



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO.19 OF 2009**

**JOSEPH NGARUIYA MWAURA.....APPLICANT**

**VERSUS**

**RAHAB NJUGUINI KINYUA.....RESPONDENT**

**RULING**

On 18<sup>th</sup> March, 2009, the respondent in the present application brought chamber summons for leave to bring judicial review application in the form of *certiorari* to quash the decision of North Kinangop Land Dispute Tribunal in case No.028 of 2008. The respondent also sought an order that, leave, if granted to operate as a stay of proceedings.

In granting the two reliefs, Koome, J ordered:

- “1 .....
- 2. ....
- 3. ....

**4. That the applicant to file and serve a substantive motion within 21 days of the date hereof failure to do so leave granted to operate as a stay shall lapse.”**

(Emphasis supplied)

The motion was filed on 7<sup>th</sup> April, 2009 clearly within the period ordered by the court.

The applicant in the instant application who is the interested party in the judicial review application has brought the application in which he seeks that the orders issued on 18<sup>th</sup> March, 2009 be vacated for the reason that the main motion to bring judicial review proceedings has not been served upon him as ordered by the court. The instant application comes six months after leave was granted to the respondent. Despite counsel for the respondent being aware of this application, he has neither filed a reply nor participated in its argument.

I have considered the application, applicant’s counsel’s submissions and the authority cited. The court, in the order reproduced at the beginning of this ruling, made it clear that the motion be filed and served within 21 days. Only one limb (the filing) of that order has been complied with nearly two years later. That failure was not only in breach of the order whose terms were clear that the leave granted to operate as a stay would lapse automatically, but also in contravention of **Order 53 rule 3(2) of the Civil Procedure Rules** which, in mandatory terms, requires the motion to be served on all persons directly

effected.

The consequence of failure to serve the motion is that the motion cannot be set down for hearing as the parties directly affected have not replied to it.

For these reasons, it is clear to me, from what counsel for the respondent told the court on 21<sup>st</sup> June, 2010 through another counsel that the respondent has been out of the country, the fact that no reply to this application has been filed and the absence of counsel for the respondent on the hearing date, that the respondent has lost interest in the matter. Sparring it will serve no useful purpose.

The orders of 18<sup>th</sup> March, 2009 are vacated as this application is allowed with costs.

**Dated, Delivered and Signed at Nakuru this 24<sup>th</sup> day of February, 2011.**

**W. OUKO  
JUDGE**