REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Miscellaneous Civil Application 325 of 2006

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

AND
IN THE MATTER OF THE LAND DISPUTE TRIBUNAL ACT, NO. 18 OF 1990
AND IN THE MATTER OF LAND DISPUTE NO.22/2006 AT CHONYI

AND
IN THE MATTER BETWEEN

JOHN RIA FAKII .....APPLICANT

VERSUS
THE ATTORNEY GENERAL
ON BEHALF OF THE CHAIRMAN,

LAND DISPUTE TRIBUNAL, CHONYI DIVISION .....RESPONDENT

AND

NJAHA CHARLES MWAVITA & 6 OTHERS .....INTERESTED PARTIES

RULING

What is coming up for determination is Notice of a Preliminary Objection dated 5th July 2006 filed by the 1st to 6th Interested Parties challenging the Applicant's Notice of Motion Application dated 11th April 2006 and filed in court on 12th April 2006. The Applicant, **JOHN RIA FAKII**, is seeking in his application orders of prohibition and certiorari pursuant to the provisions of Section 8 of Law Reform Act Cap 26 and Order LIII Rule 3 of the Civil Procedure Rules.

The Preliminary Objection raised 3 grounds as follows:-

1) The Application is incompetent and or bad in law hence fatally and incurably defective.

2) The Application is so poorly thought out and muddled in form and substance.

3) The Application is fatally defective as it fails to take into account the dictates that govern issuance of prerogative orders.

Ms Kimelu for the Attorney General on behalf of the 1st Respondent also filed 3 grounds of opposition to the Application arguing that:-

1) The Application is incompetent and bad in law as the same offends the provisions of Order LIII Rule 1 (2).

2) The Application is fatally and incurably defective and the same ought to be struck out and dismissed with costs.

3) The orders sought are outside the jurisdiction of prerogative orders.

They argue that the Application for prerogative orders ought to be brought in the name of the Republic, which the Applicant has failed to do so. It is also argued that the Application is incompetent and bad in law because there is not decision of the Tribunal before court capable of being quashed. All that was made by the Tribunal is to issue a notice to the Applicant to appear before it.

The Attorney General supports the Interested Parties' Preliminary Objection Application. The Respondent's argument is that the application offends the provisions of Order 53 Rule 4 because the Applicant filed a supporting affidavit without the leave of court. Furthermore, the orders sought are outside jurisdiction of judicial review court. The Applicant is seeking to quash summons requiring his attendance before a tribunal He is not coming to this court seeking remedies for failures of a tribunal to comply with rules of natural justice or failing to act within its statutory power. They relied on the case of **JAMES KEGA KANGAU & OTHERS –VS- ELECTORAL COMMISSION OF KENYA & ANOTHER [2006] eKLR** in which the court held that:-

"The practice which has acquired the force of law through judicial precedent is that prerogative orders are issued in the name of the Republic. The application for Judicial Review has to be instituted like the format in the FARMERS BUS CASE AND WELAMODI CASE. In The Notice of Motion dated 18th November 2005 there is no Applicant. That application is fatally defective and the court has no option but strike it out with costs to the Respondent and Interested Parties."

Mr. Mulongo for the Interested Parties further urged the court to dismiss the application. He cited the case of **FARMERS BUS SERVICE AND OTHERS –VS- THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) E.A. 779**, in which the Court held that Applications for Prerogative Orders must be properly intituted to relect the Republic as the Applicant. He submitted that in the present Application before the Court, the Applicant is one **JOHN RIA FAKII** and that the Republic does not appear in the face of the application as a party. He further urged that it is improper for a party who has sought and been granted leave to institute Judicial Review Proceedings to file the main motion under the same file.

