express provisions of O.LIII Rule 1(2) of the Civil Procedure Rules.**
- 2. That the Notice to the Registrar is defective for it does not abide by the provisions of O.LIII Rule 1(3).**
- 3. That the Notice of Motion dated 30/06/2009 is wrongly intituled in that it is expressed as an application for leave to apply for orders of Judicial Review.**
- 4. That the Judicial Review application is bad in law and incompetent and it ought to be struck out with costs.**

When the matter came for hearing before the Hon. Justice Muga Apondi on 1/3/2012 he directed that the matter be heard before me and that the parties do put in written submissions on the preliminary objection on a point of law. The matter was set down for highlighting on 17th May, 2012 before me.

The interested parties put in their written submissions on 5th April, 2012 whereas the ex parte applicant's put in their written submissions on 14th May, 2012.

The learned Counsel for the interested parties Mr. Mwirigi objected to both the Chamber Summons and Notice of Motion on the grounds that both applications were brought in the name of the Republic contrary to the then Order 53 rule 1(2),(3) of the old Civil Procedure Rules. According to Mr. Mwirigi, Advocate the application for leave to apply for prerogative orders of certiorari ought to have been brought in the name of the applicant and not in the name of the Republic. He referred this court to the case of **FARMERS BUS & ANO – VS- TRANSPORT LICENSING APPEAL TRIBUNAL(1959) E.A. 779** in which case Court of Appeal for Eastern Africa held:-

“Prerogative orders are issued in the name of the Crown and applications for such orders must be correctly intituled.”

Mr. Mwirigi Advocate, also referred me to the case of **NICHOLAS MBURUGU MUGAMBI – V- THE MINISTER FOR LOCAL GOVERNMENT & OTHERS HC.MISC. APPLICATION NO.478 OF 2008** in which the court referred to decision in **FARMERS BUS CO. LTD – VS – TRANSPORT LICENSING TRIBUNAL(1959) E.A 779** which was adopted by Justice Ringera as he then was, in the case of **JOTHAM MULATI WELAMONDI- VS – CHAIRMAN, ECK** that a Chamber Summons application for leave to commence Judicial Review proceedings should be brought in the name of the applicant. That however once leave is granted to bring the substantive motion, the application is then brought in the name of the Republic who steps in the shoes of the ex parte applicant.

The learned Counsel for the interested parties further objected to the ex-parte applicant's main motion as

it was wrongfully instituted in that it is expressed as an application for leave to apply for orders of judicial review.

On the other hand, the counsel for the ex parte applicants Mr. Kiambi on his part submitted that the preliminary objection on a point of law is not merited and ought to be disallowed. Mr. Kiambi advocate conceded that the application for leave is not correctly instituted but he submitted strongly that this is not fatal to the proceedings.

He conceded that the application for leave ought to have been brought in the name of the ex parte applicants and not in the name of the Republic. He submitted that was a procedural error which do not go to the root of the matter before the court. He averred that procedural error should not be a basis for striking out a judicial review application as an application for leave to apply for prerogative orders is merely a vehicle to move the court. In support of his submissions he referred me to the case of **Republic – V- Attorney General & Others HC.Misc.No.24 of 2006(Meru)** in which case the court stated that once leave is granted unless the order of leave is first set aside on an application, the application for leave is spent and cannot be revisited. The court in its ruling referred to the case of **Republic – V – Land Dispute Tribunal Court Central Division and Another Ex parte Nzioka(2006) EA 322** in which Hon. Justice Nyamu, as he then was held:-

“Although leave is provisional until set aside for good reason upon an application it cannot be relitigated when the application for judicial review comes up for hearing or after filing of the application. It cannot be attacked by way of a preliminary point instead of arguing the Judicial Review application itself on merit because after its grant and filing of the application it is spent and the parties have to contest the subsequent application for judicial review on the basis of the grounds and reliefs set out in the statement filed with the application for leave. Njuguna Vs Minister for Agriculture(2001) 1 E.A 184 applied”.

Mr. Kiambi, Advocate further submitted therefore leave having been granted, the leave cannot be relitigated by way of preliminary objection on a point of law. He stated at the time the court granted leave to apply for prerogative orders of certiorari, it was aware who was seeking leave and did properly grant leave. Mr. Kiambi advocate, in opposing the preliminary objection on a point of law relied on **Article 159(2)(d) of the Constitution of Kenya** and urged that in all matters before court, the court is enjoined to do administer justice without undue regard to procedural technicalities.

On the main motion Mr. Kiambi, Advocate submitted that the motion is properly instituted. He argued that the application is brought in the name of the Republic which is proper as the ex parte applicants are seeking prerogative orders. He submitted that the mere error in the recital of the main motion were the words “for leave to apply” was inadvertently added was not fatal. He pointed out the heading of ex parte applicants ought to have been:-

“IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION.....”

