REPUBLIC OF KENYA

High Court at Meru

Miscellaneous Application 94 of 2009

JOTHAM M. GITUMA …………………..........………………………APPLICANT

VERSUS

FLORENCE KAREMA ………………………………………………1ST RESPONDENT

CHAIRMAN, MERU CENTRAL DISRICT L.D.T………...……...2ND RESPONDENT

R U L I NG

The applicant Jotham M. Gituma by way of Notice of Motion dated 15th December, 2009 brought under Order LIII Rule 3 and 4 of Civil Procedure Rules and Section 8(2) and 9 of Law Reform Act sought the following orders against Florence Karema, 1st respondent and Chairman, Meru Central District Land Disputes Tribunal, 2nd respondent:-

a. (a). The honourable court be pleased to issue an order of certiorari to bring up and quash the award in land dispute tribunal case No.65 of 2009.

b. Costs be provided for.

The grounds in support of the application are stated on the face of the application. The application is supported by annexed affidavit dated 15th December, 2009. The grounds in support are that the applicant is the registered proprietor of all that parcel of land known as Nyaki/Mulathankari/455. That the 1st respondent sued the applicant at Meru Central Land Disputes Tribunal in LDT No.5 of 2009 seeking transfer of 0.40 acres out of the applicant's land and the 1st respondent's prayers were granted. The applicant deponed that he is duly advised by his advocates the tribunal acted beyond its powers as it had no jurisdiction to order transfer of the land registered under the Registered Land Act(Cap.300) (now repealed) which is a preserve of the High Court alone.

The applicant had on 30/11/2009 issued notice to the registrar pursuant to Order LIII Rule 1(3) of Civil Procedure Rules and effected service of the same on the same day. Contemporaneously at the time of filing notice to the registrar; the applicant filed statutory statement of facts, and verifying affidavit.

The applicant filed Chamber Summons on 1st December, 2009 seeking leave to apply for an order of certiorari to quash the award in L.D.T No.65 of 2009, Meru and further sought leave so granted to operate a stay of execution of the said award. That on 9th December, 2009 the applicant was granted leave to apply for an order of certiorari to quash the award in LDT No.65 of 2009 Meru and leave so granted was ordered to operate as stay of the said award.

The applicant subsequently filed notice of motion on 15th December, 2009. The 1st respondent appointed the firm of M/S Maitai Rimita & Co. Advocates who filed notice of appointment of advocates on 25th February, 2010 and subsequently filed notice of preliminary objection to notice of motion dated 25th December, 2009.

The 1st respondent in her preliminary objection to the applicant's notice of motion set down the following grounds of objection.

1) That the Notice of Motion is bad in law and incompetent.

2) That the Notice of Motion is bad in law as the same is against the provisions of the law and case law.

3) ***The Notice of Motion does not disclose any cause of action against the first respondent.***

4) ***The Notice of Motion is not well supported and the same should be struck out/dismissed with costs***.

The preliminary objection was set down for hearing. When the same came up for hearing this court heard oral submissions by Mr. Nyeyire, learned advocate for 1st respondent and Mr. Menge, learned State Counsel for 2nd respondent and Mr. Kimathi, learned advocate for the applicant.

Mr. Nyenyire, learned advocate for 1st respondent urged that the application as drawn is defective as being a Judicial Review application, it ought to have been brought in the name of the Republic. That the instant application is brought in the name of Jotham M. Gituma who is not a Republic.

He further submitted the application is not accompanied by statement of facts and that the same raises no cause of action against 1st respondent. He further submitted the verifying affidavit has scanty information and prayed that the notice of motion be dismissed. Mr. Menge, State Counsel, for 2nd respondent associated himself with submissions by the Counsel for 1st respondent.

Mr. Kimathi, learned Counsel for the applicant opposed the preliminary objection conceding there was an error in filing the notice of Motion in the name of the ex-parte applicant instead of the Republic. He stated the application can be amended under Civil Procedure Rules. He also relied on Article 159(2) (d) of the Constitution of Kenya, 2010 urging that application cannot be dismissed on a technicality.

In the instant application there is no dispute that the notice of motion has been brought in the name of the applicant. It is established law that applications for certiorari, mandamus or prohibition should be made in the name of the Republic. The substantive notice of motion herein is wrongly instituted. It has been brought in the name of the applicant. That at this stage unlike at the leave stage, the application can only be made in the name of the Republic but not in the name of the ex-parte applicant. Judicial Review proceedings are totally different from any other ordinary proceedings.

