



**REPUBLIC OF KENYA**

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

**Miscellaneous Application 93 of 2003**

**REPUBLIC .....APPLICANT**

**VERSUS**

**1. THE CHAIRMAN LAND DISPUTES APPEALS COMMITTEE AT EMBU**

**2. ATTORNEY-GENERAL.....RESPONDENTS**

**AND**

**MUTHIKE THUKA & OTHERS .....INTERESTED PARTY**

***EX PARTE* .....KYANIA THUKA**

**R U L I N G**

1. On 1<sup>st</sup> March 2004 the *Ex Parte* Applicant was granted leave to apply for judicial review to seek an order of **certiorari** in respect to the proceedings and award dated 23<sup>rd</sup> January 2003 of **Embu Appeals Committee Case No. 182 of 2002** and its adoption proceedings vide **Embu PM Miscellaneous Application No. 119 of 2003**.

2. The substantive application by **notice of motion dated 19<sup>th</sup> March 2004** was filed on that date.

3. After various false starts at either hearing or out-of-court settlement, the Interested Party raised a preliminary objection to the notice of motion by notice dated 8<sup>th</sup> July 2009. Two points are taken in the notice-

(i) That the notice of motion is fatally defective in that in the application for leave to apply for judicial review (chamber summons dated 14<sup>th</sup> July 2003) the reliefs sought are different from the ones sought in the notice of motion.

(ii) That the reliefs sought in the notice of motion are not properly framed.

(iii) That the prerogative order sought is not disclosed.

3. At the hearing of the preliminary objection, learned counsel for the Interested Party further submitted that in the notice of motion the Appeals Committee case number whose award is sought to be quashed is not included. He also submitted that once filed a notice of motion cannot be amended and sought to rely on **Order LIII, rule 4(3)** of the then **Civil Procedure Rules** (the **Rules**).

4. The *Ex Parte* Applicant opposed the preliminary objection. His learned counsel submitted that

failure to state the Appeals Committee case number is not fatal and in any case the same is stated in the statement of facts and verifying affidavit that accompanied the application for leave, which two documents were again lodged with the notice of motion as required by the rules of procedure. In any event, he further submitted, the omission can be cured by amendment. But his main submission was that there was really no difference between the relief sought in the notice of motion and that sought in the application for leave. He rounded off submitting that the notice of motion should not be defeated merely on a technicality.

5. Indeed the preliminary objection is premised on a technicality. The relief of **certiorari** sought was clearly stated in the statement of facts that accompanied the application for leave. That statement of facts was again filed together with the notice of motion. So, the Interested Party cannot be in any doubt at all as to what relief the *Ex Parte* Applicant is seeking in the notice of motion.

6. Likewise, the Tribunal whose decision is being challenged, that is, the Embu Appeals Committee in its Case No. 182 of 2002, was clearly stated in the aforesaid statement of facts. Again the Interested Party cannot be in any doubt at all as to what proceedings and decision are being challenged in the notice of motion.

7. The era of impeding substantial justice is now gone. See the overriding objective set out in **sections 1A and 1B** of the **Civil Procedure Act, Cap 21**. Our new **Constitution** will not brook undue regard to technicalities of procedure to defeat substantial justice. See **Article 159 (2) (d)**.

8. The preliminary objection is not well taken at all. It is overruled with costs to the *Ex Parte Applicant*. It is so ordered.

9. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF AUGUST 2012**

**H. P. G. WAWERU**  
**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....  
**JUDGE**