He contended the addition of the words ***“FOR LEAVE TO APPLY”*** in the main application cannot be said that an application for prerogative orders is improperly or wrongfully instituted.

He submitted the application is therefore not incurably defective and court can proceed to order the application to be deemed to be amended by removal of the offensive words as the Court of Appeal ordered in the **FARMERS BUS SERVICE AND OTHERS(supra)**.

The ex parte applicants’ counsel further in opposing the interested parties preliminary objection on a point of law relied on Section 1A and 1B of Civil Procedure Act and Order 51 Rule 10 of the Civil Procedure Rules.

I have considered the preliminary objection on point of law, the Counsel written submissions, and their oral submissions before me and attached authorities for and against the preliminary objection on a point

of law.

The ex parte applicants before filing an application for leave to apply for prerogative orders of certiorari and prohibition issued notice pursuant to Order LIII Rule 1(3) of the old Civil procedure Rules to the registrar on 8th June, 2009. The notice was filed on 8th June, 2010 and served on 9th June, 2009. The Chamber Summons was filed on 9th June, 2009. I would like to point out that the notice to the register is a mere notification to the Registrar that an application is going to be filed against the State which notice can even be waived by the court.

Under Order 53 of the current Civil Procedure Rules, 2010, there is no legal requirement for notice to be served upon the Registrar. The Chamber Summons for leave to commence judicial review is agreed by both counsel should be brought in the name of the applicant but not in the name of the Republic as in this case. See **NICHOLAS MBURUGU MUGAMBI – V – MINISTER FOR LOCAL GOVERNMENT HC.MISC. APPLICATION NO.478 OF 2008(supra)** but this case can be distinguished in that it dealt with an objection before leave was granted as opposed to the case before me in which leave was sought, granted and substantive motion filed. In the case of **REPUBLIC – VS – ATTORNEY GENERAL REGISTRAR OF SOCIETIES & OTHERS HC.MISC. APPLICATION 24 OF 2006**, Honourable Justice J. A. Emukule faced with similar objection to the one before me stated as follows:-

“Indeed the application for leave to file Judicial Review Application for the prerogative of certiorari may have been defective. Leave was however given. Once leave is given unless the Order of leave is first set aside on an application the application for leave is spent and cannot be revisited.”

Similar view was expressed by Honourable Justice Nyamu, as he then was, in case referred to by Honourable Justice J. A. Emukule in his above-mentioned case in which Honourable Justice Nyamu, as he then was held in **Republic – V- Land Dispute Tribunal Court Central Division and Another Ex parte Nzioka(Supra)** as follows:-“That although leave is provisional until set aside for good reasons upon an application it cannot be relitigated when the application for judicial review comes for hearing or after filing of the application. The application cannot be attacked by way of a preliminary point instead of arguing the judicial review application itself on merits.”

I therefore find that though the application for leave may be defective for having been brought in the name of the Republic instead of the name of the applicant, leave having been granted and main motion having been filed, the same cannot be attacked by way of preliminary objection on point of law. There has been no application before this court to set aside the leave already granted for good reason. The application for leave as of now is spent, it cannot be revisited but both parties have to contest the subsequent application for judicial review on the basis of the grounds and reliefs set out in the respective statement filed with the application for leave.

On the issue of the main motion, I find that the same is brought in the name of the Republic save that the ex parte applicants either inadvertently or otherwise added the words “for leave to apply”.

The rest of the format of the application is proper and instituted in accordance with format set out in **FARMERS BUS SERVICE AND OTHERS CASE**(supra). It is clear from the application the orders sought are not orders for leave to apply for prerogative orders of certiorari and prohibition but orders of certiorari to bring into the honourable court and quash the questioned decision and also an order of prohibition, against the respondent prohibiting them from implementing the questioned decision. No party would be confused by the nature of the application before the court. The court in dealing with a matter as this one I believe would look, unless precluded by law, to substance and reality rather than the form of phraseology.

In view of the foregoing I think in the interest of justice the words “for leave to apply” at the heading of the motion should be deleted. The application should therefore be deemed instituted.

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On application of Article 159(2),(d) of the Constitution of Kenya and Section 1A and 1B of the Civil Procedure Act and Order 51 Rule 10 of Civil Procedure Rules, I do agree with the Counsel for the interested parties that the provisions of the Constitution and Civil Procedure Act cannot be invoked in an application for Judicial Review. This is because jurisdiction under Order 53 of the Civil Procedure Rules is a special jurisdiction which is donated by Section 8 and 9 of the Law Reform Act and is *sui generis*. This position was confirmed by Court of Appeal in case of **KUNSTE HOTEL – VS – COMMISSIONER OF LANDS C.A. 234 OF 1995**. In view of the foregoing the preliminary objection on a point of law is refused. Costs be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in presence of:

1. Mr. Muthomi h/b for Mr. Mwirigi for interested parties.
2. Mr. Muriithi h/b ex-parte applicant
3. Mr. Menge for the respondent

J. A. MAKAU
JUDGE