An individual cannot seek such orders but only the Republic. In the case of **Farmers Bus Service – Transport Licensing Appeal Tribunal(1959) EA 779** the court held:-

"Prerogative orders are issued in the name of crown and applications for such orders must be correctly instituted……………"

Similarly in the case of **KENHON KIJABE HILL FARMERS CO.SOCIETY –V-THE DISTRICT OFFICER(NAIVASHA) HC.MISC.NO.280 OF 1996(UR)**, Hon. Justice Aganyanya, as he then was quoting from the Farmers Case(supra) reiterated that:-

" Prerogative orders are issued in the name of the crown(now Republic) and application for such orders must be correctly instituted……"

We went on to observe that "application for prerogative orders are totally different from ordinary pleadings in civil matters and they cannot deal with the present application in the form in which it is as it is incompetently before court………."

Yet again in the case of P**AGREX INTERNATIONAL –V-MINISTER FOR FINANCE & OTHERS HCCC NO.875/2001** Hon Justice Nyamu as he then was, observed"-

"……………..in addition the application has not been brought in the name of the Republic but in the name of the applicant(see heading …………………the Republic cannot be the applicant and the respondent at the same time and in the same cause. Further in the case of ***MOHAMMED ALAMED –V-REPUBLIC 1957 EA 523*** it was held:-

"prerogative order" now read Judicial Orders are issued in the name of the Crown(now read Republic) yet again in the case of NDETE –V-CHAIRMAN LAND DISPUTES TRIBUNAL & ANO(2002) 1 KLR 392 Hon. Justice Ringera, as he then was, held:

"The application for Judicial Review therefore ought to be made in the name of the Republic. This one is not".

That though three of the decisions referred hereinabove are decisions of the High Court and therefore not binding on me, I am however persuaded that they represent the proper position and do agree with the same.

The applicant in a bid to counter that position argued that the application can be amended under Civil Procedure Rules and further by virtue of Article 159(2) (d) of the Constitution of Kenya an application cannot be dismissed on a technicality. The applicant did not in this application ask court to amend the intitutement and as such court cannot grant what has not been sought further this is not an ordinary Civil suit but a Judicial Review application. The only document amenable to amendment in Judicial Review application is the statement of facts and nothing else. In addition to the above, it is trite law that Judicial Review proceedings are a special jurisdiction that is neither Criminal or Civil. The Judicial Review proceedings under Order 53 of Civil Procedure Rules and Law Reform Act is a complete legal regime. It is a special jurisdiction and Civil Procedure Act and the rules made thereunder are not applicable in a Judicial Review proceedings.

Further as argued by the applicant even if the failure to institute the motion in the name of the Republic were an error of form curable by provisions of Civil Procedure Rules, which I hold it is not the prayer for a prerogative writ is not such an error of form. It is an error of substance in that a relief excluded by the Statute is expressly sought.

The applicant's application has grounds on the face of the notice of motion and is supported by supporting affidavit. In an application for Judicial Review the notice of motion is not supposed to have grounds on the face of the application nor is it supposed to be supported by fresh affidavit. **Order 53 Rule 4(1) of Civil Procedure Rules** provides:-

4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided,be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."

It is therefore clear that, it is the copies of the statement accompanying the application for leave that should be served with the notice of motion together with any copies of any affidavits that accompanied application for leave. That there are no other grounds to be relied upon except the grounds in the statement.

In view of the foregoing the notice of motion was not drawn in accordance with the provisions of Order 53 of Civil Procedure Rules. Judicial Review is a special jurisdiction and the provisions of **Order 51**

Rule 4 of Civil Procedure Rules which requires in any notice of motion the grounds of the application be on the face of the application is inapplicable in Judicial Review applications.

Considering all the foregoing, I am satisfied that the applicant's notice of motion is wrongfully instituted and brought in his name rather than the Republic. The 1st respondent should have been referred to as the interested party instead of the respondent.

The 1st respondent was a claimant before Land Disputes Tribunal and did not make any decision so as to be referred to as a respondent. The applicant's application as drawn is incurably defective and ought to be struck out.

In the circumstances I uphold the objections by the Counsel for the respondents and Order struck out the Notice motion with costs to the respondents.

Dated, signed and delivered at Meru this 13th day of November, 2012.

J. A MAKAU
JUDGE

Delivered in open court in presence of

1. Mr. Kimathi for applicant

2. Mr. Nyenyire for 1st respondent

3. Mr. Menye for 2nd respondent

J.A. MAKAU
JUDGE