



**JUDICIAL REVIEW**

*A party approaching the court at ex parte stage has a great responsibility to be candid to the court.*

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU  
JUDICIAL REVIEW MISC. APPL. NO. 6 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI BY EX PARTE APPLICANT M'MWIRICHIA KIREMA M'KUCIANA**

**AND**

**IN THE MATTER OF THE OBJECTION NO. 896/2010 IN RESPECT OF P/NO. 2234 WITHIN A/KIONGO ADJ. SECTION**

**M'MWIRICHIA KIREMA M'KUCIANA ..... EX PARTE APPLICANT**

**VERSUS**

**THE DISTRICT LAND ADJ. OFFICER OF IGEMBE ..... RESPONDENT**

**M'MWIRABUA MWONGELA ..... 1<sup>ST</sup> INTERESTED PARTY**

**PETER KOOME MUTUMA ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

The ex parte applicant approached this court on 28<sup>th</sup> January 2011 and argued an *ex parte* Chamber Summons dated 24<sup>th</sup> January 2011. By that application, he sought leave to apply for order of *certiorari* to quash the decision of the district land adjudication officer of Igembe North over the objection No. 896/10 in respect of parcel number 2234 in *A/Kiongo Adjudication section*. It further sought that such leave do operate as stay of that decision. It is important in this ruling to reproduce the prayer for stay because it has brought controversy between the *ex parte* applicant and the interested party. It is also the subject of the Notice of Motion dated 18<sup>th</sup> March 2011 which I am considering in this ruling. The prayer is in the following terms:-

***“That the leave so granted do operate as a stay of any further dealings, trespass either by the respondent, 1<sup>st</sup> or 2<sup>nd</sup> interested party or anybody else acting on their behest in respect of P/No. 2234 in the same A Kiongo Adjudication Section.”***

As can be seen from that prayer, the *ex parte* applicant added words beyond the stay that is ordinarily sought. He sought to stay and trespass either by the respondent or by the interested party. The Chamber Summons which is the subject of this ruling was brought under sections 1A, 1B, 3A and 80 (a) and (b) of the Civil Procedure Act and Articles 10(2) (b), 159(2) (a) and (d) of the Constitution of Kenya 2010. It is

brought by the interested party. He seeks that the court do stay vary set aside end or review the orders of stay granted to the ex parte applicant. The grounds upon which the 2<sup>nd</sup> interested party seeks those orders is that he was in possession of the parcel number 2234 when the stay which is reproduced in this ruling was granted by the court. He stated that on obtaining the said orders of stay the ex parte applicant used it to evict him. That the ex parte applicant proceeded to harvest all of the interested party's miraa, he cut his fence and installed a new gate and has continued to occupy the land on the strength of that stay order. The ex parte applicant in his replying affidavit did not deny the allegations of the 2<sup>nd</sup> interested party as can clearly be seen from the following paragraphs of his affidavit sworn on 8<sup>th</sup> March 2011.

**3. That the orders granted in this matter did not in anyway go beyond the award of the subject matter herein as it's the same award that the 1 & 2 interested party used so as to unlawfully transfer and invade my land.**

**4. That the 2<sup>nd</sup> interested party colluded with the 1<sup>st</sup> interested party and the respondent to transfer this land from my name into that of the interested parties so as to defeat any cause of justice I may pursue.**

**5. That the 2<sup>nd</sup> interested party and allege that since I left in the adjudicate process I have no legitimate claim over the subject matter is baseless, since I have a recourse in this court.**

It is obvious to me that the ex parte applicant deliberately added words of trespass or of further dealing with the subject land by the 2<sup>nd</sup> interested party with an intention to use that order to evict the 2<sup>nd</sup> interested party as he did. Ex parte applicant had a responsibility to be candid when he appeared before me during the ex parte stage. He ought to have disclosed that the 2<sup>nd</sup> interested party was in possession of the land in question. He ought not to have obtained an order that went beyond the staying of the decision of the district land adjudication officer of Igembe North. In obtaining an order that went beyond staying the decision of the adjudication officer the ex parte applicant failed to show utmost good faith.

"The requirement of a party at ex parte stage showing utmost good faith was also stated in the case **The King Vs. General Commissioners for the Purpose of the Income Tax Acts for the District of Kensington KBD [1971]** where the Court stated:-

***"That the rule of the court requiring uberrima fides on the part of an applicant for an ex parte injunction applied equally to the case of an applicant for a rule nisi for a writ of prohibition ..... that, there having been a suppression of material facts by the applicant in her affidavit, the court would refuse a writ of prohibition without going into the merits of the case."***

It is because of the failure of the ex parte applicant to show utmost good faith that I grant the following orders:-

**1. The order granted by this court on 28<sup>th</sup> January 2011 is hereby valid by deleting the order No. 3 entirely. To that end, the Deputy Registrar of the Court will issue a fresh order deleting No. 3.**

**2. I hereby order that the 2<sup>nd</sup> interested party Peter Koome Mutuma be restored back into the possession of parcel No.2234 in A/Kiongo Adjudication Section forthwith. It therefore follows that the ex parte applicant M'Mwirichia Kirema M'Kuciana should be evicted from that land forthwith.**

**3. The 2<sup>nd</sup> interested party is granted costs of the Notice of Motion dated 18<sup>th</sup> march 2011 which shall be paid by the ex parte applicant.**

**Dated, signed and delivered at Meru this 13<sup>th</sup> day of April 2011.**

**MARY KASANGO**

**JUDGE**