Mr. Njanga Counsel for the Applicant opposed the Preliminary Objection. In his written submission, Mr. Njanga argued that defects in form, procedure and heading in the Notice of Motion, does not render the application fatally defective since the same is curable by amendments. He submitted that the case of **FARMERS CASE** has been reversed by the Court of Appeal case in **REPUBLIC –VS- CHARLES LUTTA KASMANI & UNITED INSURANCE COMPANY Ex-parte THE MINISTER FOR FINANCE AND THE COMMISSIONER OF INSURANCE** as Licensing and Regulating Officers Civil Appeal No. 281 of 2005, in which it held that:-

"Suffice is to say that defects in form in the title or heading of an appeal, or a misjoinder or non-joinder are irregularities that do not go to the substance of the appeal and are curable by amendments":

It is Mr. Njanga's contention that this court in granting the leave to apply for orders of prohibition and certiorari, the court has ascertained whether Application discloses a prima facie case meriting the filing of a substantive motion for judicial review and whether the relief sought might be granted on the hearing of the application. It is his submission that this court was satisfied that the Applicant had laid out

a prima facie case and that the orders sought might be granted at the hearing of the application. He further argued that the Chonyi Land Dispute Tribunal in issuing the Hearing Notice dated 7th March 2006 to the Applicant, the Tribunal has acted in excess of its jurisdiction, which decision this Court can quash through the prerogative writ of certiorari. He asked the Court to dismiss the Preliminary Objection with costs to allow the matter to be heard and determined on its merits. Mr. Njaga contends that any defective in the application can be amended and therefore the Preliminary Objection should be dismissed.

I have considered the grounds raised in the Preliminary Objection and submissions by Counsel.

It is trite law that once an Applicant obtains leave to file judicial review proceedings he is required to only file a Notice of Motion without any affidavit introducing evidentiary material. Once leave is granted, the principal pleadings in the Statutory Statement is the evidence in the Verifying Affidavit accompanying the Chamber Summons for leave to file the judicial review applications. The Provisions of Order 53, Civil Procedure Rules are clear on this. In fact, the court itself has no jurisdiction to grant leave to the Applicant to file any further or other affidavit to the Notice of Motion which is merely a vessel to present the Verifying Affidavit before the court and which itself contains the facts in support of the statement. The statement cannot have any exhibits or other evidence annexed to it. It therefore follows that the purported "Supporting Affidavit" to the Notice of Motion dated 11th April 2006 is inadmissible and unnecessary appendage. The court must cleanse its record, and I hereby strike out the said Affidavit to leave the Notice of Motion bare as required by Law.

With regard to the intitulment of the application for judicial review, I agree with the Interested Parties' Counsel that at the point of obtaining leave, the Chamber Summons may refer to the initial Applicant as the Ex parte Applicant who filed the proceedings. However, once leave is granted then the Applicant is deemed to be the Republic i.e. the application must be in the Republic's name.

Be that as it may it was well stated in the case of **FARMERS BUS SERVICE AND OTHERS – VS- THE TRANSPORT LICENSING APPEAL TRIBUNAL** that the defect in form is the title or heading of an appeal or misjoinder are irregularities that do not go to the substance of the proceedings and are curable by amendment. The objection on this ground must therefore fail.

The issue raises that an application for judicial review ie. The Notice of Motion must be filed in a separate file from that in which leave was obtained does not hold any substance or water in law. This does not render the proceedings defective. Infact, I would recommend that both the leave application and the Notice of Motion be in the same file to save costs and to avoid multiplicity and loss of files.

The last point of law is whether there is any decision before the court which is capable of being quashed by way of an order for Certiorari.

I have considered the said Ground of Objection and it is clear that what is being sought to be questioned is a mere notice to attend the Tribunal or a summon. The tribunal has not heard the matter or rendered any decisions.

This court cannot delve into the alleged "merits" of the case and the facts before the Tribunal hears the dispute and renders a decision. These proceedings are pre-emptive and a total abuse of the court process. This application does not meet the requirement of judical review application.

This court is able and capable of revisiting this question at this stage even if the court granted leave. It is noted that the leave proceedings are ex parte.

As a result, I do hereby strike out the Notice of Motion dated 11th April 2006 as a *nullity ab initio* with costs to the 1st Respondent and the Interested Parties. Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 16TH DAY OF AUGUST 2012.

M.K. IBRAHIM
JUDGE

DATED AND DELIVERED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER 2012.

J.W. MWERA
JUDGE
In the presence of: